SUPREME COURT OF QUEENSLAND

CITATION:	*Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors (No. 2)* [2019] QSC 249
PARTIES:	**AURIZON NETWORK PTY LTD ACN 132 181 116** (Plaintiff) **v** **GLENCORE COAL QUEENSLAND PTY LIMITED ACN 098 156 702** (First Defendant) AND **CALEDON COAL PTY LIMITED ACN 120 967 839 (IN LIQ)** (Second Defendant) AND **YARRABEE COAL COMPANY PTY LTD ACN 010 849 402** (Third Defendant) AND **WESFARMERS CURRAGH PTY LTD ACN 009 362 565** (Fourth Defendant) AND **WASHPOOL COAL PTY LTD ACN 139 976 819** (Fifth Defendant) AND **COLTON COAL PTY LTD ACN 140 768 636** (Sixth Defendant)
FILE NO/S:	BS No 2880 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions

JUDGE: Jackson J

ORDER: **The order of the court is that:**

1. **The defendants pay 65 percent of the plaintiff's assessed costs of the proceeding.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – Where the plaintiff was the successful party – Where the plaintiff was successful on one of three issues – Whether costs should be awarded on a proportional basis – Where the defendants were ordered to pay 65 percent of the plaintiff's assessed costs as an estimate made on the broad-brush basis

AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors [2009] QCA 262, considered

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor [2013] QSC 216, cited

Allianz Australia Insurance Ltd v Swainson [2011] QCA 179, considered

Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors [2019] QSC 163, cited

Australian Conservation Foundation and Others v Forestry Commission and Others (1988) 81 ALR 166, distinguished

BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No. 2) [2009] QSC 64, considered

Bostik Australia Pty Ltd v Liddiard (No. 2) [2009] NSWCA 304, cited

Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No. 2) [2018] NSWCA 266, cited

Cinema Press Limited v Pictures & Pleasures Limited [1945] KB 356, cited

Cocias v Mount Isa Mines Limited [1967] QWN 22, cited

Day v Humphrey & Ors [2018] QCA 321, considered

Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3) [2003] 1 Qd R 26, cited

McFadzean & Others v Construction, Forestry, Mining &

Energy Union & Others (2007) 20 VR 250, cited

Murdoch v Lake [2014] QCA 269, [20]; *Alborn v Stephens* [2010] QCA 58, cited

Oshlack v Richmond River Council (1998) 193 CLR 72, cited

Port of Melbourne Authority v Anshon Pty Ltd (1981) 147 CLR 589, cited

Sze Tu v Lowe (No. 2) [2015] NSWCA 91, cited

Thiess v TCN Channel Nine Pty Ltd (No. 5) [1994] 1 Qd R 156, cited

Todrell Pty Ltd v Finch (No. 2) [2008] 2 Qd R 95, cited

Civil Proceedings Act 2011 (Qld) s 15

Uniform Civil Procedure Rules 1999 (Qld) rr 678, 680, 681, 682, 684, 687

COUNSEL:	S Cooper for the First Defendant D O'Sullivan QC and J O'Regan for the Third to Sixth Defendants
SOLICITORS:	Quinn Emanuel Urquhart & Sullivan for the Plaintiff Holding Redlich for the First Defendant Clayton Utz for the Second Defendant Norton Rose Fulbright for the Third to Sixth Defendants

JACKSON J:

[1] Following the judgment in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors*,[1] the parties provided written submissions as to the costs orders that should be made.

[2] It is not disputed that there were three substantial issues raised by the plaintiff's claim in the proceeding, namely whether:

(a) the WIRP Deed should be construed or there was an implied term to the effect that notice could not be issued under cl 6.1(c) of each WIRP Deed if the relevant Customer Segment was necessary to enable the plaintiff to provide the Customer's Aggregate Access Rights ("Necessary Segment for Access issue");

(b) there was an implied term that in giving notice under cl 6.1(c) a Customer must act in good faith and fairly deal with the plaintiff that was breached ("Good Faith issue");

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1 [2019] QSC 163.

