SUPREME COURT OF QUEENSLAND

CITATION:	*Midson Construction (Qld) Pty Ltd & Ors v Queensland Building and Construction Commission & Ors (No 2)* [2018] QSC 286
PARTIES:	**MIDSON CONSTRUCTION (QLD) PTY LTD ACN 135 951 549** (first applicant) and **MICHAEL ANTHONY VICKERS** (second applicant) and **BRUCE GEORGE BENNETT** (third applicant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (first respondent) and **BRETT BASSETT AS THE COMMISSIONER OF THE QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (second respondent) and **MARK E WILSON** (third respondent)
FILE NO/S:	No 3696 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2018
DELIVERED AT:	Rockhampton
HEARING DATE:	On the papers 10 September 2018
JUDGE:	Crow J
ORDER:	**I make the following orders:** **1. With respect to the application filed 5 April 2018, the applicants are to pay the respondents' costs of and incidental to the application on a standard basis;** **2. With respect to the application filed 3 May 2018, the applicants are to pay the respondents' costs of and incidental to the application on a standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the respondents were successful in an application and seek their costs – where the unsuccessful applicants argue that they ought to receive two-thirds of their costs of the primary application and the respondents ought to receive one-third of their costs of the primary application – where the unsuccessful applicant alternatively submits that each party bear their own costs – where prior to the application the respondents changed their position, confirming, *inter alia,* that Midson Constructions Qld Pty Ltd was no longer an excluded company – where the first respondent effectively reversed its decision which meant that the second and third applicants' business was no longer placed in jeopardy – where as a result of the respondents changing their position, the applicants had achieved their goal – where despite this, the applicants continued with the balance of their application and were unsuccessful – whether the applicants should be ordered to pay the respondents' costs

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – CROSS APPLICATION – where the respondents filed a cross application seeking dismissal of the applicants' application – where after the second applicant resigned as a director of the first applicant, the first respondent changed their position and chose to no longer pursue the relief sought in the cross application – where the effect of r 681 *Uniform Civil Procedure Rules* 1999 (Qld) is that the applicants ought to have their costs of the cross application – whether the applicants ought to have their costs of the cross application

Queensland Building and Construction Commission Act 1991 (Qld) s 56(2)(c), s 56AF, s 56AG
Uniform Civil Procedure Rules 1999 (Qld) r 5, r 658, r 681

AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors (No 2) [2009] QSC 75, cited
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26, cited
Oshlack v Richmond River Council (1998) 193 CLR 72, cited
Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2) [2009] QCA 239, cited

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Costs of Application filed 5 April 2018

[1] Rule 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> **681 General rule about costs**
>
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> (2) Subrule (1) applies unless these rules provide otherwise.

[2] In *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)*[1] McPherson JA said:

> "These authorities show that the structure and language of the new r. 689(1) has not introduced any marked change in the practice governing awards of costs in Queensland. Costs are, as they were before, in the discretion of the court. They follow the "event" which, when read distributively, means the events or issues, if more than one, arising in the proceedings unless the court makes some other order that is considered "more appropriate". It is not by this intended to suggest that there has been a reversion to a regime under which costs of separate issues must now be determined. The practice of doing so was responsible for so much litigation in England that the rule was eventually altered to place costs within the general discretion of the court or judge: see *Judicature Act* 1925, s. 50(1). Rule 689(1) may fairly be regarded as producing the same result as prevailed before it came into force, although it now does so in somewhat different language and is structured in a slightly different way. Few civil matters are now tried by jury in Queensland, and it ought not to be assumed that, by introducing the new rule in a form that now omits reference to such trials, a fundamental change in the practice of awarding costs was intended."

[3] This has been applied in the Court of Appeal in *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)*: [2]

> "Rule 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") provides that costs of a proceeding are in the discretion of the court but follow the event unless the court orders otherwise. The rule which specifically relates to appeals is r 766(1)(d), which simply

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1 [2003] 1 Qd R 26 at [84].

