

**The Owners - Strata Plan No 84741 v Nazero Constructions Pty Limited & Ors
(Costs) - [2016] NSWSC 965**

Supreme Court

New South Wales

Medium Neutral Citation:	The Owners - Strata Plan No 84741 v Nazero Constructions Pty Limited & Ors (Costs) [2016] NSWSC 965
Hearing dates:	On the papers
Date of orders:	13 July 2016
Decision date:	13 July 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Bergin CJ in Eq
Decision:	Cross-defendant to pay the plaintiff and cross-claimant's costs of and incidental to the Notice of Motion for the determination of the separate questions and the hearing on 31 May 2016.
Catchwords:	<p>COSTS – where separate questions ordered – where number of questions reduced to a single question at hearing – whether successful parties should have their costs – whether successful parties' costs should be reduced by reason of the reduction in the number of questions to be determined</p> <p>SEPARATE QUESTIONS – expectation that the Court will be cautious – need for precise formulation of questions and agreed facts – prospect that the Court may decline to answer questions if inappropriate to do so</p>
Legislation Cited:	Civil Procedure Act 2005 Uniform Civil Procedure Rules 2005 .
Cases Cited:	Attwells v Jackson Lalic Lawyers Pty Ltd (2016) 331 ALR 1 . Bostik Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304 . Floruit Holdings Pty Ltd v Sebastian - Builders & Developers Pty Ltd [2009] NSWCA 411 . James v Surf Road Nominees Pty Ltd (No 2) [2005] NSWCA 296 . Pavlovic v Universal Music Australia Pty Ltd (No 2) [2016] NSWCA 31 . The Owners - Strata Plan No 84741 v Nazero Constructions Pty Limited & Ors [2016] NSWSC 832 . Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 .
Category:	Costs
Parties:	The Owners - Strata Plan No 84741 (Plaintiff) Nazero Constructions Pty Limited (1st Defendant) Iris Diversified Property Pty Limited (2nd Defendant/Cross-Claimant) Wardy Younan (Cross-Defendant)
Representation:	Counsel: H Chiu (Plaintiff) A McGrath SC (2nd Defendant/Cross-Claimant) L Gor (Cross-Defendant) Solicitors: Doyle Edwards Anderson Lawyers (Plaintiff) Henry Davis York (2nd Defendant/Cross-Claimant) Sachs Gerace Broome Lawyers (Cross-Defendant)
File Number(s):	2014/367636
Publication restriction:	Nil

Judgment

1. These reasons relate to the issue of costs in respect of the hearing of a separate question on 31 May 2016 which was determined on 22 June 2016: [The Owners - Strata Plan No 84741 v Nazero Constructions Pty Limited & Ors](#) [2016] NSWSC 832 (the Judgment). I will adopt the same nomenclature as used in the Judgment which should be read with these reasons.

2. The parties were ordered to file written submissions by 8 July 2016 in relation to the issue of costs. The parties complied with those orders and there is no objection to the issue being determined on the papers.
3. The plaintiff commenced the main proceedings on 19 February 2015 against Nazero and Iris. Judgment was entered against Nazero on 16 October 2015. Iris filed a Cross-Claim against Mr Younan on 18 February 2016 seeking, *inter alia*, a declaration that Mr Younan is liable to rectify any defects or in the alternative pay Iris any amount that Iris might be ordered to pay to the plaintiff. In his Cross-Claim Response, Mr Younan denied any liability and also contended that by way of “complete defence” Iris had released him from any liability.
4. On 1 April 2016 orders were made for Mr Younan to file and serve a Notice of Motion and evidence seeking the determination of “any separate question” by 15 April 2016.
5. On 6 May 2016 Mr Younan was granted leave to file an Amended Notice of Motion in the form handed up to the Court on that day. The amended Motion sought the following orders:
 1. Prior to the taking of any further steps in the First Cross Claim, the First Cross Claim proceed by way of determination of the following separate questions:
 - A. Whether on the proper construction of the Construction Contract (as this term is defined in paragraph B.1 of the Cross Claim List Statement), the cross defendant is liable to rectify the Defects (as this term is defined in paragraph A.1 of the Cross Claim List Statement) or pay the plaintiff the Judgment Sum (as this term is defined in paragraph C.5 of the Cross Claim List Statement).
 - B. Whether on the proper construction of the Deed of variation and release exchanged and performed in May 2012, the cross claimant has released the cross defendant from any liability to the cross claimant.
 2. If question 1A is answered in the negative or question 1B is answered in the positive, the First Cross Claim be dismissed.
 3. Such further and other orders as this Honourable Court deem (*sic*) appropriate.
 4. The cross claimant pay the cross defendant’s costs of this Notice of Motion and the First Cross Claim.