(c) the time to issue a notice under cl 6.1(c) had expired before the notices were given because the "Port Facilities (Initial) Available Date" occurred before the notices were issued ("Port Date issue").

[3] It is also not in dispute that the plaintiff succeeded on the second issue but the defendants succeeded on the first and third issues.

[4] In these circumstances, the plaintiff submits that the appropriate order for costs is that the defendants pay the plaintiff's costs of the proceeding, including the claim and counterclaims. Alternatively, the plaintiff submits that the parties should bear their own costs of the Port Date issue, but otherwise the defendants should pay the plaintiff's costs of the proceeding.

[5] The defendants submit that the appropriate order for costs is that there should be no order for costs of the proceeding. Alternatively, the defendants submit that the defendants should be ordered to pay one third of the plaintiff's costs of the proceeding.

[6] For the reasons that follow, in my view, the defendants should be ordered to pay 65 percent of the plaintiff's assessed costs of the proceeding.

[7] There is no dispute as to the operative statutory provisions. Section 15 of the *Civil Proceedings Act* 2011 (Qld) provides that a court may award costs in all proceedings unless otherwise provided. Chapter 17A of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") applies to costs payable or to be assessed under an Act, the rules, or an order of the court.[2] A party to a proceeding cannot recover any costs of the proceeding from another party other than under the rules or an order of the court.[3] Further, the costs the court may award must be decided in accordance with Chapter 17A.[4] The central provision of Chapter 17A is in r 681(1), that the cost of a proceeding, including an application in a proceeding are in the discretion of the court and follow "the event", unless the court orders otherwise; and that provision applies unless the UCPR provide otherwise.[5] Two other particular provisions should be noted. One is that under r 687 if a party is entitled to costs under an order of the court, the costs are to be assessed costs; however, instead of assessed costs, the court may order a party to pay to another party a specified part or percentage of the assessed costs.[6] The other is that under r 684 the court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding, including declaring a percentage of the costs that is attributable to the question or part of the proceeding to which the order relates.[7]

[8] These rules are modelled on or are similar to comparative provisions in other jurisdictions. Their operation is well established.

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2 *Uniform Civil Procedure Rules* 1999 (Qld), r 678(1).

3 *Uniform Civil Procedure Rules* 1999 (Qld), r 680.

4 *Uniform Civil Procedure Rules* 1999 (Qld), r 682(1)(b).

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

6 *Uniform Civil Procedure Rules* 1999 (Qld), r 687(1) and (2)(a).

7 *Uniform Civil Procedure Rules* 1999 (Qld), r 684(1) and (2).

[9] The plaintiff submits that for the purposes of r 681(1), "the event" is the "practical result of a particular claim".[8] That description tends to elide the flexibility of the meaning of the words "the event" used in r 681(1) and the words "particular question in or a particular part of" used in r 684. In *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor*,[9] I said as follows:

> "The width of the power where each party can claim some success is now reflected in *UCPR* 681 and 684. The word 'event' in the former rule is to be read as including the plural 'events', so that an order for costs may reflect the success of particular parties in respect of separate events decided in the proceeding. As well, the latter rule refers to making an order for costs in relation to 'a particular question in, or a particular part of, a proceeding' whereas the previous comparable rule referred to costs of several 'issues', which had a potential confining affect. It is unnecessary to further explore the operation of *UCPR* 681 and 684 together…
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> In a number of cases prior to the introduction of the UCPR, courts expressed concern that taxation of issues often had disconcerting and unfair results, as well as being troublesome and difficult to carry out. A rough apportionment of costs 'intelligently made', has been said to lead to a fairer result."[10] (footnotes omitted)

[10] Those propositions were drawn from a number of cases.[11]

[11] The plaintiff submits the circumstances that engage r 684 are "exceptional circumstances, and the enquiry must be: what is it about the present case which warrants departure from the general rule?"[12] and that "[n]otwithstanding 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 with a degree of hesitancy".[13] In further support of that approach, the plaintiff relies on a summary of the principles in a decision of the Court of Appeal in New South Wales.[14]

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8 *Sze Tu v Lowe (No. 2)* [2015] NSWCA 91, [39].

9 [2013] QSC 216.

