SUPREME COURT OF QUEENSLAND

CITATION:	*Harcombe & Anor v Thorne & Anor* [2016] QSC 78
PARTIES:	**DANIEL CRAIG HARCOMBE** (first plaintiff) and **HECKER PTY LTD** **ACN 113 703 996 as trustee for THE DANIEL HARCOMBE FAMILY TRUST** (second plaintiff) **v** **CENAN OZLEM THORNE** (first defendant) and **JRDT PTY LTD** **ACN 121 102 958 as trustee for THE THORNE FAMILY TRUST**
FILE NO:	SC No 639 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	8 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Applegarth J
ORDER:	**1. The plaintiffs pay the defendants' costs of and incidental to the application.** **2. The costs to be fixed in accordance with paragraphs [12] and [13] of these reasons.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where the applicants were substantially successful in their application for security for costs, which was opposed by the respondents – whether the costs order in the applicants' favour should be discounted to reflect the respondents' partial success on the quantum of the security to be provided – whether costs should be fixed
SOLICITORS:	Russells for the applicants/defendants Morgan Conley for the respondents/plaintiffs

[1] I granted the defendants' application for security for costs and ordered security in the amount of $55,000. I now have to make an appropriate order in relation to the costs of the application. Sensibly, the parties did not wish to be heard in person on the issue of costs, and were content for the matter to be determined by me on the basis of written submissions which were emailed to my Associate.

[2] The defendants submit that there is no reason why the plaintiffs should not pay the costs of unsuccessfully opposing the application.

[3] The plaintiffs accept that costs should follow the event, but submit that there should be a reduction in the defendants' costs because of the "counterclaim-associated portion of the application". As noted in my oral judgment, it was appropriate in arriving at an amount by way of security to adjust the costs estimate on account of costs associated only with the counterclaim. The plaintiffs suggested a reduction of 50 per cent; the defendants' evidence was that the proportion would be 25 per cent to 30 per cent. I adopted a reduction of one third.

[4] Rule 681(1) provides that the costs of a proceeding are in the discretion of the court but follow the event, unless the court orders otherwise. The event, in this case, is the order I made granting security for costs. In *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2),*[1] McMurdo J, following early authority, stated that:

> "Notwithstanding that the court has power to deprive a successful party of costs, or even order a successful party to pay costs, that is a course to be taken in unusual cases and with a degree of hesitancy."[2]

His Honour reiterated the view that:

> "… ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and severable and has occupied a significant part of the trial."[3]

I respectfully follow that approach.

[5] The plaintiffs' opposition to the application was not limited to the appropriate quantum of the security sought. It opposed an order for security on a number of grounds. The hearing and most of the time taken to hear and determine the application could not have been avoided by the parties agreeing to the quantum of the security, or even agreeing that there should be a certain percentage discount to the quantum on account of matters which related only to the counterclaim. A substantial part of the hearing was concerned with arguments about whether the discretion to order security should be exercised and aspects of quantum unrelated to the counterclaim. The discount which I allowed in respect of the costs of the counterclaim was closer to that contended for by the

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1 [2009] QSC 64 at [8] ("*BHP Coal*").

2 *BHP Coal* at [8] following *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 423, at [4] and *Todrell Pty Ltd v Finch & Ors* [2008] 2 Qd R 95 at [21].

3 *BHP Coal* at [8].

defendants than the 50 per cent sought by the plaintiffs. The figure which I ultimately arrived at was substantially less than the amount which the defendants sought of $105,000, and substantially more than the sum of about $12,000 which the plaintiffs suggested.

[6] Even if a substantial portion of the costs associated with the preparation of material in support of, or in opposition to, the application related to quantum issues, the defendants still obtained an order for security in a substantial amount, and substantially in excess of the amount which the plaintiffs contended should be ordered in the event the application was granted over their opposition.

[7] The fact that the successful applicants have not succeeded to the full extent of obtaining an order for security in the amount they sought is not a sufficient reason to deprive them of some of their costs. The time occupied by dealing with the question of the reduction that was appropriate on account of the counterclaim was relatively small.

[8] In all the circumstances, I consider that costs should follow the event. The plaintiffs should pay the defendants' costs of and incidental to the application. If these costs were to be assessed they would be assessed on the standard basis.

[9] The defendants submit that their costs should be fixed on the basis of Ms Craig's affidavit, which I grant leave to read and file. The plaintiffs oppose such an order. The defendants seek an order that costs be fixed in order to avoid the further costs involved in an assessment. Ms Craig's affidavit estimated that the defendants' actual costs of the application were in the amount of approximately $17,865, and that the standard costs would be approximately $12,000. The latter was based on standard costs being assessed at about 60 per cent of the firm's actual fees. The appropriate figure may be 50 per cent. The defendants invite the court to fix costs in accordance with *Practice Direction 3 of 2007* in the sum of $12,000 or such other sum as the court considers appropriate.

[10] The plaintiffs note that the costs set out in Ms Craig's affidavit have not been calculated pursuant to the scale and have not been particularised in a way which would permit them to be assessed in accordance with the scale. I do not consider that these are sufficient reasons to not fix costs. The procedure for fixing costs avoids unnecessary costs being incurred in preparing itemised costs statements. Provided the work performed and the cost of doing that work are appropriately specified, it should be possible to fix costs and to do so, in an appropriate case, by applying a percentage reflective of the likely difference between actual costs and the amount which would be recovered on an assessment in such a matter. That percentage may be, for example, 60 per cent in a particular case, based on experience and a comparison between the hourly rate charged and the hourly rate provided in the scale.

[11] *Practice Direction 3 of 2007* does not require a fully itemised costs statement. That would defeat its purpose. Still, the Court must be confident that it can fix costs "on a reliable basis", and any estimate must be "carefully formulated and realistic." I am prepared to fix costs on the basis of Ms Craig's estimate. In doing so I have regard to the difference between the hourly rates charged by the solicitors involved in the matter and the court scale. I also have regard to what I consider to be a reasonable time to

attend to those tasks. Therefore, I consider that costs should be fixed to avoid the additional costs of an assessment.

[12] The plaintiffs advance, however, an additional concern about the fixing of costs. They note that Mr Tiplady's affidavit was prepared and filed prior to the previous application and that the defendants already have received a costs order with respect to that particular application. There is the potential for a double-up in costs already awarded to the defendants. A practical course is for the defendants to clarify whether the costs associated with Mr Tiplady's affidavit are to form part of the assessment in respect of the previous application which was heard by Daubney J on 26 February 2016, or, instead, are to be included in the assessment of costs in this application. They cannot be included in both. If it had not been for that matter, I would have been inclined to fix costs in the amount of $10,000 (inclusive of Mr Tiplady's affidavit and its preparation) or $8,500 if it is to be excluded from the costs I order the plaintiffs to pay.

[13] For the moment, the only order I will make is the one which I have indicated. If, however, the inclusion or exclusion of the costs of Mr Tiplady's affidavit are addressed by the defendants' solicitors, then I will fix costs in one or other of the sums I have stated so as to avoid the parties incurring further costs in an assessment of the costs which I have ordered.