FEDERAL COURT OF AUSTRALIA

Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd (No 2) [2017] FCAFC 175

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| Appeal from: | *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004; (2015) 333 ALR 193 |
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| File numbers: | QUD 923 of 2015  QUD 924 of 2015  QUD 925 of 2015  QUD 1002 of 2015 |
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| Judges: | **DOWSETT, GREENWOOD AND WHITE JJ** |
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| Date of judgment: | 10 November 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – consideration of the final orders to be made in disposition of each appeal having regard to the reasons for judgment in relation to each appeal published on 1 September 2017 in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 – consideration of the orders to be made in relation to costs |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) |
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| Cases cited: | *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 |
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| Date of hearing: | 1, 2 and 3 March 2016 |
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| Date of last submissions: | 3 October 2017 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 12 |
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| **In QUD 923 of 2015:** |  |
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| Counsel for the Appellant: | Mr A Collins and Mr J Trost |
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| Solicitor for the Appellant: | Carter Newell Lawyers |
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| Counsel for the First Respondent: | Mr D Murr SC and Ms M Painter QC |
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| Solicitor for the First Respondent: | Lander & Rogers Lawyers |
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| Counsel for the Second Respondent: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Second Respondent: | Warlow Scott Lawyers |
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| **In QUD 924 of 2015:** |  |
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| Counsel for the First and Second Appellants and First Cross‑Respondent: | Mr D Murr SC and Ms M Painter QC |
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| Solicitor for the First and Second Appellants and First Cross‑Respondent: | Lander & Rogers Lawyers |
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| Counsel for the First Respondent: | The First Respondent appeared in person |
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| Counsel for the Second Respondent and Cross‑Appellant: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Second Respondent and Cross‑Appellant: | Warlow Scott Lawyers |
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| Counsel for the Third Respondent and Second Cross‑Respondent: | Mr A Collins and Mr J Trost |
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| Solicitor for the Third Respondent and Second Cross‑Respondent: | Carter Newell Lawyers |
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| **In QUD 925 of 2015** |  |
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| Counsel for the First and Second Appellants: | Mr D Murr SC and Ms M Painter QC |
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| Solicitor for the First and Second Appellants: | Lander & Rogers Lawyers |
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| Counsel for the First Respondent: | The First Respondent appeared in person |
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| Counsel for the Second Respondent: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Second Respondent: | Warlow Scott Lawyers |
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| Counsel for the Third Respondent: | Mr A Collins and Mr J Trost |
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| Solicitor for the Third Respondent: | Carter Newell Lawyers |
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| **In QUD 1002 of 2015:** |  |
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| Counsel for the Appellant: | Mr K Barlow QC with Ms B O’Brien |
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| Solicitor for the Appellant: | Warlow Scott Lawyers |
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| Counsel for the First and Second Respondents: | Mr A Collins and Mr J Trost |
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| Solicitor for the First and Second Respondents: | Carter Newell Lawyers |

ORDERS

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|  | | QUD 923 of 2015 |
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| BETWEEN: | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Appellant | |
| AND: | INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  First Respondent  ADAM KIMBERLY BARCLAY  Second Respondent | |
|  |  | |
| JUDGES: | DOWSETT, GREENWOOD AND WHITE JJ | |
| DATE OF ORDER: | 10 NOVEMBER 2017 | |

**THE COURT ORDERS THAT:**

1. The appeal is dismissed and the Court notes that the subject matter which gave rise to Grounds 10 and 11 of the Notice of Appeal concerning the value of, and loss, if any, arising from the sale of Lot 191 may be considered by the primary Judge in respect of the separate issue of remedy.
2. The appellant pay the respondents’ costs of the appeal.
3. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published by the Full Court from the Chambers of the Hon Justice Greenwood.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | QUD 924 of 2015 |
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| BETWEEN: | INVESTA PROPERTIES PTY LTD ACN 084 407 241  First Appellant  INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  Second Appellant | |
|  |  | |
| AND: | ASHLEY COLIN NANKERVIS  First Respondent  ADAM KIMBERLY BARCLAY  Second Respondent  OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Third Respondent | |
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| AND BETWEEN: | ADAM KIMBERLY BARCLAY  Cross-Appellant | |
|  |  | |
| AND: | INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  First Cross‑Respondent  OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Second Cross‑Respondent | |
|  |  | |
| JUDGES: | DOWSETT, GREENWOOD AND WHITE JJ | |
| DATE OF ORDER: | 10 NOVEMBER 2017 | |

