Equity Division
Supreme Court
New South Wales

Case Name:	Burton v Prior (No 2)
Medium Neutral Citation:	[2019] NSWSC 1431
Hearing Date(s):	On the papers: written submissions 30 August 2019, 30 September 2019, 16 October 2019 and 18 October 2019
Date of Decision:	21 October 2019
Date of Orders:	21 October 2019
Jurisdiction:	Equity Division
Before:	Kunc J
Decision:	Defendant to pay two-thirds of the plaintiff's costs of the proceedings
Catchwords:	COSTS — party/party – general rule that costs follow the event – application of the rule and discretion – each party enjoys a measure of success – no issue of principle
Legislation Cited:	Civil Procedure Act 2005 (NSW) Conveyancing Act 1919 (NSW) Property (Relationships) Act 1984 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Burton v Prior [2019] NSWSC 518 Calderbank v Calderbank [1975] 3 All ER 333 Calverley v Green [1984] HCA 81; (1984) 155 CLR 242
Category:	Costs
Parties:	Marea Therese Burton (Plaintiff) John David Prior (Defendant)
Representation:	Counsel: K J Young (Plaintiff) P Abdiel (Defendant)

Solicitors:

Stratos Lawyers Pty Ltd (Plaintiff)
John de Mestre & Co Pty Ltd (Defendant)

File Number(s): 2014/267512

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JUDGMENT

Summary

1 I delivered the principal judgment in these proceedings on 8 May 2019: *Burton v Prior* [2019] NSWSC 518 (the "Principal Judgment"). This judgment determines the question of costs and must be read with the Principal Judgment. Defined terms in the Principal Judgment have the same meaning in these reasons.

2 I observed at the outset of the Principal Judgment that "almost everything … has been put in issue in the bitter dispute between" Marea and John. With the exception of having agreed that costs be resolved on the papers, this remains the case in relation to costs. Their submissions as what costs orders should be made are diametrically opposed.

3 Marea has been vindicated in these proceedings in that the Court has found, despite John's vigorous assertions to the contrary until the last day of the hearing, that Marea does have an interest in the Property, albeit 15.97% instead of the 50% for which she contended. She has obtained an order for the sale of the Property, which at least for some part of the history of these proceedings was also resisted by John. However, she has failed in what was, in effect if not name, a cross-claim, that if the Court was not satisfied she had a 50% interest in the Property, that interest should be awarded to her by an adjustment under the PRA (or on other bases which it is not necessary to repeat in detail).

4 Given the bitter and protracted litigious history between these parties and the difficulties that would inevitably arise on assessment, it would be completely undesirable for costs orders to be made in favour of both Marea and John which attempted to reflect their respective success in the proceedings. A just outcome is to treat Marea as the principal victor in the proceedings but to reduce the proportion of her costs for which John will be liable to reflect her failure to increase her interest in the Property beyond 15.97%. The Court is satisfied that the appropriate exercise of its discretion as to costs is to order John to pay two-thirds of Marea's costs of the proceedings.

5 As she has done throughout the proceedings, Ms K J Young of Counsel appeared for Marea. Ms P Abdiel of Counsel appeared for John on the question of costs.

The parties' respective contentions

6 To understand the parties' respective contentions as to costs, it is necessary briefly to recall the history and outcome of these proceedings. I described what can fairly be called the "battlelines" in the Principal Judgment:

> "7 Marea commenced these proceedings in 2014 after the FCC Judgment. As it was put by Ms Young, Marea's basic claim is for an equal division of the Property with a further adjustment in her favour for occupation rent. (On 5 February 2018 I made an order to the effect that the quantum of any occupation rent be determined separately from and after the determination of all other issues in the proceedings.) To that end she seeks an order that trustees for sale of the Property be appointed under s 66G of the Conveyancing Act 1919 (NSW) (the "CA") with the proceeds of sale being used to pay out the existing loan, and settle the finances between both parties.
>
> 8 John's defence has been to deny Marea's claims and (by cross-claim) initially to allege an agreement between him and Marea pursuant to which he alleged Marea held her share of the Property on trust for him (the "Co-Ownership Agreement"). He also says that the FCC Judgment creates certain estoppels. As I explain in paragraph [20] below, John amended his cross-claim on the last day of the hearing to allege (in reliance on the decision of the High Court in Calverley v Green [1984] HCA 81; (1984) 155 CLR 242) ("Calverley") that their respective equitable interests in the Property were in accordance with their contribution to the purchase price – 84.03% to John and 15.97% to Marea. The abandonment by John of his case based on the Co-

Ownership Agreement means that the defences to that case raised by Marea also fall away.

