CITATION:	*FE Accommodation Pty Ltd & Anor v Gold Valley Iron Ore Pty Ltd (No 2)* [2024] NTSC 103
PARTIES:	FE ACCOMMODATION PTY LTD (ACN 160 943 082) and G&C PASTORAL CO PTY LTD (ACN 008 039 405) v GOLD VALLEY IRON ORE PTY LTD (ACN 618 094 634)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	No 56 of 2018 (21828241) No 64 of 2018 (21830728)
DELIVERED:	11 December 2024
HEARING DATES:	On the papers following written submissions filed on 12 September 2024 and 1 October 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

PRACTICE AND PROCEDURE – COSTS – Application for costs following determination of a separate question – Guiding principle is that successful party is entitled to costs by way of indemnity – Displacement of general rule where conduct of litigation justifies a different outcome –Whether costs

should be awarded on an issue by issue basis – No fixed rule as to the issue by issue basis – Overall, parties had mixed success - Whether the failure of the plaintiff to accept an offer and subsequent failure to better that offer in the substantive litigation displaces the application of the guiding principle – Guiding principle displaced in the circumstances – No order as to costs.

PRACTICE AND PROCEDURE – COSTS – Application for costs of interim injunction – Injunction granted – No basis to displace the guiding principle

Baller Industries Pty Ltd v Mero Mero Leasing Pty Ltd [2019] NSWSC 1067, *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2)* [2007] NSWCA 142, *Northern Territory v Sangare* (2019) 265 CLR 164, *Taylor v Heading (No 2)* [2021] FCA 925, referred to.

Supreme Court Rules 1987 (NT) rr 63.03, 63.19, 63.26

Supreme Court Act 1979 (NT) ss 14(1)(c), 71

Practice Direction No 6 of 2009

REPRESENTATION:

Counsel:

First & Second Plaintiffs:	A Harris KC
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Solicitors:

First & Second Plaintiffs:	CCK Lawyers
Defendant:	HWL Ebsworth Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

FE Accommodation Pty Ltd & Anor v Gold Valley Iron Ore Pty Ltd (No 2) [2024] NTSC 103
No. 56 of 2018 (21828241)
No. 64 of 2018 (21830728)

BETWEEN:

FE ACCOMMODATION PTY LTD (ACN 160 943 082)
First Plaintiff

AND:

G&C PASTORAL CO PTY LTD (ACN 008 039 405)
Second Plaintiff

AND:

GOLD VALLEY IRON ORE PTY LTD (ACN 618 094 634)
Defendant

CORAM: BROWNHILL J

REASONS FOR JUDGMENT ON COSTS

(Delivered 11 December 2024)

Factual and procedural background

[1] The factual background of this matter is set out in *FE Accommodation Pty Ltd v Gold Valley Iron Ore* [2024] NTSC 61 at [7]-[38]. The terms used in those reasons are used consistently in these reasons.

[2] On 28 June 2018, the plaintiffs commenced a proceeding in the Supreme Court (No 56 of 2018) seeking orders that the defendant: (a) itemise the items of Plant and Equipment which it had removed, or may in the future remove, from the Mineral Leases; (b) inform the plaintiffs of the location of that Plant and Equipment; (c) be restrained from further moving or using any relocated Plant and Equipment; and (d) account to the plaintiffs for any of that Plant and Equipment sold to third parties by payment of any proceeds into the Court.

[3] On 5 July 2018, the Supreme Court granted an interim injunction (until 26 July 2018) restraining the defendant from removing items of Plant and Equipment from the Mineral Leases or any other location to which they had been removed.

[4] On 13 July 2018, the interim injunction was extended to 14 August 2018.

[5] On 17 July 2018, the plaintiffs commenced a separate proceeding in the Supreme Court (No 64 of 2018) seeking payment in full of the purchase price under the Contract of Sale or damages for breach of the Contract of Sale comprised of the balance of the purchase price payable for the chattels under the Contract of Sale, being $6 million.