THE COURT DECLARES THAT:

1. Having regard to:
   1. the functions and responsibilities of Mr Ashley Colin Nankervis (“Mr Nankervis”) described at [285] to [291], [348] and [349] of the reasons of the Full Court published on 1 September 2017 in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 (the “Full Court’s reasons”);
   2. the capacity Mr Nankervis enjoyed to shape and influence decision‑making by Investa Properties Pty Ltd (“Investa Properties”) concerning the sale of Lots 170 and 191 by Investa Residential Group Pty Ltd (“Investa Residential”);
   3. the vulnerability of Investa Residential to action taken by Mr Nankervis in the sale and disposal of its land assets;
   4. the awareness Mr Nankervis must reasonably be taken to have had that his functions and responsibilities were to be performed for the benefit of Investa Residential as well as Investa Properties;

Mr Nankervis came under or assumed a duty not to put himself in a position of conflict between his duty to act in good faith in the best interests of Investa Properties and Investa Residential on the one hand and his own personal interests on the other hand, without the informed consent of Investa Properties and through Investa Properties, Investa Residential; and a duty to disclose to Investa Properties and through Investa Properties, a duty to disclose to Investa Residential, all matters material to the sale by Investa Residential of Lots 170 and 191 (the “Declaration 1 fiduciary duties”).

2. Mr Nankervis breached the Declaration 1 fiduciary duties owed to Investa Residential having regard to, so far as Lot 170 is concerned, the matters described at [302] to [331], [339] to [347] and [380] to [382] of the Full Court’s reasons and, so far as Lot 191 is concerned, the matters described at [354] to [366] and [385] to [395] of the Full Court’s reasons.

3. Having regard to the matters described at [302] to [352] and [379] to [382] of the Full Court’s reasons, Adam Kimberly Barclay (“Mr Barclay”) and Oliver Hume South East Queensland Pty Ltd (“OHSEQ”) owed fiduciary duties to Investa Residential in respect of the sale and disposition of Lot 170 by that company which duties were these (the “Declaration 3 fiduciary duties”):

(a) an obligation to act in good faith in the best interests of Investa Residential;

(b) an obligation to convey to Investa Residential any offers in relation to Lot 170 which fell within the terms of the emails and related communications exchanged between Mr Nankervis and Mr Barclay (whether directly or as participants to emails to or from others) as described in the Full Court’s reasons at [302] to [350];

(c) an obligation to disclose to Investa Residential (by disclosing the relevant matters to officers of Investa Properties) any matters material to the sale of Lot 170;

(d) an obligation not to put themselves in a position of conflict between their duties to act in good faith in the best interests of Investa Residential on the one hand and their own personal interests on the other hand, without the informed consent of Investa Residential;

(e) an obligation to disclose to Investa Residential (by disclosing the relevant matters to officers of Investa Properties) the arrangements struck between Mr Nankervis, Mr Barclay and Mr David Tonuri (“Mr Tonuri”) in relation to Lot 170, having regard to the matters described at [302] to [316] and [338] to [352] of the Full Court’s reasons.

4. Mr Barclay breached the Declaration 3 fiduciary duties by:

(a) entering into the arrangement, agreement or understanding with Mr Nankervis and Mr Tonuri as examined in the Full Court’s reasons at [338] to [348] pursuant to which Mr Barclay would derive profit or other benefits (along with Mr Nankervis and/or Mr Tonuri or otherwise) from the sale by Investa Residential of Lot 170 to Mr Tonuri or his nominee entity;

(b) failing to disclose to Investa Residential (by disclosing the relevant matters to officers of Investa Properties) the content of the arrangement, agreement or understanding Mr Barclay had reached with Mr Nankervis and Mr Tonuri for the sale of Lot 170 by Investa Residential to Mr Tonuri or his nominee entity;

(c) failing to disclose to Investa Residential (by disclosing the relevant matters to officers of Investa Properties) any and all matters material to the sale of Lot 170 by Investa Residential including any matters falling within Declaration 3(b).

5. Having regard to Mr Barclay’s position, role and responsibilities within OHSEQ, the knowledge of Mr Barclay concerning all matters material to the sale of Lot 170 by OHSEQ as agent for Investa Residential is knowledge of, and imputed to, OHSEQ.