10 *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216, [5] and [15].

11 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26, [79]-[84]; *Todrell Pty Ltd v Finch (No. 2)* [2008] 2 Qd R 95, [11]-[15]; *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No. 2)* [2009] QSC 64, [7]; *Cinema Press Limited v Pictures & Pleasures Limited* [1945] KB 356, 363-364; *Cocias v Mount Isa Mines Limited* [1967] QWN 22, 38-39; cf *McFadzean & Others v Construction, Forestry, Mining & Energy Union & Others* (2007) 20 VR 250, [157]-[160].

12 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No. 2)* [2009] QSC 64, [6]-[7].

13 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No. 2)* [2009] QSC 64, [8].

14 *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No. 2)* [2018] NSWCA 266, [9]-[13]; see also *Bostik Australia Pty Ltd v Liddiard (No. 2)* [2009] NSWCA 304, [38].

[12] For my part, it is preferable to have regard to the principles expressed by the Court of Appeal in this jurisdiction in relation to the operation of the rules in Chapter 17A. For example, in *Day v Humphrey & Ors*,[15] the court said:

> "Costs can also be awarded on a differential basis depending on the degree of success, and whether the success was only on issues that occupied an identifiable proportion of the time. Other bases for departing from the general rule include where the successful party was seeking an indulgence from the court, where the successful party had excessively delayed the prosecution of the case or where a successful party's interests were conducted jointly with that of an unsuccessful party."[16] (footnote omitted)

[13] In *Allianz Australia Insurance Ltd v Swainson*,[17] the court said:

> "The… general principle was expressed in somewhat less emphatic terms by Muir JA in *Alborn v Stephens*:
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> > '…a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs…'" (citations omitted)

[14] And in *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors*,[18] the court said:

> "The trial judge applied the principle which his Honour had earlier formulated in *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)*, 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… as McHugh J explained in *Oshlack v Richmond River Council*:
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> > 'The primary purpose of an award of costs is to indemnify the successful party. 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.'"[19]

[15] Accordingly, in my view, it may be accepted that there is significant support for the approach taken in *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)*, but it would be a mistake to carry that approach too far. Where, as in this case, the plaintiff runs its case on alternative bases and a significant amount of the time is taken and significant costs are incurred in the proceeding with the pleading, interlocutory steps such as disclosure, and expert evidence and

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15 [2018] QCA 321.

16 *Day v Humphrey & Ors* [2018] QCA 321, [9].

17 [2011] QCA 179, [4].

18 [2009] QCA 262.

19 *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors* [2009] QCA 262, [46].

other witness evidence given at trial on a basis that is ultimately unsuccessful, the question 'what is it about the present case which warrants a departure from the general rule?' is answered, *prima facie*. But that does not foreclose the exercise of the discretion as to an order for costs having regard to the wider considerations identified in *Oshlack*.[20] I note that McHugh J's reasons for judgment in *Oshlack* were given in dissent, but they have been referred to with approval so many times since that for present purposes they may be taken to be a leading statement of principle.

[16] For its part, the first defendant submits that a "distributive" approach to the meaning of "the event" in r 681(1) has a long history, relying for its present status on *Interchase Corporation Limited (in liq) v Grosvener Hill (Queensland) Pty Ltd (No. 3)*.[21] The first defendant also refers to more recent statements, to similar effect, made in the Court of Appeal of this jurisdiction.[22] More particularly, it urges that the approach to the relevant "event" or "events" is one to be taken with a broad brush, by apportioning costs according to the party's success or failure on different issues, relying on *Thiess v TCN Channel Nine Pty Ltd (No. 5)*,[23] as a good example.

[17] For their part, the third to fifth defendants invoke similar cases and principles to the first defendant, although perhaps with a greater focus on cases where judges have said it is appropriate to award costs for a separate issue where there is a clearly definable and separable issue on which the successful party has failed that occupied a significant part of the trial.

[18] The second defendant adopts the submissions of the other defendants, and submits in addition that no order for costs should be made against it from 12 May 2017, because it was then placed into voluntary liquidation and became, in effect, a submitter in the proceeding.