[6] On 9 August 2018, the defendant filed a defence and counter-claim in proceeding No 64 of 2018, which itemised the items of Plant and Equipment it had removed from the Mineral Leases and their location. The defence and counter-claim was that the plaintiffs had repudiated the Contract of Sale by

fraudulent misrepresentation and/or misleading and deceptive conduct and/or conduct in breach of the Contract of Sale, and the defendant had validly terminated the Contract of Sale on 9 August 2018.

[7] On 14 August 2018, the interim injunction was set aside upon various undertakings by the parties and proceeding No 56 of 2018 was dismissed by consent, with the question of costs adjourned. Also on that date, the Supreme Court ordered that the issue of which party bore liability for damages for breach of the Contract of Sale be tried as a separate issue ('liability trial').

[8] On 10 December 2018, the defendant abandoned its allegations of fraudulent misrepresentation and misleading and deceptive conduct.

[9] On 11, 12 and 13 December 2018, the liability trial was conducted, with the decision reserved.

[10] On 11 September 2020, the Supreme Court delivered its decision on the liability trial.[1] The Court held that the defendant was liable to the plaintiffs for the wrongful repudiation of the Contract of Sale, with damages to be assessed.[2]

[11] On 15 September 2020, the Supreme Court made orders consequent upon its decision on the liability trial.

[12] The defendant appealed from the decision on the liability trial.

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1 *FE Accommodation Pty Ltd v Gold Valley Iron Ore Pty Ltd* [2020] NTSC 61 ('Liability Reasons').

2 Liability Reasons at [195].

[13] In August 2021, the plaintiffs filed an application under Order 37A of the *Supreme Court Rules 1987* (NT) for an order that the defendant not dispose of or deal with its Australian assets up to the unencumbered value of $5 million, and that the defendant keep the plaintiffs informed of all its assets, including their value, location and encumbrances.[3]

[14] On 16 August 2021, the Court of Appeal dismissed the appeal, except in relation to two grounds relating to a drilling rig.[4] The Court of Appeal allowed the appeal in relation to grounds 19 and 20 and declared that the term 'Ex WDR Plant & Equipment' in the Contract of Sale included the drilling rig.[5]

[15] On 4 November 2021, in proceeding No 56 of 2018, the Supreme Court made orders that the defendant must not, until further order of the Court, remove from Australia or in any way dispose of, deal with or diminish the value of its unencumbered shareholding of shares in FE Limited, save to the extent required by law, and that the undertakings as to damages given by the plaintiffs applied until the defendant is released from the first order.

[16] The damages trial was conducted from 10 to 12 April 2024, with further written submissions filed on 16 and 26 April 2024. The decision was reserved.

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3 *FE Accommodation Pty Ltd v Gold Valley Iron Ore Pty Ltd* [2021] NTSC 85.

4 *Gold Valley Iron Ore Pty Ltd v FE Accommodation Pty Ltd & Anor* [2021] NTCA 2 ('Appeal Reasons') at [113].

5 Application to the High Court for special leave to appeal was refused on 2 December 2021.

[17] On 16 August 2024, the Court of Appeal ordered the defendant to pay the respondents 90% of their costs of the appeal.[6]

[18] The Court of Appeal declined the plaintiffs' application for costs in relation to the liability trial at that stage.[7]

[19] On 22 August 2024, I delivered judgment on the assessment of damages, with the parties to file orders consistent with that decision.[8]

[20] On 16 September 2024, I made orders as follows:

(a) There be judgment in favour of the first plaintiff against the defendant in respect of the first plaintiff's claim for damages for breach of the Contract of Sale in the sum of $1.

(b) There be judgment in favour of the second plaintiff against the defendant in respect of the second plaintiff's claim for damages for breach of the Contract of Sale in the sum of $382,555, plus interest in the sum of $175,803.92, being a total judgment of $558,358.92.

(c) There be judgment in favour of the defendant in respect of its counterclaim against the first plaintiff for restitution in the sum of $500,000, plus interest in the sum of $229,965.29, being a total judgment of $729,964.29.

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6 *Gold Valley Iron Ore Pty Ltd v FE Accommodation Pty Ltd & Anor (Costs)* [2024] NTCA 3 ('Appeal Costs Reasons') at [16].

