

Supreme Court

New South Wales

Medium Neutral Citation: [The Owners – Strata Plan 7684I v Ceerose Pty Ltd \(No 2\) \[2016\] NSWSC 1629](#)

Hearing dates: On the papers

Decision date: 17 November 2016

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: Plaintiff to pay three quarters of the defendants' costs of the plaintiff's notice of motion of 20 July 2016

Catchwords: COSTS – where plaintiff achieved only partial success on application for leave to amend – where defendants substantially successful – where plaintiff accepted some order for costs should be made in favour of defendants – whether defendants should be permitted to have such costs assessed immediately – whether Court should otherwise order under relevant Practice Note – practical effect of permitting assessment of costs forthwith

Legislation Cited: [Legal Profession Act 2004 \(NSW\)](#),
[Legal Profession Uniform Law Application Act 2014 \(NSW\)](#)

Practice Note SC Eq 3
[Uniform Civil Procedure Rules 2005 \(NSW\)](#)

Cases Cited: [The Owners – Strata Plan 7684I v Ceerose Pty Ltd \[2016\] NSWSC 1545](#)

Category: Costs

Parties: The Owners – Strata Plan 7684I (Plaintiff)
Ceerose Pty Ltd (First Defendant)
Prisand Pty Ltd (Second Defendant)

Representation: Counsel:
P J Bambagiotti (Plaintiff)
M Sheldon (Defendants)

Solicitors:
Makinson & d'Apice Lawyers (Plaintiff)
Blackstone Waterhouse Lawyers (Defendants)

File Number(s): SC 2014/58603

Judgment

1. I gave judgment in this matter on 2 November 2016, [The Owners – Strata Plan 76841 v Ceerose Pty Ltd](#) [2016] NSWSC 1545.
2. These reasons assume familiarity with that judgment.
3. The effect of the judgment was to grant the Owners Corporation leave to amend its claim to include the Fire and BCA Defects Claims (on condition that the claim was limited to \$195,000) and to allow the Owners Corporation leave to expand its negligence claim, but to refuse the Owners Corporation leave to include the proposed claim concerning the Water Ingress Defect.
4. These reasons deal with the costs of the Owners Corporation's motion seeking leave to amend. The parties agree I may deal with this question on the papers.
5. It is common ground that the Owners Corporation should pay the costs thrown away by the amendment.
6. The issue is as to what further order for costs should be made.
7. Mr Bambagiotti, on behalf of the Owners Corporation, accepted that Ceerose had achieved substantial success in opposing the Owners Corporation's application to amend. The Owners Corporation sought leave to make amendments which would have increased its claim by some \$2 million. The amendments permitted add far less to the Owners Corporation's claim.
8. However, Ceerose was not successful in relation to all of its arguments; in particular, that concerning the limitation point.
9. On behalf of the Owners Corporation, Mr Bambagiotti submitted that the appropriate order was that the Owners Corporation pay 75 per cent of Ceerose's costs of the application. That strikes me as a fair reflection of the success achieved by each party on the application.
10. Ceerose also seeks to have its costs assessed forthwith.

11. By reason of cl 57 of Practice Note SC Eq 3, that is a result which, in the Commercial List and in the Technology and Construction List, follows unless there is an order to the contrary.
12. I see no reason to make a contrary order.
13. As Mr Sheldon submitted on behalf of Ceerose, when conducting proceedings in this list, litigants should expect that, unless otherwise ordered, a party in whose favour a costs order is made may proceed to assessment of costs forthwith.
14. As Mr Sheldon also pointed out, the effect of s [70\(5\)](#) of the [Legal Profession Uniform Law Application Act 2014 \(NSW\)](#) is that once a costs assessor determines the amount of costs payable, and issues a certificate, such certificate can be lodged in the Registry of any court having jurisdiction and is taken to be a judgment of that court for the amount of the unpaid costs. The position was the same under s [368\(5\)](#) of the [Legal Profession Act 2004 \(NSW\)](#).
15. There may or may not be a tension between that circumstance and [Uniform Civil Procedure Rules 2005 \(NSW\)](#) r [42.7\(2\)](#) (which provides that unless the Court otherwise orders, costs do not become payable until the conclusion of the proceedings). However the authors of the Practice Note must be taken to have had knowledge of the procedure under the *Legal Profession Act* and I see no reason why, in this case, the usual position contemplated by the Practice Note should not apply, despite it having the consequences to which I have referred.
16. I order that the plaintiff pay three quarters of the defendants' costs of the plaintiff's notice of motion of 20 July 2016.

Decision last updated: 17 November 2016