SUPREME COURT OF QUEENSLAND

CITATION:	*Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (No 2)* [2024] QSC 64
PARTIES:	**CIVIL MINING AND CONSTRUCTION PTY LTD** (plaintiff) **v** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD** (defendant)
FILE NO:	BS 6050 of 2013
DIVISION:	Trial Division
PROCEEDING:	Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers: written submissions 2 April 2024.
JUDGE:	Muir J
ORDER:	**It is ordered that:** **1. WICET pay CMC's costs of WICET's application; and** **2. CMC pay 90 per cent of WICET's costs of CMC's application.**
CATCHWORDS:	PROCEDURE – COSTS - whether costs should follow the event - assessing the event warranting an award of costs - whether proportion of costs should be awarded to the defendant
	Uniform Civil Procedure Rules 1999 (Qld) r 681
	Aklia Holdings Pty Ltd v *The Carter Group Pty Ltd (in liq) (No 2)* [2017] QSC 266 *Alborn & Ors v Stephens & Ors* [2010] QCA 58 *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 325 *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [No 2] [2023] QCA 140* *Commonwealth of Australia v Gretton* [2008] NSWCA 117 *Courtney v Chalfen* [2021] QCA 25

Davis v *Perry O'Brien Engineering Pty Ltd (No 2)* [2023] QSC 281
Interchange Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26
James & Ors v Surf Road Nominees Pty Ltd & Ors (No 2) [2005] NSWCA 296
Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2) [2013] QSC 170
MacKinnon v *Petersen,* unreported judgment Supreme Court of New South Wales, Cole J, 10 April 1989
Mickelberg & Ors v *The State of Western Australia & Ors* [2007] WASC 140 (S)
Oshlack v Richmond River Council [1998] HCA 11
Speets Investment Pty Ltd v Bencol Pty Ltd (No 2) [2021] QCA 39
Waterman v Gerling Australia Insurance Co Pty Ltd (No 2) NSWSC 1111
Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (No 2) [2019] NSWCA 173

COUNSEL:	Thomson Geer sols prepared costs submissions
	S Eggins for the defendant
SOLICITORS:	Thomson Geer for the plaintiff
	Corrs Chambers Westgarth for the defendant

Overview

[1] On 8 March 2024, I published detailed Reasons following an earlier four day hearing of separate applications by CMC and WICET for a review of a costs assessor's assessment of CMC's costs in the substantive proceeding.[1] Final Orders consequential upon my findings were made on 22 March 2024. The Final Orders increased the costs assessor's certificate by $160,833.43, but otherwise, both applications for review were dismissed.[2]

[2] My Reasons outlined my then preliminary view that (subject to there being other factors warranting another order being made) the appropriate order as to costs was that WICET pay 20 per cent of CMC's costs of CMC's application for review and all

1 *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2024] QSC 28.
2 That figure includes the amount referred to in paragraph 12(c) of these Reasons plus an adjustment (by agreement of the parties) for the correct amount for care and conduct arising from an error in the costs assessment.

of CMC's costs of WICET's application for review. I allowed the parties the opportunity to deliver written submissions on the issue of costs, which they both did.

[3] CMC submitted that the appropriate order for costs is as I had initially intimated. On the other hand, WICET accepted that it ought to bear CMC's costs of its application but submitted that, on balance, the court should make no order as to costs in respect of both applications or, alternatively, that the court should order that:

(a) WICET pay CMC's costs of WICET's application; and

(b) CMC pay WICET's costs of CMC's application (or, alternatively, say, 95 per cent of those costs).

[4] Given the concession about the costs of WICET's application, the real issue for my determination is the appropriate order as to costs of CMC's application.

Relevant Principles

[5] The starting point is that the costs of litigation follow the event unless the court orders otherwise or the rules provide otherwise.[3] This general rule is a "starting point" that is subject to the court's discretion in light of the facts of the case.[4] The "event" is not determined merely by reference to the judgment or order, but is to be determined by reference to the "events or issues" if there are more than one arising in the proceeding.[5] In that sense, "success" is a relative concept that must always be evaluated by reference to the events.[6]

[6] The mere fact that a party has been unsuccessful on some issues is not ordinarily sufficient to depart from the general rule;[7] but the court may depart from the general rule if the unsuccessful party succeeds on significant issues.[8]

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3 *Uniform Civil Procedure Rules 1999 (Qld)* r 681.

4 *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* NSWSC 1111 at [10] (Brereton J).

5 *Interchange Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26, at [70]-[74] (Macpherson JA). See also *Alborn & Ors v Stephens & Ors* [2010] QCA 58 at [8] (per Muir JA with whom Holmes JA and Daubney J agreed).

6 As illustrated by Applegarth J in *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2)* [2013] QSC 170 at [5]-[8].

7 *Courtney v Chalfen* [2021] QCA 25 at [5] (per Morrison JA, with whom Philippides and Mullins JJA agreed), *Speets Investment Pty Ltd v Bencol Pty Ltd (No 2)* [2021] QCA 39 at [16].

8 *James & Ors v Surf Road Nominees Pty Ltd & Ors (No 2)* [2005] NSWCA 296 at [31]-[36]; *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38] (Beazley, Ipp and Basten JJA).