7 Appeal Costs Reasons at [20].

8 *FE Accommodation Pty Ltd & Anor v Gold Valley Iron Ore Pty Ltd* [2024] NTSC 61 ('Damages Reasons').

(d) There be judgment in favour of the second plaintiff in respect of the defendant's counterclaim against the second plaintiff for restitution which is accounted for in the damages awarded by Order 2 and the counterclaim is otherwise dismissed.

[21] Costs were reserved.

Matters for determination

[22] The matters now for determination are the orders to be made in respect of the costs of:

(a) the whole of proceeding No 56 of 2018;

(b) the separate trial on liability in proceeding No 64 of 2018;

(c) the application for the freezing order in proceeding No 64 of 2018; and

(d) the trial on damages in proceeding No 64 of 2018.

[23] The parties relied on written submissions and the defendant also relied on an affidavit by its solicitor, Mark Hibbins, made on 30 September 2024. The parties were content for the orders as to costs to be dealt with on the papers.

[24] The plaintiffs argued that the appropriate orders are that: (i) the plaintiffs be paid their costs in respect of proceeding No 56 of 2018 on a party and party basis;[9] (ii) the plaintiffs be paid their costs in respect of proceeding No 64 of 2018 up to and including 15 September 2020 (being the date on which orders

9 I take this to be a reference to 'the standard basis' referred to in r 63.26 of the *Supreme Court Rules 1987* (NT).

were made disposing of the liability trial); (iii) the plaintiffs be paid their costs in respect of the freezing order application; and (iv) there otherwise be no order as to costs for the period after 15 September 2020.

[25] The defendant argued that the appropriate order is that there be no order as to costs in both proceedings, meaning the parties bear their own costs.

Consideration and determination

[26] By ss 14(1)(c) and 71 of the *Supreme Court Act 1979* (NT) and r 63.03(1) of the *Supreme Court Rules 1987* (NT), the costs of a proceeding are in the discretion of the Court.[10]

[27] The power to award costs is a discretionary power, to be exercised judicially by reference to considerations relevant to its exercise and upon facts connected with or leading up to the litigation.[11]

[28] The most important guiding principle by reference to which the discretion as to costs is to be exercised is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party.[12] The application of that principle may be modified or displaced where there is conduct of the litigation that would justify a different outcome, which can include unreasonable delay or a want of the cooperation required of litigants to

10 *Northern Territory v Sangare* (2019) 265 CLR 164 at [13]-[15] per the Court.

11 Ibid at [24] per the Court.

12 Ibid at [25] per the Court.

ensure the just resolution of the real issues in civil proceedings with minimum delay and expense.[13]

[29] Practice Direction No 6 of 2009 ('PD6/2009') addresses such matters and makes clear that the parties' conduct of the litigation, particularly whether there were offers to settle some or all of the issues in the proceeding, may be taken into account when the Court exercises its discretion as to costs.

Proceedings No 64 of 2018

[30] In proceedings No 64 of 2018, the parties all had some measure of success. The defendant was effectively successful in its counter-claim against both plaintiffs (being its claim to recover the $1 million paid by it to the plaintiffs as instalments of the purchase price under the Contract of Sale). The plaintiffs were effectively successful in establishing the defendant's liability for damages for breach of contract. In the assessment of those damages, it was accepted that the purchase price instalments paid by the defendant to each plaintiff would reduce the amount of damages to which each plaintiff was entitled. After that reduction, the second plaintiff was found to be entitled to damages of $382,555, but the first plaintiff was found to be entitled only to nominal damages, because its established loss did not exceed the amount of the purchase price it had received. The difference of $229,965.29 was payable by the second plaintiff to the defendant by virtue of the successful counter-claim.

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13 Ibid, citing *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [90].

[31] The plaintiffs argued that they should have their costs up to the resolution of the liability trial, because they both succeeded on liability, with no order as to costs thereafter because the second plaintiff's entitlement to its costs flowing from its success in its damages claim would be effectively cancelled out by the defendant's entitlement to be paid by the first plaintiff its costs flowing from its success on the counter-claim.