2 [2009] QCA 239 at [3] - [4] (my underlining).

provides that the Court of Appeal "may make the order as to the whole or part of the costs of an appeal it considers appropriate". Although r 766(1)(d) does not express the general principle under which a successful appellant is usually given costs in its favour, that general principle remains applicable. In *Oshlack v Richmond River Council* (1998) 193 CLR 72, which concerned a provision conferring a discretionary power to award costs in general terms, McHugh J explained why a successful party is usually given costs:

> [67] The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is granted in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party [*Latoudis* (1990) 170 CLR 534 at 543, per Mason CJ: at 562–563, per Toohey J; at 566–567, per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ]. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.
>
> [68] As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.

The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the court considers that some other order is more appropriate: see *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)*[2003] 1 Qd R 26 at [84], per McPherson JA."

[4] In *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors (No 2)*[3] McMurdo J (as his Honour then was) said:

> "Although ordinarily costs should follow the event, in an appropriate case the court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding. I have recently considered the circumstances in which the ordinary rule should be

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3 [2009] QSC 75 at [15]. Footnotes omitted.

> departed from in favour of a party who was unsuccessful overall but who succeeded on particular questions in *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)*. Each side in the present case seems to accept, as I there said, 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.

[5] The respondents, who succeeded on the application filed by the applicants on 5 April 2018, seek their costs relying on r 681 *Uniform Civil Procedure Rules* 1999 (Qld).

[6] The unsuccessful applicants argue that it ought to receive two-thirds of their costs of the primary application and the respondents be ordered one-third of their costs of the primary application, or alternatively each party bear their own costs. The respondents submit that they have been largely successful in the proceeding because, as recorded at [5] of the principal judgment,[4] the respondents changed their position on 13 August 2018, confirming, *inter alia,* that Midson Constructions Qld Pty Ltd was no longer an excluded company. As explained,[5] the first applicant's substantial business was placed in jeopardy because of the respondents' decision on 13 March 2018 to propose cancellation of the applicants' builder's license. If that was all that had occurred, then the applicants' submission ought to be accepted.

[7] That however is not all that occurred because the first respondent's change of position as set out in its letter of 13 August 2018, was based on the following:

> "The Queensland Building and Construction Commission ('**Commission**') has reviewed the circumstances with respect to Midson Construction (Qld) Pty Ltd A.C.N 135 951 549 in light of the new information provided in Mr Vickers' affidavit. The affidavit of Mr Anthony Vickers was provided to the first respondent by the applicant by email on Friday 3 August 2018 at 4:19pm."

[8] In his affidavit, Mr Vickers provided information confirming he had in fact resigned as a director of Midson Queensland, and accordingly was in compliance with the requirements of s 56(2)(c) of the *Queensland Building and Construction Commission Act* 1991 (Qld). Mr Vickers' resignation as a director of Midson Queensland signified an important change because it removed a key obstacle to Midson Queensland. This was because his directorship was a factor of prime significance to the first respondent in it considering that Midson Queensland was an excluded company.

[9] It is also important to record again that ss 56AF and 56AG of the *Queensland Building and Construction Commission Act* 1991 (Qld) are show cause procedures. Had those procedures been undertaken and with Mr Vickers' resignation, there was no reason to conclude that the first respondent, as a model litigant, would not have come to the

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4 *Midson Construction (Qld) Pty Ltd & Ors v Queensland Building and Construction Commission & Ors* [2018] QSC 199 at [5].

5 *Midson Construction (Qld) Pty Ltd & Ors v Queensland Building and Construction Commission & Ors* [2018] QSC 199 at [1] and [3].

position it did on 13 August 2018. That is, to effectively reverse the decision on the basis of new facts.