6. On 6 May 2016 the following orders were also made by the List Judge:

The proceedings are set down on an estimate of one day on 31st May 2016 for hearing on the separate question (*sic*) which the parties are going to precisely formulate and submit to my chambers during the week.

The parties are to agree a set of facts for all purposes and any evidence which the cross-claimant wishes to adduce must be served by 13th May 2016. Any evidence in reply must be served by 23rd May 2016.

The parties are to prepare a Court Book containing the agreed statement of facts and any documents which are pertinent to it, the additional evidence, if any, sought to be led by any party, and a brief written outline of the parties' position. The Court Book is to be delivered to my chambers no later than 12.00 noon on 27th May 2016.

7. On 19 May 2016 the List Judge made the following orders:

I order that the following questions be determined separately and before any other questions in the proceedings:

1. On the proper construction of the Construction Contract Formal Instrument of Agreement of 12 July 2011 (*Construction Contract*), is the cross defendant liable to pay the plaintiff the Judgment Sum of 16 October 2015 for \$1,452,419.32 or to rectify the defects the subject of this Judgment Sum?
2. On the proper construction of the Construction Contract, is the cross defendant liable to pay the cross claimant such sum as the Court might order the cross claimant to pay the plaintiff by way of damages as a consequence of any breaches of the statutory warranties owed to the plaintiff by the cross claimant under the [Home Building Act 1989 \(NSW\)](#) as alleged in the Technology and Construction List Statement filed 19 February 2015?
3. If the answer to either question 1, question 2 or both questions is "Yes", on the proper construction of the Deed of variation and release dated 28 September 2012, is the cross defendant released from any of the liabilities that arise in answer to question 1 and 2 above?

8. When the matter came on for hearing on 31 May 2016 there was debate about whether it was appropriate for the Court to answer questions presented after which the orders made by the List Judge on 19 May 2016 were, by consent, vacated. The separate question, the subject of the Judgment, was then ordered to be determined separately and before any other question in the proceedings. The separate question was answered in the negative.

9. The plaintiff and Iris contended for a negative answer to the separate question and Mr Younan contended for a positive answer. The plaintiff and Iris seek an order that Mr Younan pay their costs of and incidental to the determination of the separate question. Mr Younan accepts that Iris is entitled to a costs order in its favour. However it is contended that those costs should be reduced by 50%. Mr Younan contends that the plaintiff should pay its own costs.

10. The Court "is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs": r 42.1 of the *Uniform Civil Procedure Rules 2005* (UCPR). The costs in respect of the determination of a separate question ordered pursuant to [UCPR r 28.2](#) are to be dealt with in the same way as the general costs of the proceedings: [Pavlovic v Universal Music Australia Pty Ltd \(No 2\)](#) [2016] NSWCA 31 at [6]. A successful party is entitled to its costs following the determination of a separate question: [Floruit Holdings Pty Ltd v Sebastian - Builders & Developers Pty Ltd](#) [2009] NSWCA 411 at [7]. However it is not in issue that the decision is discretionary: s 98 of the [Civil Procedure Act 2005](#).

11. Mr Younan accepted that the negative answer to the separate question is the “event” which costs should follow in favour of Iris. However he submitted that such costs should be reduced by 50% because of the consensual reduction of the questions at the commencement of the hearing on 31 May 2016. It was also submitted that seven of the thirteen documents in the Court Book related to the vacated questions and about thirty minutes of the hearing was allocated to discussion about the efficacy of the questions before the consensus was reached (tr I-16).
12. Iris submitted that Mr Younan should pay its costs of and incidental to the Notice of Motion and the hearing on 31 May 2016. It was submitted that the Court made the orders sought by Mr Younan for the determination of separate questions and also ordered the parties to confer in relation to the precise formulation of those questions. Iris attempted to formulate those questions in consultation with the other parties. Iris contended that the work required to prepare the agreed facts and submissions in relation to the vacated questions was also relevant to the separate question that was determined. For example the Construction Contract needed to be considered in some detail to give the background and context for the proper construction of the Deed of variation and release.
13. Iris also noted that Mr Younan’s outline of submissions dated 27 May 2016 expressly relied on and made numerous references to the Construction Contract in support of his submissions in relation to the separate question.
14. Iris also submitted that Mr Younan was the moving party who sought the separate determination of the issues. He consented to the abandonment of the original questions and therefore effectively consented to the abandonment of that part of the Notice of Motion. It was submitted that as a consequence, Mr Younan should pay any costs wasted by Iris in preparing to meet the vacated questions. However Iris submitted that if the Court is minded to apply a reduction to the costs, then 50% is excessive and disproportionate. It submitted that a discount of 20% would more accurately reflect that discrete aspect of the preparation.
15. Mr Younan submitted that the plaintiff was not a party to the Deed of variation or release and it made no useful submissions on the question of the proper construction of the Deed. That of course is a subjective assessment and one with which I disagree. It is true that the plaintiff’s counsel supported Iris’s submissions. However the plaintiff did make its own separate submissions that were indeed helpful in the determination of the separate question.
16. Mr Younan submitted that there was no “event” in respect of which the plaintiff was successful and that the plaintiff chose to participate and therefore should bear its own costs of what he described as “this indulgence”. However Mr Younan also submitted that if the Court is minded to make a costs order in favour of the plaintiff it ought to be reduced for the same reasons advanced against Iris.