9 Marea has responded that if the Court comes to the view that she and John hold their interests in the Property other than equally, those interests should be adjusted by reference to several different legal analyses, including under the Property (Relationships) Act 1984 (NSW) (the "PRA"). She has also raised various limitation arguments in response to John's cross-claim."

7 In relation to the central question of Marea and John's respective interests in the Property, the Court concluded that Marea had a 15.97% interest in the Property.

8 On 27 June 2019 the Court made these orders to give effect to the Principal Judgment:

"1. Order that Darren John Vardy and Ian James Purchas be appointed trustees of all the land in Folio Identifier XXX, ("the Property") title to which is presently registered in the names of Marea Therese Burton, the Plaintiff, and John David Prior, the Defendant, as tenants in common in equal shares.

2. Order that the Property be vested in the trustees subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on the statutory trust for sale under Division 6 of the Conveyancing Act 1919 as amended.

3. Order that the trustees are authorised to charge at a rate not exceeding the rates specified in the Tables of Rates as annexed to these orders (being rates applicable from 1 July 2019) and are authorised to deduct all such expenses from the proceeds of sale as per the following order.

4. Order that upon sale of the Property, the sale proceeds are to be applied in the following priority:

(a) payment to Australian and New Zealand Banking Group Limited of the amount required to secure discharge of mortgage AD XXX from Marea Therese Burton and John David Prior to the mortgagee;

(b) in payment of such Agent's commission and costs of sale of the Property as the trustees may determine;

(c) in payment to the trustees of their fees determined at the rates specified in Order 3;

(d) any balance to be paid into Court unless the Plaintiff and Defendant otherwise agree.

5. Order that upon any sale either party may bid at any auction or otherwise offer to purchase the Property.

6. Liberty is reserved to the parties and to the trustees to apply to the Court on seven (7) days' notice including to seek the advice of the Court as to distribution and as to the expenses of the trustees or to obtain such further, or other, relief to enable effect to be given to these Orders or the discharge thereof as are considered necessary or appropriate.

7. On or before 19 July 2019 the Defendant is to file and serve a document giving particulars of those matters set out in the Plaintiff's Updated Table of Agreed Contributions with which the Defendant disagrees and the reasons for that disagreement."

9 The reason for Order 4(d) was to cater for the possibility that by the time the Property was sold, Marea and John may not have agreed on the adjustments required to reflect the interests in the Property as found by the Court, including consequential adjustments to contributions they had made to the Property.

10 The issue of the costs of the proceedings has been brought to a head by John filing a motion on 30 August 2019 which sought these orders:

"1. The plaintiff pay the defendant's costs of the proceedings on an ordinary basis.

2. Further and in the alternative, in the event the Court orders that the defendant is to pay any part of the plaintiff's costs, order that the defendant pay 10% of the plaintiff's costs of the proceedings on an ordinary basis (being 10% of the costs that would be allowed on an ordinary basis)."

11 In addition, John relies on what the parties have been content to describe as a Calderbank letter (the text of which neither party is able to tender, but which they agree was sent) for $250,000 in support of a submission that he should have his costs on the indemnity basis or, at a minimum, on the ordinary basis.

12 Insofar as he seeks his costs of the proceedings, John submits that he:

(1) was successful in the proceedings to a much more significant degree than Marea, including as to key factual matters in dispute; and

(2) did not act so unreasonably in his abandonment of his “Co-Ownership Agreement” case, as to warrant a decision against him on costs. In any event, that case did not occupy a significant amount of Court time.

13 John’s alternative submission that he should be ordered to pay no more than 10% of Marea’s costs is based on the Court taking into account that:

(1) Marea’s successful arguments occupied no more than 5% of the Court’s judgment;

(2) Some of the Court’s fundamental factual findings (for example, evidence of Marea’s occupation of the Property, and her departure from it) may have impacted those arguments;

(3) While the Court has before it no evidence of the quantum of occupation rent, it is unlikely to translate into a significant pecuniary award to Marea; and

(4) Marea’s claim for relief under s 66G of the CA did not impact Marea’s pecuniary result.

14 In reliance on the Calderbank letter, John submits that the Court should exercise the costs discretion in his favour because the offer was for $250,000 and Marea’s share of the Property will be $243,000 after repayment of the mortgage.

