

AUSTRALIA / JUDGMENT

White v Kohacek (No. 2)

[2025] NSWSC 1118**COURT**

Supreme Court

DECIDED

25 September 2025

BEFORE

Williams J

CASE / FILE NUMBER

2023/142094

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Supreme Court**New South Wales****Amendment notes**

Medium Neutral Citation:	White v Kohacek (No. 2) [2025] NSWSC 1118
Hearing dates:	25 September 2025
Date of orders:	25 September 2025
Decision date:	25 September 2025
Jurisdiction:	Equity - Real Property List
Before:	Williams J
Decision:	See [22]
Catchwords:	COSTS – no question of principle
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 98 Uniform Civil Procedure Rules 2005 (NSW), r 20.26, r 42.1, r 42.15
Cases Cited:	Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (No 2) [2014] NSWCA 391 Zurich Australian Insurance Limited v CIMIC Group Limited & Ors (No 2) [2024] NSWCA 276
Category:	Costs
Parties:	Gary John White (First Plaintiff/Cross-Defendant) Terryll Sylvia Cassidy (Second Plaintiff/Cross-Defendant) Arno Mario Carlo Kohacek (Defendant/Cross-Claimant)
Representation:	
Counsel:	Mr B Koch (First and Second Plaintiffs/Cross-Defendants) Mr H Weller (solicitor) (Defendant/Cross-Claimant)

Solicitors: Bridges Lawyers (First and Second Plaintiffs/Cross-Defendants)
Herbert Weller (Defendant/Cross-Claimant)

File Number(s): 2023/142094

Publication restriction: Nil

JUDGMENT

Judgment was delivered in these proceedings on 12 September 2025: *White v Kohacek* [2025] NSWSC 1042. Familiarity with the principal judgment is assumed. Defined terms used in these reasons have the same meaning as in the principal judgment unless otherwise specified.

In summary, the plaintiffs failed on (1) their claim for declaratory relief that the Heads of Agreement is valid and enforceable and for an order for specific performance of that agreement, (2) their claim for a declaration that the defendant holds a further one-third interest in the Property on trust for them, (3) their claim for an order restraining the parties from encumbering the Property, and (4) their claim for orders requiring the defendant to execute in registrable form a transfer of a two-thirds interest in the Property to the plaintiffs.

The plaintiffs succeeded on their alternative claim for moneys had and received, save in respect of the amount of \$3,981.01 spent on a new ride-on mower which the plaintiffs purchased in April 2021. [1]

Mr Kohacek's primary contention that the Heads of Agreement is not binding and enforceable on the basis that the parties did not intend by entering into it to create legal relations was upheld. To that extent, Mr Kohacek succeeded in his cross-claim for an "Order that the Statement of Claim be dismissed". I overlooked that prayer for relief in the cross-claim when formulating the proposed orders in the principal judgment at [316]. The appropriate order in [316(4)] is not an order dismissing the whole of the cross-claim, but an order that the cross-claim is "otherwise dismissed". I determined that, if the parties had intended to create legal relations by their entry into the Heads of Agreement, Mr Kohacek would have succeeded in his cross-claim for an order setting aside the Heads of Agreement on the ground of unconscionability or declaring it void pursuant to the Contracts Review Act 1980 (NSW). Mr Kohacek abandoned his cross-claim for damages in the sum of \$1,000,000 on the first day of the hearing.

I made orders giving effect to the reasons for judgment and orders concerning the costs of the proceedings at the conclusion of a short hearing on 25 September 2025. These are my reasons for the costs orders.

Relying on an offer of compromise that he claims to have made in accordance with rule 20.26 of the Uniform Civil Procedure Rules 2005 (NSW) on 17 July 2023, Mr Kohacek submitted that the plaintiffs/cross-defendants should be ordered to pay his costs for the whole of the proceedings on the ordinary basis up to the date of the offer and on an indemnity basis from the date of the offer.

The plaintiffs submitted that the offer of compromise did not substantially comply with r 20.26 and was not capable of being accepted. Relying on their success in obtaining judgment on their claim for money had and received, the plaintiffs submitted that the Court should order Mr Kohacek to pay two-thirds of their costs of the proceedings up to and including the first day of the hearing on the ordinary basis as agreed or assessed, and that the Court should make no order in relation to costs incurred by the parties on and from 12 November 2024 with the intention that each party bear their own costs incurred during that period.

The plaintiffs commenced these proceedings on 3 May 2023 by filing their summons together with a supporting affidavit of Mr White sworn on 3 May 2023. Mr White's affidavit included his account of payments that the plaintiffs claimed to have made for the benefit of the defendant in relation to the Property, and exhibited documents which included records of such payments.

The plaintiffs filed a statement of claim on 27 June 2023.

Mr Kohacek filed his defence on 18 August 2023.

Before filing his defence, Mr Kohacek served his offer of compromise on the plaintiffs on 17 July 2023.

The offer was in the following terms:

"The defendants offer to compromise the whole of this claim on the following terms:

1. Upon verification that the Plaintiffs made payments to or on behalf of the Defendants totalling \$246,052.71 the Defendants pay that amount to the Plaintiffs.
2. The proceedings be dismissed.
3. This offer of compromise is made in accordance with rule 20.26 of the Uniform Civil Procedure Rules 2005."