[32] Such an approach ignores two matters. The first is that the defendant succeeded in its counter-claims against both plaintiffs, which would entitle it to its costs against both of them. The second, and more important, is that the first plaintiff's success on the liability trial came to nothing because it was awarded only nominal damages, having failed to establish any loss.

[33] Apportioning costs between the parties according to their respective successes or failures separately across the two stages of the proceedings (liability and damages) creates an artificiality. This artificiality arises because this approach ignores the ultimate outcome of the proceedings, in which the first plaintiff failed to establish loss and the defendant successfully resisted the first plaintiffs' claim for damages in its entirety, the second plaintiff was successful in its claim for damages, and the defendant was wholly successful in its counter-claims against both plaintiffs.

[34] For this reason, the authorities relied on by the plaintiffs are of little assistance. In those authorities, the courts accepted that costs may be awarded on an 'issue by issue' basis or ruled that, prior to the ultimate

determination, the costs of a separate question be ordered in favour of the successful party on that question.[14] This is particularly so when the Court of Appeal ruled against awarding costs for the liability trial prior to the determination of the damages trial.

[35] As Charlesworth J observed in *Taylor v Heading (No 2)* [2021] FCA 925 (at [18]), the outcomes in the authorities (which include a number of those relied on by the plaintiffs) turn on their particular facts and circumstances, do not give rise to any fixed rule, demonstrate that a range of outcomes might be available in any particular case, and that it is not unusual to award costs by reference to the parties' success or failure in respect of significant discrete issues. Accepting those matters does not dictate that the plaintiffs should, in this case, have their costs up to the decision on the liability trial.

[36] There is some additional artificiality in treating the plaintiffs individually when determining costs in this case, given that both plaintiffs are owned and operated by the same individual, were represented by the same solicitors and counsel, and pleaded their cases jointly (which cases had the same legal foundations and, throughout the proceedings, their cases were run and addressed together, albeit recognising and accounting for their respective property entitlements under the Contract of Sale).

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14 See *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 at [5] per Finkelstein and Gordon JJ; *Myers v Defries* (1880) 5 Ex D 180 at 728 per Thesiger LJ; *Alborn v Stephens* [2010] QCA 58 at [8] per Muir JA; *A, DC v Prince Alfred College Inc (No 2)* (2016) 139 SASR 396 at [5]-[13] per the Court; *Ruddock v Vardalis (No 2)* (2001) 115 FCR 229 at [11] per Black CJ and French J; *Taylor v Heading (No 2)* [2021] FCA 925 at [18] per Charlesworth J; *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd (No 2)* [2017] SASC 115 at [7]-[8] per Stanley J; *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [8] per McMurdo J.

[37] When considered together, the net result of the ultimate outcome of the proceedings is that the plaintiffs are to pay the defendant the sum of $117,444 plus interest. The plaintiffs' claim for damages for breach of the Contract of Sale exceeding some $2 million was not successful.

[38] The plaintiffs pointed to the following matters in support of their position: (a) the defendant had run, and then abandoned the day before the liability trial, a counter-claim founded on fraudulent misrepresentation and misleading and deceptive conduct; (b) the defendant ran a counter-claim founded on the plaintiffs' repudiation of the Contract of Sale, which failed; (c) the liability determination permitted the plaintiffs to conduct their affairs in the knowledge that the Contract of Sale was no longer on foot (including retrieving possession of some of the Plant and Equipment and entering into contracts for the sale of the chattels the subject of the Contract of Sale in mitigation of its loss); and (d) that mitigation did not occur until the asset sale deeds were entered into in July 2019, and the last instalment payments to the plaintiffs under those deeds were made seven months before the damages trial.

[39] As regards those matters:

(a) The defendant's abandonment of part of its pleaded case shortly before the liability trial bears on whether the defendant complied with the requirement for litigants to ensure the just resolution of the real issues in civil proceedings with minimum delay and expense. It may be

inferred that the plaintiffs incurred unnecessary costs in preparing to meet that case at trial. However, there is no evidence before me as to the extent of those costs in the overall context of the proceedings, so I am unable to ascertain, even roughly, the degree to which the defendant's conduct contributed to the costs incurred by the plaintiffs.