15 Three alternative costs outcomes have been argued on behalf of Marea:

(1) Marea is entitled to a costs order in her favour because she succeeded in the proceedings either in whole or on significant issues in the case, and viewed in combination with John’s disentitling conduct (that conduct said to be taking a “scorched earth approach” which included

refusal to accept that Marea was entitled to an order under s 66G of the CA; his refusal to accept she had any share in the Property at all and that she had in fact made contributions to the Property; his last minute abandonment of the Co-Ownership Agreement case; and his dishonest evidence);

(2) Alternatively, an order that Marea receive 80% of her costs in recognition of John's success on some issues belatedly raised and pleaded by him, and viewed in combination with the disentitling conduct on his part; and

(3) In the further alternative, in accordance with what was said to be the usual practice applications under s 66G of the CA, the costs of both parties (as agreed or assessed) being paid out of the proceeds of sale of the Property.

16 In addition, Marea seeks some particular costs orders in relation to certain limited aspects of the proceedings.

Resolution – costs generally

17 The parties have provided detailed written submissions. With no disrespect intended, I do not propose to make this judgment unnecessarily long by even attempting to summarise them. I have read them carefully. As will be apparent from the diametrically opposed positions taken by the parties, the detail of their submissions reflects complete disagreement.

18 However, I have come to the view that by their rapid descent into the detail, the approach adopted by the parties has not adequately taken into account the overall shape of the issues litigated and how the proceedings developed. Reference to the pleadings, rather than the issues, is apt to confuse because the final, operative pleadings became very convoluted: amended consolidated statement of claim, defence to amended consolidated statement of claim, further amended statement of cross-claim and defence to amended statement of cross-claim.

19 Looking at the matter in the broad by reference to the issues enables the Court to identify the relevant “events” for the purposes of exercising the Court’s undoubted discretion as to costs. Those costs are in the discretion of the Court (s 98 of the *Civil Procedure Act 2005* (NSW) (the “Act”)). That discretion is very broad, save that it must be exercised judicially and for the purposes for which it is intended. There was no dispute that the general rule is that costs will follow the event, unless it appears to the Court that some other order should be made (see Pt 42, r 42.1 of the Uniform Civil Procedure Rules (NSW) (“UCPR”)).

20 The litigious shape of these proceedings (summarised in the Principal Judgment – see paragraph [6] above) is relatively clear.

21 First, Marea was the moving party who, by her original summons filed on 11 September 2014, sought that she be “granted relief pursuant to s 66G of the Conveyancing Act in that the [Property] be sold and the proceeds distributed on the basis of a just & equitable distribution”. The “just & equitable distribution” for which she came to contend was a 50/50 split between her and John.

22 Second, John’s response to Marea’s claim was one of adamantine resistance: she was not entitled to relief under s 66G of the CA and, by reference to what came to be known as the Co-Ownership Agreement, Marea had no interest in the Property at all because (as it was consistently pleaded until abandoned by John) “[Marea] has failed to contribute to the cost of acquiring the land and premises and holds her interest on trust for [John]”. By his defence filed on 7 November 2016, John pleaded that he did “not oppose the sale of the Property, but relies on the cross-claim”. In terms of costs that concession does not assist him, because it was more illusory than real. His ongoing reliance on the cross-claim (which raised the Co-Ownership Agreement) meant that in real terms there continued to be a very live question as to whether or not the sale of the Property would ever be an appropriate form of relief.

23 More significantly in terms of the present costs debate, up to and including the last day of the hearing John maintained his case that Marea had no beneficial interest in the Property at all. He was then granted leave in the course of final submissions to amend his pleading to abandon the cross-claim based on the Co-Ownership Agreement and to assert what was ultimately the successful position that the parties' respective interests were 84.03% (John) and 15.97% (Marea) in accordance with the High Court's decision in *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242.

24 Third, Marea responded that if her interest in the Property was found to be anything less than the 50% for which she contended, then she was entitled to be awarded a 50% interest on several bases, including constructive trust and under the PRA ("Marea's Adjustment Claim"). What is important for present purposes is that even after John abandoned his case based on the Co-Ownership Agreement, Ms Young forcefully advocated Marea's Adjustment Claim.

25 In setting out the overall litigious architecture of the proceedings in this way, I have not overlooked that each party made ancillary claims (such as Marea's successful claim for occupation rent, ultimately not pressed to assessment after the Principal Judgment was delivered) and raised numerous defences in answer to each other's claims. However, none of these make any difference for the purposes of costs because their outcomes are necessarily tied up in the overall result.