[19] Two affidavits were relied upon by the defendants in support of their submissions as to costs. A solicitor from the first defendant's solicitors estimated that the Port Date issue took up a little over 11 hours of the oral evidence given and other time at the trial, whereas the Good Faith issue took only approximately one hour and 20 minutes. In a similar vein, a solicitor from the third to fifth defendant solicitors estimated that: of the 5,000 documents disclosed, only 166 related solely or substantially to the Good Faith issue; of the non-party disclosure notices and documents, none related solely or substantially to the Good Faith issue; of the ten lay witnesses, only two related solely or substantially to the Good Faith issue and of the five expert witnesses, only two related to the Good Faith issue. As well, that solicitor estimated that of 370 pages of written submissions, only 33 related solely to the Good Faith issue and that only a minor part of the oral submissions related solely to the Good Faith issue.

[20] I accept that it is relevant to consider the time and expense by way of interlocutory processes and final hearing time and documents that are associated with an issue or issues on which the successful party failed. However, the evidence tendered by the defendants, as I have

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[20] *Oshlack v Richmond River Council* (1998) 193 CLR 72.

[21] [2003] 1 Qd R 26.

[22] *Murdoch v Lake* [2014] QCA 269, [20]; *Alborn v Stephens* [2010] QCA 58, [8].

[23] [1994] 1 Qd R 156, 207-208.

summarised it, is not as compelling as it might otherwise have been, because of the chosen framework of matters which related "solely or substantially" to the Good Faith issue. In reality, much of the case that was devoted to the Necessary Segment for Access issue was also relevant to the Good Faith issue. There is not a discrete compartment separating or a bright line that can readily be drawn between all or most parts of the case that were concerned with those two issues.

[21] In my view, this is a case where the extent of the time and costs devoted to the Port Date issue, on which the plaintiff was unsuccessful, in comparison with the other issues in the proceeding, and the quite separate factual and legal basis of that issue, tend to repel the conclusion that the defendants should be ordered to pay all of the plaintiff's costs of the proceeding, just because in the result the plaintiff was successful on the events of the claim and the defendants' counter-claims.

[22] The plaintiff submits, and it may be accepted, that it did not act unreasonably in bringing forward the Port Date issue as an alternative basis for the relief claimed. But that it was not unreasonable does not automatically mean that the plaintiff should recover its costs of the event on that issue. The plaintiff further submits that it was required to bring the Port Date issue forward in the present proceeding because it would have been precluded from raising it later by the principles of *res judicata*.[24] I do not understand this submission. A party who brings an unsuccessful claim or cause of action in a proceeding, that constitutes an event within the meaning of r 681(1), is in no better or worse position, in my view, because they would have been precluded from bringing that unsuccessful claim or cause of action in a later proceeding, when it comes to the question of costs.

[23] The plaintiff relied upon a statement from *Australian Conservation Foundation and Others v Forestry Commission and Others*,[25] that:

> "A party against whom an unsustainable claim is prosecuted is not to be forced, at his peril in respect of costs, to abandon every defence he is not sure of maintaining, and oppose to his adversary only the barrier of one hopeful argument: he is entitled to raise his earthworks at every reasonable point along the path of assault."

[24] Despite its attractive metaphorical language, in my view, this statement is not apt to decide the question of costs in the present case. First, in my view, the question is not one of entitlement to raise every reasonable point. It is a question of what the appropriate order is for costs having regard to all the circumstances, in the context of the prima facie rule as to exercise of the discretion provided for in r 681(1). Second, there seems to be a difference in the cases between the position of a defendant who raises alternative grounds of defence and a plaintiff who raises alternative grounds of claim, in that defendants may be treated more sympathetically. Whether that difference should be retained in the 21st century may be a real question. But, in any event, in my view, the exercise of discretion in the present case is not

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24 *Port of Melbourne Authority v Anshon Pty Ltd* (1981) 147 CLR 589.

25 (1988) 81 ALR 166, 169.

well informed by such generalities. It is best informed by the particular circumstances of the case, the particular issues, and their outcomes.