(b) The failure of the defendant's counter-claim alleging the plaintiffs' repudiation of the Contract of Sale was essentially the same case which the defendant put in defence of the plaintiffs' claims for damages for the defendant's breach of contract. The defendant's failure on the counter-claim is simply the reflection of the plaintiffs' success on its claims that the defendant was liable for breach of the Contract of Sale. This is no more than a submission that the plaintiffs succeeded in relation to liability.

(c) It is not accurate to say that the plaintiffs' success in the liability trial (determined in September 2020) permitted them to conduct their affairs in the knowledge that the Contract of Sale was no longer on foot. As pleaded in the defence and counter-claim, the defendant's position, from 9 August 2018, was that the Contract of Sale had been terminated. As pleaded in the plaintiffs' reply and defence filed on 30 August 2018, the plaintiffs' position was that the defendant's purported termination of the Contract of Sale on 9 August 2018 was itself a repudiation of the Contract of Sale which the plaintiffs accepted and they elected to terminate the Contract of Sale from that date. Consequently, from

9 August 2018, or at the latest 30 August 2018, it was clear that all parties accepted that the Contract of Sale was no longer on foot and the plaintiffs were free to conduct their affairs on that basis. That they did so is confirmed by the plaintiffs' entry into the asset sale deeds with Britmar in July 2019, over 14 months prior to the determination of the liability trial.

(d) Even if it be accepted that the plaintiffs' pursuit of the litigation up to the liability trial was reasonable because they could not know, at that point in time, that the net amount they claimed in damages would be wholly mitigated by the amounts they received from the subsequent sales of the chattels, this was a commercial decision based on knowledge of the value of the chattels, the likelihood they could be sold, the duty under the general law to mitigate their loss and that any amounts received in mitigation would effectively reduce the damages recoverable against the defendant. Ultimately, this commercial decision was an unsuccessful one. The ultimate net failure of the plaintiffs cannot be ignored.

[40] The defendant pointed to the plaintiffs' failure to accept an offer, made by the defendant on 19 October 2018, to settle the proceedings on the basis that the plaintiffs pay the defendant $100,000, the defendant would retain the Plant and Equipment which the defendant had removed from the Mineral Leases and had in its possession, and the parties would mutually release each other from all claims relating to the Plant and Equipment, the Sawfish Camp

(being the chattels the subject of the Contract of Sale) and both proceedings, including costs.

[41] By that date, the plaintiffs had received the $1 million paid by the defendant under the Contract of Sale. I assessed the value of the Plant and Equipment which had been removed from the Mineral Leases at $73,500. Consequently, the defendant argued that, if the plaintiffs had accepted the offer of settlement, they would have received a net benefit of $826,500. Instead, by continuing with the litigation, the plaintiffs have been ordered to pay the defendant $171,605.37 (including interest), making them about $1 million worse off than if they had accepted the offer.

[42] It must be accepted that the plaintiffs declined but failed to better the defendant's settlement offer by the litigation. Paragraph 25 of PD6/2009 provides that, in the ordinary case, the Court is likely to require the party who declined but then failed to better an offer of compromise to pay the other party's costs from the date the offer of compromise could reasonably have been accepted on an indemnity basis.

[43] The defendant does not rely on paragraph 25 of PD6/2009 to seek an award of indemnity costs in its favour, noting that the defendant's case, as explained in the offer of settlement, did not succeed, the case which did succeed was not explained, and that the defendant only gave the plaintiffs seven days to accept the offer.

[44] Nevertheless, the fact that the plaintiffs pursued the litigation from October 2018 to September 2024, and ultimately achieved an outcome which has seen them $1 million worse off than they would have been if they had accepted the defendant's settlement offer points strongly in favour of the exercise of the discretion as to costs by, at best for the plaintiffs, making no order as to costs.