[7] Ordinarily in complex disputes, the court will refrain from engaging in an analysis of the myriad of disputes between parties and will instead award costs according to the ultimate sum due from one to another.[9] Although, in applications where there are multiple issues which are determined in different directions, a court might form an overall impression taking into account the significance of the issues, the way they were determined, and the amount of time and cost spent on them; and order one party to pay a proportion of another party's costs as fairly reflective of the overall outcome.[10]

[8] The touchstone of the general rule, and any departure from it, is fairness – having regard to what the court considers to be the responsibility of each party for incurring the costs.[11] Costs are, of course, awarded to compensate successful parties and not to punish unsuccessful parties.

Analysis

[9] My Reasons deal with two discrete applications for review of a costs assessor's certificate on various and separate grounds. CMC raised five grounds of objection and WICET raised three. For obvious reasons of convenience, the applications were heard consecutively: CMC's application over two days on 7 and 8 August 2023; and WICET's application over two days on 9 and 31 August 2023.

[10] Relevantly, the quantum of CMC's objections in its application for review totalled just over $3.701 million.

[11] CMC's submission that it is the successful party on its application for review is underpinned by the following two propositions:

(a) First: WICET defended CMC's application, and the court ultimately awarded CMC the sum of $160,833.43; and so it follows that CMC was the successful party and therefore ought to have its costs of CMC's application – although discounted to allow for the level of its success; and

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9 *MacKinnon v Petersen,* unreported judgment Supreme Court of New South Wales, Cole J, 10 April 1989, at [5]-[6]; *Mickelberg & Ors v The State of Western Australia & Ors* [2007] WASC 140 (S), [35]-[43]; *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [No 2]* [2023] QCA 140, at [25]-[27].

10 S*peets Investment Pty Ltd v Bencol Pty Ltd (No 2)* [2021] QCA 39 at [17].

11 *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121] (Hodgson JA); *Oshlack v Richmond River Council* [1998] HCA 11, at [67] (McHugh J).

(b) Second: CMC was successful on one of its five grounds of objection, so roughly speaking, it was successful on 20 per cent of its application.

[12] I accept that it is correct to categorise CMC as the successful party in relation to WICET'S application, but I do not accept that CMC was the successful party in relation to its own application for the following three reasons:

(a) First: It is not correct to say that CMC was successful on one of the five grounds it advanced. By ground three, CMC claimed the costs assessor wrongly disallowed some of the costs it paid for various counsel it briefed in the proceedings [totalling $675,959]. Various reasons were pressed by CMC including, for example, the costs assessor wrongly capped pre-trial preparation and did not allow mediation costs.

(c) Second: The only issue on which CMC succeeded in ground three was the issue of the daily rate of two counsel. A further sum of $83,200.62 was allowed for Mr O'Donnell KC's fees, and $28,891.78 for Mr Doyle KC's fees [i.e $160,833.43].

(d) Third: The question of the appropriate senior counsel rates was a comparatively less complex issue to others raised by CMC's application. It did not demand, for example, a careful analysis of individual costs items or delving into the factual background of what occurred during the proceeding. The issue occupied very little time in both oral and written submissions.

[13] In these circumstances, the following observations of Bond J in *Aklia Holdings Pty Ltd* v *The Carter Group Pty Ltd (in liq) (No 2)* are most apposite: [12]

> **"...where, in a particular unit of litigation, there are multiple issues which are determined in different directions as between the parties,** a court might form an overall impression having regard to the significance of the issues, the way they were determined, and the amount of time and cost spent on them, and order one party to pay a proportion of another party's costs as a way to reflect fairly the parties' comparative success or failure in the outcome **which was obtained."** [Emphasis added.]

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12 [2017] QSC 266 at [4], in particular at (d)(iv). Bond J's formulation has been subsequently endorsed, e.g., *Davis v Perry O'Brien Engineering Pty Ltd (No 2)* [2023] QSC 281 at [91] per Applegarth J. See also *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 325 at [4] per Finkelstein J.

[14] On the above analysis and upon reflection, it is not a difficult or complex assessment to conclude that WICET ought to be regarded as the successful party on CMC's application. It successfully defended nearly all of CMC's five grounds of review – apart from one of three discrete issues ventilated in ground three. In doing so, it successfully avoided over $3.5 million worth of fees being remitted to the costs assessor for further determination.

[15] I am therefore satisfied that WICET is the successful party in relation to CMC's application. Although, my overall impression is that an allowance of 10 per cent ought to be given in CMC's favour, given its success on the discrete issue of counsel's fees.

[16] Both parties submitted that the court should make a costs order that avoids a complicated costs assessment, which the courts have shown a preference to avoid.[13] That is desirable, particularly in a case such as this. Although WICET's proposed order would avoid any further calculations, I am not persuaded it reflects the appropriate outcome. It is to be hoped, however, that the parties can sensibly agree on an amount that reflects my orders rather than continue this battle with a further expensive costs assessment.

Orders

[17] I therefore order as follows:

(a) WICET pay CMC's costs of WICET's application; and

(b) CMC pay 90 percent of WICET's costs of CMC's application.

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13 *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (No 2)* [2019] NSWCA 173 at [9].