[10] It therefore cannot be concluded that the first respondent was incorrect in sending its Notice of Reasons for proposed cancellation on 13 March 2018. With the first respondent effectively reversing its decision and the applicants' business no longer being placed in jeopardy, the applicants had achieved their goal, albeit on the basis of a change of facts. It was then that the applicants could have withdrawn their application. The applicants did not do this. They continued with the balance of their application and were unsuccessful. In these circumstances, there is no reasonable basis to depart from the usual rule pursuant to r 681(1) *Uniform Civil Procedure Rules* 1999 (Qld). Costs will therefore follow the event. I order the applicants to pay the respondents' costs of and incidental to the application filed 5 April 2018 on a standard basis.

Cross Application

[11] On 3 May 2018 the respondents filed a cross application seeking dismissal of the applicants' application pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld) and ss 12, 13, and 14 of the *Judicial Review Act* 1991 (Qld). After the second applicant resigned as a director of the first applicant, the first respondent changed their position and withdrew their notices. The respondents then chose not to pursue the relief sought in the cross application. The cross application was therefore dismissed. The effect of r 681 *Uniform Civil Procedure Rules* 1999 (Qld) is that the applicants ought to have their costs of the cross application. The respondents resist this order on the basis that the position with respect to the application changed following the receipt of Mr Vickers' affidavit of 3 August 2018 and the consequential decision of the Queensland Building and Construction Commission to no longer consider Midson Queensland (and Mr Bennett) to be excluded persons.

[12] The respondents argue, that given the change in position following receipt of Mr Vickers' affidavit, a matter of substance was resolved between the parties and there was no utility in proceeding with the cross application. This, it is argued reduced the hearing from two days to half a day. The respondents further argue that the cross application was an entirely proper response to the originating application and the respondents ought not be penalised for adopting a pragmatic approach consistent with its duty as a model litigant.

[13] Rule 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> **5 Philosophy – overriding obligations of parties and court**
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> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.
>
> Example**:** The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court.

[14] The respondents have consistently maintained that the proper course to challenge any decisions made under ss 56AF and 56AG of the *Queensland Building and Construction Commission Act* 1991 (Qld) was to follow the procedure set down in the Act. That is, to seek an internal review, and if dissatisfied with the internal review, embark upon an external review to the Queensland Civil and Administrative Tribunal.

[15] It is important to the first respondent that the scheme of the Act is complied with. In such circumstances I accept that the filing of the counter application was a proper response to the originating application filed by the applicants which sought twenty-two orders from the Court.

[16] I further conclude that in accordance with obligations as a model litigant, and in accordance with r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld), on the significant change of position of Mr Vickers (no longer being a director of the first applicant) the principal matter between the parties had been resolved. There was therefore, from 13 August 2018, little utility in pursuing the cross application. Accordingly and on the change of information, it was entirely reasonable for the respondents to no longer pursue their cross application.

[17] In those circumstances, not to award the respondents their costs in respect of the cross application would fail to adhere to the principles as set out in r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[18] In this case, sight must not be lost of the need to instil in the party contemplating before commencing or defending litigation, the sober realisation of potential financial expense involved.[6] It is for this reason that the *Queensland Building and Construction Commission Act* 1991 (Qld) provides for both an internal review and external review to the Queensland Civil and Administrative Tribunal. That is, to enable parties to avail themselves of a mechanism to resolve these disputes without the need to resort to the expense of Supreme Court litigation.

[19] The cross application had its genesis in and was a proper response to the originating application filed 5 April 2018. The cross application cannot be considered a "separate event". Although the cross application has not been pursued, given that it arises entirely from the originating application which has been dismissed, it is appropriate that the applicants be ordered to pay the respondents' standard costs of and incidental to the cross application filed 3 May 2018.

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6 See *Oshlack v Richmond River Council* (1998) 193 CLR 72 per McHugh J at 97 [68].

[20] I make the following orders:

1. With respect to the application filed 5 April 2018, the applicants are to pay the respondents' costs of and incidental to the application on a standard basis;

2. With respect to the application filed 3 May 2018, the applicants are to pay the respondents' costs of and incidental to the application on a standard basis.