[45] Also pointing in favour of that exercise of discretion are the facts that (a) neither party complied or fully complied with the pre-litigation action requirements of PD6/2009, and (b) neither party complied with the spirit of PD6/2009 once litigation had commenced. Further, there was a lengthy delay between the determination on 2 December 2021 of the application for special leave to appeal from the Court of Appeal's decision and the parties' further pursuit of the proceedings, which was not initiated until 3 July 2023. Despite emails to the parties from the Registry Manager of the Court on 30 September 2022, 7 October 2022, 11 October 2022, 27 October 2022 and 30 May 2023, the plaintiffs did not seek to have the proceedings listed until 3 July 2023. While this delay would not have seen either party incur significant costs during this period, it comprises a failure to ensure the just resolution of the real issues in civil proceedings with minimum delay and expense, particularly on the part of the plaintiffs given it was their claim for damages to pursue after succeeding in establishing the defendant's liability.

[46] For the above reasons, I consider that the appropriate order in relation to proceeding No 64 of 2018 is that there be no order as to costs, i.e. that each party is to bear their own costs.

Freezing order – No 64 of 2018

[47] In *Baller Industries Pty Ltd v Mero Mero Leasing Pty Ltd* [2019] NSWSC 1067, Ward CJ held (at [18]) that, ordinarily, where an interlocutory injunction is granted and the defendant did not concede that injunctive relief, the costs of that application will be costs in the cause (or the plaintiff's costs in the cause). That observation was based on the explanation given by the New South Wales Court of Appeal in *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2)* [2007] NSWCA 142 at [16]-[32].

[48] In that case, the Court of Appeal explained (at [18]) that an order that the costs be 'costs in the cause' or 'costs in the proceedings' (which terms are interchangeable) means that the costs of the interlocutory proceedings correspond with the final order for costs in the action. Thus, if, in the final proceedings, the plaintiff is successful and an order for costs of the final hearing is made in the plaintiff's favour, the plaintiff gets the costs of the interlocutory proceedings as part of the costs of the action against the defendant, regardless of who was successful on the interlocutory application. The Court of Appeal explained (at [21]) that the rationale for making an

order that costs be costs in the cause is that, at the stage of granting an interlocutory injunction, the court is not in a position to adjudicate on the ultimate outcome of the proceedings. Further, if a plaintiff who applies for an interlocutory injunction is not ultimately successful in the proceedings, that plaintiff should not receive the costs of the application for an injunction which, when the matter is considered in overview, cannot be sustained. The Court of Appeal also explained (at [27]) that, if there is nothing to distinguish an application for an interlocutory injunction from the typical case that comes before the court, then the underlying jurisprudence relating to the exercise of the discretion may warrant the making of what is referred to as 'the usual order' (i.e., costs in the cause). That gives effect to the principles that govern the court's discretion in circumstances where there are no counter-veiling or different circumstances to warrant the exercise of the discretion in a different manner.

[49] In this Court, r 63.19 of the *Supreme Court Rules* provides that the costs of an interlocutory or other application in a proceeding are to be costs in the proceeding,[15] unless the Court otherwise orders.

[50] That is the usual rule for interlocutory applications in this jurisdiction. The explanation set out above applies equally here.

[51] On 4 November 2021, Grant CJ granted an interlocutory injunction prohibiting the defendant from disposing, dealing with or diminishing the

15 The term 'costs in the proceeding' means that the party who is successful in the proceeding is entitled to the party's costs of the application in respect of which such an order is made: see r 63.02(2).

value of its shares. Despite the last paragraph of the reasons for decision indicating that his Honour would hear the parties as to costs if need be, no order for costs was made.

[52] There was nothing unusual or out of the ordinary about the plaintiffs' application for the injunction. In support of its position that each party should bear its own costs, the defendant has argued, effectively, that it did not resist the making of the injunction because it gave an undertaking having similar effect. The plaintiffs have argued, effectively, that the defendant did resist the making of the injunction because the injunction gave a degree of protection which the undertaking did not. Even if the plaintiffs' submission is accepted, it does not follow that the plaintiffs should have their costs of the application because the usual rule is that costs be costs in the proceeding, whether a plaintiff succeeds in obtaining an interlocutory injunction or not.

[53] The plaintiffs argued that they should have their costs of the injunction application because they succeeded on it, and it was 'justified' because the worth of the shares is now 'slightly less' than the judgment obtained by the second plaintiff in the damages trial. That judgment is for some $558,000.