6. Oliver Hume South East Queensland Pty Ltd breached the Declaration 3 fiduciary duties by:

(a) failing to disclose to Investa Residential (by disclosing the relevant matters to officers of Investa Properties) the content of the arrangement, agreement or understanding Mr Barclay had reached with Mr Nankervis and Mr Tonuri for the sale of Lot 170 by Investa Residential to Mr Tonuri or his nominee entity;

(b) failing to disclose to Investa Residential (by disclosing the relevant matters to officers of Investa Properties) any and all matters material to the sale of Lot 170 by Investa Residential including any matters falling within Declaration 3(b).

**THE COURT ORDERS THAT:**

1. The appeal is allowed.
2. Declarations 5(c), 5(d), 5(e), 5(f) and 5(g) of the Declarations made by her Honour Justice Collier on 10 September 2015 be set aside.
3. The cross‑appeal is dismissed and the Court notes that the subject matter of Grounds 6 and 7 of the cross‑appeal by Mr Barclay filed on 23 October 2015 concerning the value of, and loss, if any, arising from the sale of Lot 191 may be considered by the primary Judge in determining questions of remedy.
4. The respondents pay the costs of the appellants of the appeal.
5. The cross‑appellant, Mr Barclay, pay the cross‑respondents’ costs of the cross‑appeal.
6. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published by the Full Court from the Chambers of the Hon Justice Greenwood.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| ORDERS | | |
|  | | QUD 925 of 2015 |
|  | | |
| BETWEEN: | INVESTA PROPERTIES PTY LTD ACN 084 407 241  First Appellant  INVESTA RESIDENTIAL GROUP PTY LTD ACN 098 527 390  Second Appellant | |
|  |  | |
| AND: | ASHLEY COLIN NANKERVIS  First Respondent  ADAM KIMBERLY BARCLAY  Second Respondent  OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Third Respondent | |
|  |  | |
| JUDGES: | DOWSETT, GREENWOOD AND WHITE JJ | |
| DATE OF ORDER: | 10 NOVEMBER 2017 | |

**THE COURT ORDERS THAT:**

1. The appeal is dismissed and the Court notes that matters concerning the value of Lot 170 and loss, if any, arising from the sale of Lot 170 are matters that may be considered by the primary Judge in determining questions of remedy.
2. The appellants pay the costs of the respondents of and incidental to the appeal.
3. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published by the Full Court from the Chambers of the Hon Justice Greenwood.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| ORDERS | | |
|  | | QUD 1002 of 2015 |
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| BETWEEN: | ADAM KIMBERLY BARCLAY  Appellant | |
| AND: | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  First Respondent  VERO INSURANCE LIMITED ABN 48 005 297 807  Second Respondent | |
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| JUDGES: | DOWSETT, GREENWOOD AND WHITE JJ | |
| DATE OF ORDER: | 10 NOVEMBER 2017 | |

THE COURT ORDERS THAT:

1. The appeal so far as it relates to Order 4 of the orders of her Honour Justice Collier made on 10 September 2015 be allowed.
2. The appeal so far as it relates to Order 5 of the orders of her Honour Justice Collier made on 10 September 2015 be allowed.
3. Orders 4 and 5 of the orders made by her Honour Justice Collier on 10 September 2015 be set aside.
4. The cross‑claim of the first respondent against the appellant filed on 10 December 2012 (the subject of Order 5 of 10 September 2015) be remitted to her Honour Justice Collier for determination according to law and in accordance with the reasons of the Full Court published on 1 September 2017.
5. The cross‑claim of the appellant against the second respondent filed on 15 December 2012 (the subject of Order 4 of 10 September 2015) be remitted to her Honour Justice Collier for determination according to law and in accordance with the reasons of the Full Court published on 1 September 2017.
6. The appeal from Order 3 of the orders of her Honour Justice Collier made on 10 September 2015 dismissing the appellant’s cross‑claim against the first respondent filed on 15 December 2012, is dismissed.
7. As to the appellant’s appeal from Orders 3 and 5 of the orders made on 10 September 2015, there be no order as to costs.
8. As to the appellant’s appeal from Order 4 of the orders made on 10 September 2015, the second respondent pay the appellant’s costs of the appeal.
9. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published by the Full Court from the Chambers of the Hon Justice Greenwood.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWSETT J:

1. The orders proposed by Greenwood and White JJ reflect their Honours’ reasons, published on 1 September 2017. On that basis I concur in the proposed orders.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett. |

Associate:

Dated: 10 November 2017

REASONS FOR JUDGMENT

GREENWOOD AND WHITE JJ:

1. On 1 September 2017, the Court published orders and reasons for judgment in support of those orders in four appellate proceedings heard together (QUD 923 of 2015, QUD 924 of 2015, QUD 925 of 2015 and QUD 1002 of 2015): *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141.
2. The orders provided for a timetable for the submission by the parties of proposed final orders giving effect to the reasons for judgment in support of each appeal and the filing and serving of written submissions in relation to the costs of and incidental to each appeal and any proposed orders in relation to costs of the primary proceeding.
3. It should be noted that in appeal QUD 923 of 2015, the appellant, Oliver Hume South East Queensland Pty Ltd (“OHSEQ”), sought an order that the first respondent Investa Residential Group Pty Ltd (“Investa Residential”) pay OHSEQ’s costs of and incidental to the principal proceeding (QUD 231 of 2011) including any reserved costs. This was the only appeal in which any order was sought, from the Full Court, concerning the costs in relation to the principal proceeding. It should also be noted that the primary Judge made orders for the determination of questions concerning duties owed (by whom and to whom) separately from the question of the remedies to be granted or awarded in respect of any proven breach. Thus, critical elements of the causes of action are yet to be determined by the primary Judge. As to the other three appeal proceedings and the cross‑appeal by Mr Adam Kimberly Barclay in QUD 924 of 2015, the appellant or appellants (and in the case of the cross‑appeal, the cross‑appellant), sought an order in their favour for the costs of and incidental to the appeal (and cross‑appeal).
4. These proceedings are concerned with the determination of the final orders to be made in each appeal and the disposition of the costs.
5. We have had regard to the reasons for judgment, the written submissions of the parties and each of the notices of appeal and in the case of QUD 924 of 2015 the cross‑appeal and related material.
6. There is no utility in reciting in these reasons the text of each of the orders made today. It is sufficient to identify the following matters.
7. First, the appeals are concerned with grounds relied upon and contentions made concerning the question of whether the primary Judge erred in making, on 10 September 2015, any of Declarations 1 to 5 and any of Orders 1 to 7. As we said in the reasons for judgment, the question of remedy is yet to be determined by the primary Judge. One of the matters agitated before the Full Court was a question of whether the primary Judge erred in making a finding that the market value of Lot 191 at 25 June 2010 was $290,000. Another matter agitated before the Full Court was whether the primary Judge erred in finding that there was no evidence, or no sufficient evidence, to support a finding that Lot 170 had a greater value than the price paid by Two Eight Two Nine Pty Ltd of $1,454,545 exclusive of GST.
8. In the reasons for judgment, we observed that questions of value and valuation only go to the quantification of the claim and that it would be premature for the Full Court to express a view on those findings and those issues more generally: [25], [26], [383], [384], [417]. As we said in the reasons for judgment, no party contended that the Court could presently determine, in the appeal proceedings, questions of valuation. That position no doubt arose because, first, there was no “order” appealed from to which the assessments of value related and, second, questions of relief were separated out by the primary Judge for later determination.
9. The primary Judge will in due course determine questions of remedy and it may be that the findings of the primary Judge in relation to value concerning each Lot will be challenged if and when a challenge is made to a dispositive order or a declaration concerning a remedy which engages the factual question of valuation.
10. That is why Order 1 in QUD 923 of 2015; Order 3 in QUD 924 of 2015; and Order 1 in QUD 925 of 2015 recite that the matters the subject of the relevant grounds as recited in those orders concerning the value of, and loss, if any, arising from the sale of Lots 170 and 191 are matters the primary Judge may consider in determining the separate issue of remedy.
11. The second matter of principle concerns the exercise of the discretion as to costs. The fundamental principle guiding the exercise of the discretion under s 43 of the *Federal Court of Australia Act 1976* (Cth) is that “the award is discretionary but generally that discretion is exercised in favour of the successful party”: *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, Gleeson CJ, Gummow, Hayne and Crennan JJ at [25]. Of course, all of the relevant circumstances need to be weighed in the exercise of the discretion and we have taken into account the features of each appeal and the resolution of each appeal according to the reasons for judgment. The orders as to the costs of and incidental to each appeal (and the cross‑appeal) are the expression of that weighing. As to the determination of the costs of and incidental to the separate questions before the primary Judge having regard to the final orders made on the substantive grounds of appeal (and cross‑appeal), we make no order as to those costs because the primary Judge is yet to determine finally the ultimate merits or otherwise of the competing claims and cross‑claims. The costs of the principal proceeding ought to be determined by the primary Judge having regard to the final orders made in disposition of the principal proceeding.

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| I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Greenwood and White. |

Associate:

Dated: 10 November 2017