The terms of the offer refer to defendants in the plural because, at that stage, Mr Colley's estate was named as the second defendant in the proceedings.

The plaintiffs' failure to accept the offer does not attract the operation of r 42.15 so as to entitle Mr Kohacek to indemnity costs from the date of the offer because: (1) the judgment to be entered in favour of the plaintiffs is more favourable to them than the offer; and (2) the offer did not contain the requisite element of compromise in any event, being merely an offer to entertain part of the plaintiffs' claim, subject to further disputation in relation to the quantum of that part of the claim, on terms that the whole of the plaintiffs' claims would then be dismissed. [2]

As the plaintiffs submitted, costs are in the discretion of the Court and the usual order is that costs follow the event. [3]

The plaintiffs' submissions correctly acknowledge that they have failed on their primary claims in the proceedings and succeeded only on their alternative claim – a mixed outcome.

The plaintiffs' submissions fail to acknowledge that Mr Kohacek succeeded on the primary contention underpinning the relief sought in his cross-claim (putting to one side his abandoned claim for damages of \$1,000,000 which I will address below).

The plaintiffs submit that the claims on which they succeeded and those on which they failed arose "out of the same dealings and transactions between these parties". That is true in a very general sense. However, the claims on which the plaintiffs failed (and Mr Kohacek, as cross-claimant, succeeded) turned on the dealings between them in the period up to and including late September 2019, the events in the context of which those dealings occurred, and subsequent events to the extent that they shed light on the dealings in September 2019. By contrast, the claims on which the plaintiffs succeeded turned on specific payments made by the plaintiffs in the period after September 2019. Contrary to the plaintiffs' submissions, the evidence and submissions relating to each set of claims was distinct. To my observation, the evidence and submissions relating to the claims on which the plaintiffs failed (and Mr Kohacek succeeded) occupied at least 80% of the time taken for the trial, and I consider that it would have accounted for a similar proportion of the time and resources expended by the parties in preparing their evidence and in preparing for trial generally. The evidence concerning the payments (the claims on which the plaintiffs succeeded) was not complex, even though it was voluminous due to the number of payments made over a long period of time leading up to the hearing.

Contrary to the plaintiffs' submissions, I consider that there are two events to be taken into account for the purpose of r 42.1 in this case: the plaintiffs' success on their money claim, and Mr Kohacek's success in defeating the plaintiffs' other claims on the grounds pleaded in his cross-claim. For the reasons explained above, I consider that the costs of the two sets of claims are separable, [4] and that 20% of costs are attributable to the plaintiffs' money claim with the remaining 80% of costs attributable to the other claims in the proceedings.

As the plaintiffs submitted, Mr Kohacek conducted the proceedings in an unreasonable manner by serving multiple rounds of affidavits and by maintaining his cross-claim for damages in the sum of \$1,000,000 until the first day of the hearing. However, the plaintiffs engaged in the same unreasonable conduct in relation to service of affidavits and, contrary to their submissions, Mr Kohacek's cross-claim did not cause the parties to incur additional costs over and above that which they incurred in respect of the claims and defences that were maintained by both parties. I reject that the plaintiffs' submission that Mr Kohacek's unreasonable conduct of the proceedings is relevant to the exercise of the costs discretion in those circumstances.

The plaintiffs' proposed costs order requiring Mr Kohacek to pay two-thirds of their costs up to and including the first day of the trial and requiring the parties to pay their own costs thereafter would unjustly deprive Mr Kohacek of any costs notwithstanding the substantial degree of success he has enjoyed in the proceedings. On the other hand, it would be unjust to deprive the plaintiffs of their costs in relation to the money claim on which they succeeded.

For all of those reasons, it is my opinion that the appropriate exercise of the costs discretion in this case is to order the plaintiffs to pay 80% of Mr Kohacek's costs of the proceedings on the ordinary basis as agreed or assessed, and to order Mr Kohacek to pay 20% of the plaintiffs' costs of the proceedings on the ordinary basis as agreed or assessed. Depending on the quantum of those costs, that will result in a net amount being payable by the plaintiffs to Mr Kohacek, or by Mr Kohacek to the plaintiffs, on account of costs.

Endnotes

1.

See the principal judgment at [311].

2.

Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (No 2) [2014] NSWCA 391 at [41] – [42] per McColl JA (with whom Gleeson JA and Sackville AJA agreed).

3.

Civil Procedure Act 2005 (NSW), s 98; Uniform Civil Procedure Rules 2005 (NSW), r 42.1.

4.

Zurich Australian Insurance Limited v CIMIC Group Limited & Ors (No 2) [2024] NSWCA 276 at [7]-[8] and the authorities there referred to (White and Stern JJA and Griffiths AJA).

Amendments

25 September 2025

-

typographical error

26 September 2025

-

Typographical error in coversheet

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated:

26 September 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/1997e9facc78fd96f0a6f88>

CASE PAGE <https://chat.esheria.ai/case-law/australia/white-v-kohacek-no-2-2025>

Prepared on 25 October 2026 · Esheria