[54] The submission ignores that, upon satisfaction by the first plaintiff of the judgment against it of some $730,000, the defendant would have ample funds to satisfy the judgment owed to the second plaintiff, without recourse to its shares.

[55] In relation to the application for the Mareva injunction, I do not see any reason to depart from the usual rule that the costs be costs in the proceeding. As determined above, the order in the proceeding will be that there be no order as to costs.

Proceedings No 56 of 2018

[56] The plaintiffs commenced these proceedings on 28 June 2018.

[57] As found in the liability trial,[16] that commencement was precipitated by the defendant removing items of Plant and Equipment from the Mineral Leases, a request by the plaintiffs for an undertaking from the defendant that the Plant and Equipment removed would be preserved and the plaintiffs would be informed of the location to which the Plant and Equipment had been removed, and the defendant's failure to provide that undertaking.

[58] Further, as found in the liability trial,[17] after the proceedings were commenced and the originating motion was served on the defendant, the defendant continued to remove items of Plant and Equipment from the Mineral Leases without identifying which items were removed and the location to which they were taken. The undertaking sought by the plaintiffs, which included being informed about the removed items and their location, was sought again. No such undertaking was given before an injunction was

16 Liability Reasons at [118]-[135].

17 Liability Reasons at [136]-[143].

granted on 5 July 2018 preventing the removal of Plant and Equipment from the Mineral Leases or other current location.

[59] Further, as found in the liability trial,[18] the purpose of the injunction was to maintain the *status quo* pending the outcome of the litigation, the defendant continued to remove Plant and Equipment without identifying it or stating where it was located, and only stopped removing the Plant and Equipment upon the grant of the injunction.

[60] The injunction was set aside and proceeding No 56 of 2018 was dismissed by consent after the defendant: (a) informed the plaintiffs of the items of Plant and Equipment it had removed and their location (by filing its defence and counter-claim in proceeding No 64 of 2018); and (b) gave an undertaking to pay any net proceeds of the sale of any of the removed Plant and Equipment into a solicitor's trust account.

[61] On these facts, the plaintiffs were successful in the proceedings. An injunction was granted preventing any removal of the Plant and Equipment from wherever it was then located. Further, the proceedings were only commenced because of the defendant's failure to give the undertaking and information it ultimately gave, permitting the injunction to be set aside and the proceedings brought to an end.

18 Liability Reasons at [144].

[62] In accordance with the guiding principle referred to in paragraph [28] above, that would *prima facie* entitle the plaintiffs to an order for costs in their favour.

[63] The defendant argued that the plaintiffs should not have such an order, relying on a written offer made by the defendant on 4 July 2018 to agree to 'an interim regime' that keeps the plaintiffs fully informed of the location, status and any proceeds of sale of, the Plant and Equipment, and to discuss an arrangement whereby the proceeds of sale be kept in a trust account. The plaintiffs never responded to that offer, and proceeded with the litigation.

[64] By the time the offer was made, the proceedings had been commenced. An originating motion and a lengthy affidavit in support had been filed and served. Preparation for the hearing on 5 July 2018 would have been largely undertaken. The plaintiffs would have incurred most of their costs by that stage. The things the subject of the offer, particularly information about what items had been removed and where to, had been sought by the plaintiffs over a month earlier.

[65] Further, the injunction that was granted on the plaintiffs' application went beyond the content of the offer because it prevented the defendant from moving any of the Plant and Equipment. It could not be said that, to adopt the language in paragraph 25 of PD6 of 2009, the plaintiffs 'declined but then failed to better' the offer.

[66] I do not accept that this last minute offer to provide the plaintiffs with what they had sought over a month before commencing the proceedings warrants a departure from the application of the guiding principle that the successful party is generally entitled to their costs.

[67] There will be an order that the defendant pay the plaintiffs' costs of proceeding No 56 of 2018.

Disposition

[68] I make the following orders.

(1) In relation to proceeding No 64 of 2018, including the plaintiffs' application for the Mareva injunction, there is no order as to costs.

(2) In relation to proceeding No 56 of 2018, the defendant is to pay the plaintiffs' costs, as agreed or taxed.