26 That overall result is that Marea, as the original moving party, vindicated her position that she *did* have an interest in the Property, albeit only 15.97% rather than the 50% or other figures for which she contended. Her rights to her interest in the Property are being given effect through the sale which she sought under s 66G of the CA. The vindication which she has achieved has been in the face of resolute opposition by John on virtually every point. So understood, Marea is the overall successful party and, in the ordinary course, would be entitled to her costs of the proceedings as following the event of her success. I do not regard the fact that the Court has found only a 15.97%

interest as opposed to 50% is, in and of itself, a sufficient basis to reduce what would otherwise be the ordinary costs consequence of that success.

27 This analysis is not affected by the fact that the Court's finding was in the proportions for which John contended by the amendment which he was allowed to make on the last day of the hearing. Quite apart from the view I have taken of Marea as the successful moving party in the proceedings, the fact that John's "success" arose from an amendment made on the last day of the hearing is a strong, secondary factor in support of Marea receiving her costs up to and including that point (which, in practical terms, means her costs of the proceedings). I have no doubt that if John had abandoned the Co-Ownership Agreement case before the hearing, the hearing would have been shorter (including less cross-examination of John about the Co-Ownership Agreement) and more focussed in identifying what were the real issues in dispute between the parties.

28 On the other hand, a significant part of the case was taken up with what might be seen as Marea's alternative case in reply – Marea's Adjustment Claim. As I have already observed, it is important for the purposes of the present exercise to note that she maintained that claim against the possibility that the Court would find she had a 15.97% interest in the Property. John's successful resistance of that part of Marea's case is also an event for the purposes of costs and John is accordingly entitled to his costs in relation to it. I do not accept that any of John's conduct which was described on behalf of Marea as "disentitling" (see paragraph [15(1)] above) has that character so as to alter what would otherwise be John's entitlement to his costs of Marea's Adjustment Claim.

29 Given the intertwining of the issues in these proceedings, it would be both completely impractical and inconsistent with the overriding purpose of the Act and the UCPR to make a costs order in favour of each of Marea and John intended to reflect the respective success which they enjoyed that I have identified. The assessor's task of attributing costs to those matters on which each succeeded would be difficult, time consuming and only productive of

further argument, cost and delay. This is a case where justice can be achieved by reducing the costs otherwise payable to the successful moving party to reflect that party's loss on a significant issue in the proceedings.

30 At this point, the Court's analysis can engage with one of each of the alternative outcomes proposed on behalf of each of Marea and John. John's submission is that he should only be required to pay 10% of Marea's costs. Marea's submission, on this hypothesis, is that John should be required to pay 80% of her costs.

31 In an analysis such as this, the Court is required to apply a broad brush approach. A completely rational or scientific analysis is impossible and the outcome largely depends on the instinctive assessment of the trial judge. In this case, I think the question can be resolved by considering how much of the case was devoted to material which solely arose because of Marea's Adjustment Claim.

32 The early stages of John and Marea's relationship and their dealings in relation to the acquisition of the Property would have to have been traversed even without Marea's Adjustment Claim. Furthermore, up to the point during the hearing when an agreed table of contributions and adjustments was provided to the Court, the entire financial history of John and Marea's relationship remained relevant because of John's position that Marea had made no relevant contributions.

33 What is really left is so much of the case as involved an exploration of the personal (and, until agreed during the hearing, financial) history of the relationship, including Marea's alleged personal non-financial contributions, for the period after John and Marea had moved into the Property until Marea moved out. But for Marea's Adjustment Claim, those aspects of John and Marea's relationship would not have had to have been explored in the detail in which they in fact were. This included preparing affidavits from a number of third party witnesses who were ultimately not required for cross-examination (see paragraph [18] of the Principal Judgment). Doing the best I can, I

attribute one third of the proceedings to matters solely referable to Marea's Adjustment Claim. Accordingly, subject to what follows, John's obligation to pay Marea's costs of the proceedings will be reduced by one-third.

Resolution - the Calderbank letter

34 The parties agree that John's former solicitors sent to Marea's then solicitors a Calderbank letter offering to settle the proceedings by John paying Marea $250,000. The exercise of liens by each of John and Marea's former solicitors means neither party has been able to tender a copy of the letter. There is no dispute that a letter in that amount was sent. While not accepted by Marea, I accept as inherently likely John's evidence that the letter was sent before the hearing. However, there is no evidence as to :

(1) whether the letter was expressed to be inclusive of costs;

(2) when precisely it had been sent and for how long it was expressed to be open;

(3) any other specific terms or conditions it did or did not contain;

(4) whether it referred to the principles in *Calderbank v Calderbank*;

(5) whether it gave any reasons for its acceptance; and

(6) whether it stated that non-acceptance would be relied on in support of an application for indemnity costs.