17. The plaintiff submitted that the “event” that costs should follow was Mr Younan’s contention that he had been contractually released from liability to anyone in respect of the plaintiff’s claim for damages for breach of statutory warranties. It was submitted that the plaintiff and Iris argued against that contention and were successful.
18. The plaintiff also submitted that Mr Younan pursued the hearing of separate questions for his own benefit in that a determination in his favour would enable him a significant costs saving as a result of an early release from the proceedings. It was submitted that he should not be permitted to take the benefit of that course, without accepting responsibility for the costs of that process now that the Court has found against him.
19. Finally the plaintiff submitted that the hearing of the separate question was a final hearing of part of the proceedings brought by the plaintiff. The plaintiff was present, had a right to be heard and made substantive written submissions. The plaintiff submitted that the general approach of ordering costs in respect of the whole of the proceedings without attempting to differentiate between particular issues should be adopted: [*Bostik Australia Pty Ltd v Liddiard \(No 2\)*](#) [2009] NSWCA 304 at [\[38\]](#); [*James v Surf Road Nominees Pty Ltd \(No 2\)*](#) [2005] NSWCA 296 at [\[31\]-\[36\]](#).
20. The Amended Notice of Motion that was filed in Court on 6 May 2016 identified Iris as the only person affected by the orders sought. However it is quite clear that during the course of the preparation for the hearing of the separate questions, the plaintiff appeared and was represented. The plaintiff was one of the “parties” ordered to take part in the precise formulation of the questions. The plaintiff had an interest in the outcome of the proceedings given that it had secured judgment against Nazero on 16 October 2015 and the questions as originally crafted related to whether Mr Younan was liable to rectify the defects. That aspect of the questions remained in place at the commencement of the hearing on 31 May 2016. There was no suggestion made by Mr Younan once the orders in relation to the other questions were vacated and the separate question was ordered, that the plaintiff should then be excused from further appearance on the day. There is no doubt that the plaintiff was economic in the way it approached the hearing on 31 May 2016, adopting Iris’s submissions and only making additional submissions (which I regard as appropriate).
21. The parties made numerous contentions in respect of the determination of the separate question, which were unnecessary to decide having regard to the approach adopted in the Judgment in relation to the interpretation of the Deed, in particular to the meaning of the term “parties”. The other contentions raised by the parties required an analysis of the Construction Contract, as did the determination of the separate question. Much of the preparation in respect of the Agreed Statement of Facts and the provision to the Court of the Court Book also related to the determination of the separate question.
22. All parties were ordered to “precisely formulate” the separate questions, notwithstanding that it was Mr Younan who was the applicant on the Motion. I have no doubt that all parties attempted to formulate those questions in the manner ordered. However the necessity to ensure that

difficulties are not caused by the determination of separate questions resulted in further debate on the morning of the hearing when it became clear that it was more prudent to vacate the previous orders and proceed with the determination of the separate question.

23. When parties embark on the process under [UCPR r 28.2](#) of seeking the determination of separate questions, they must anticipate that the Court will exercise caution in relation to the making of such an order and may require additional work and consultation in deciding upon the efficacy of the process: [Attwells v Jackson Lalic Lawyers Pty Ltd](#) (2016) 331 ALR 1 at [21]. The parties should also be aware that even though they may take part in a process of formulating separate questions, the Court may decide (as it did in this instance in respect of the vacated questions) that it may be prudent to decline to answer the presented questions because it is inappropriate to do so: [Woolcock Street Investments Pty Ltd v CDG Pty Ltd](#) (2004) 216 CLR 515 at [7]. These are all steps the costs for which an unsuccessful party may be at risk of bearing. Mr Younan embarked upon this process within which there were these inherent risks and was ultimately unsuccessful.

24. I am satisfied that the just result in respect of the costs of this application is that Mr Younan pays the costs of Iris and the plaintiff. I do not see any basis upon which there should be a reduction in the costs that the successful parties should recover in this process.

25. The cross-defendant, Wardy Younan, is to pay the costs of the cross-claimant, Iris Diversified Property Pty Limited, and the plaintiff, The Owners – Strata Plan No 8474I, of and incidental to the Notice of Motion for the determination of the separate questions and the hearing on 31 May 2016.

Decision last updated: 13 July 2016