35 Given the evidentiary gaps to which I have just referred, I accept Ms Young's submission for Marea that the fact (which is all the Court can find) that a pre-trial Calderbank offer for $250,000 was sent is not sufficient to be taken into account in the exercise of the Court's discretion as to the costs of these proceedings. I also record that, in any event, Marea does not accept that she will receive less than $250,000. It is not necessary for the Court to resolve

that debate to determine costs because of the other difficulties that have been identified with John's reliance on the Calderbank letter.

36 There is a further reason why I would not give effect to such a Calderbank letter. Accepting that such a letter was sent, the question would then be whether Marea's refusal of the offer it contained was unreasonable. Because I am satisfied the letter was sent some time prior to the hearing, Marea would still have been faced with John's case that she had no beneficial interest at all in the Property, by reason of the alleged Co-Ownership Agreement. John's "success", such as it has been, reflects the case which he made by his amendment on the last day of the hearing. A refusal to accept a Calderbank offer will not be unreasonable where the event upon which that offer is premised (John demonstrating that Marea had no interest at all in the Property) is different to that upon which the offeror ultimately succeeds (John's amended case that Marea only had a 15.97% interest in the Property). Therefore, whatever else the Calderbank letter may have said, it would not be a letter which the Court would consider relevant to the exercise of its discretion as to the costs of the proceedings on the issues finally presented for determination.

Resolution - other costs issues

37 On 26 July 2017 the Court dealt with a motion by Marea seeking an early order under s 66G of the CA and for John to approach the Australian Taxation Office to make his tax returns available to the Court. The motion was denied with costs to be in the cause. John's grounds of opposition included his reliance on the Co-Ownership Agreement.

38 Marea submits that, given John's subsequent abandonment of the Co-Ownership Agreement, she should have her costs of that motion. John responds that while he had conceded that the Property should be sold (a concession which I regard as being of little relevance on costs – see paragraph [22] above) he ultimately successfully contended that the parties did not have equal shares in the Property. Furthermore, he says that he

produced his tax returns to the extent that he had them at the time. John submits that he should have the costs of that motion.

39 I do not find either analysis sufficiently persuasive to cause me to depart from the order that was made at the time, namely that costs be in the cause. This means that the costs of the motion will fall within the general costs order that I have foreshadowed and I am satisfied that is the just outcome in relation to the motion.

40 On the first day of the hearing, 12 February 2018, John was granted leave to amend his cross-claim to plead an equitable claim for contribution seeking an adjustment for mortgage repayments he claimed to have made and in respect to other payments to utility providers and improvements to the Property. Marea was granted leave to amend her defence to that cross-claim. However, no order was made at the time that Marea should have her costs thrown away by reason of John's amendment. Marea now asks for that order.

41 It is not suggested that the order was sought at the time. In the absence of Marea having provided any evidence in support of her current application that her costs thrown away by reason of the amendment are more than *de minimis*, the Court declines to make that order now.

42 Marea seeks her costs said to have been thrown away by reason of John's failure to comply with orders I made on 17 March 2019 and 27 June 2019 for John to provide a response to the updated table of agreed contributions that had been prepared on behalf of Marea. Costs sought included Marea's costs of attending the directions hearing on 27 June 2019. John points out that the directions hearing on 27 June 2019 was not solely taken up with the question of the updated agreed table of contributions. He submits that Marea should pay his costs of and incidental to the directions hearing on 27 June 2019.

43 I have already made some costs orders in relation to matters that have arisen since the delivery of the Principal Judgment. Nothing I am about to say is intended to displace the effect of those orders. For the avoidance of doubt,

the Court is satisfied that the work undertaken by the parties in relation to the updated agreed table of contributions and, to the extent not already dealt with in other costs orders, other work undertaken since the delivery of the Principal Judgment all falls within the category of the working out of the Principal Judgment and are costs of the proceedings to be dealt with in accordance with the overall costs order which I shall make. I am satisfied that the overall costs order is just in relation to those additional matters, including the parties' costs of and incidental to the 27 June 2019 hearing.

Conclusion

44 No order is required other than to give effect to the Court's conclusion set out in paragraph [33] above. As each party has also had a measure of success in relation to the overall disposition of the costs of the proceedings, the Court is also satisfied that the costs of the costs argument should fall within the general costs order.

45 The order of the Court is:

(1) Order that the defendant pay two thirds of the plaintiff's costs of the proceedings (including, for the avoidance of doubt, two thirds of the plaintiff's costs in relation to the argument conducted on the papers as to costs).

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