[25] Lastly, the plaintiff relied on the finding that the defendants had failed to act in good faith as warranting an order that they pay all of the plaintiff's costs. In my view, in the circumstances of this case, that submission should be rejected. The good faith argument in this case was not about fraudulent behaviour. It was about the existence of an implied limit as to the scope of a contractual power that contained no express limit. The plaintiff succeeded on that issue because the defendants exercised, or purported to exercise, the power not in good faith in the sense of acting arbitrarily and for their own self-interests. But no finding of dishonesty was involved.

[26] The first defendant submits that adopting the broad brush approach referred to in the authorities on which it relied, the two issues on which the plaintiff failed were the major focus and would account for at least two thirds of the costs of the proceeding. If costs were ordered separately on the basis of success on the event of each of the three issues, the plaintiff would be liable to pay the defendants' costs of the two "major focus" issues and the defendants would be liable to pay the plaintiff's costs of the Good Faith issue. However, the first defendant submits that to avoid the time and expense of an assessment of the costs of separate issues, the appropriate order is that there should be no order as to costs. It submits that would be more favourable to the plaintiff than setting off the costs of the Good Faith issue on which the plaintiff succeeded against the costs of the two issues on which the defendants succeeded. However, the first defendant submits that such an order would take account of the fact that the plaintiff achieved success, overall, in the proceeding.

[27] Alternatively, the first defendant submits that the overall success of the plaintiff may be a reason why the plaintiff should have a costs order in its favour. In those circumstances, it submits that the proportion of the plaintiff's costs which the defendants should be ordered to pay should be reduced to reflect the plaintiff's failure on the two issues on which the defendants succeeded. They submit that the defendants should not be ordered to pay any more than one third of the plaintiff's costs of the proceeding.

[28] The third to fifth defendants also submit that each party should bear their own costs, and there should be no order as to costs of the proceeding. Alternatively, they too submit that if an order for costs in favour of the plaintiff is warranted, a substantial discount should be made to the costs awarded to reflect the fact the issues on which the plaintiff was unsuccessful accounted for most of the time and cost of the proceedings. They submit that if an order for costs is made in the plaintiff's favour, it should be that the defendants pay one third of the plaintiff's costs.

[29] In my view, the circumstances of the case do warrant an order that the defendants pay at the least some of the plaintiff's costs of the proceeding, because success by the plaintiff on any one of the three issues meant success in the proceeding as a whole.

[30] Second, in my view, the circumstances of the case do not warrant an order that the defendants should be ordered to pay the whole of the plaintiff's costs of the proceeding, because the Port Date issue was a quite discrete basis of claim that occupied a substantial part

of the time, steps, and underlying costs, during the interlocutory steps and at trial of the proceeding.

[31] Third, nevertheless, I accept that it is preferable for the court to approach the matter on a broad-brush basis, by a rough apportionment of costs 'intelligently made', so as to reduce the plaintiff's costs to a specified percentage of assessed costs than to make an order for the assessment of costs of separate issues and separate orders as to the payment or non-payment of costs of those issues.

[32] Fourth, in my view, the defendants' approach, as taken in the evidence, to the allocation of time and by inference the costs of the Good Faith issue, as opposed to the other two issues in the proceeding, was flawed.

[33] Fifth, in my view, only a limited reduction of the plaintiff's assessed costs should be made because the defendants succeeded on the Necessary Segment for Access issue. As the reasons for judgment show, a significant proportion of the time and, therefore, the underlying costs were associated with the defendants' opposition to the admissibility of evidence and the defendants' lengthy and detailed submissions on questions as to the applicable legal principles that were not accepted, even though the plaintiff fell at the last legal hurdle on the issue.

[34] Sixth, on the other hand, so far as the proceeding constituted a witness trial, it is also true to say that the Port Date issue occupied more than one third of the hearing by reason of the complexity of the factual questions to be considered and the extent of the expert evidence relevant to the decision of that question.

[35] Seventh, although the second defendant did not actively participate in the trial, that is not a reason to make a different order against that defendant in the circumstances of this case. The plaintiff's costs were not thereby reduced and the plaintiff was required to proceed against the second defendant to establish its right against the second defendant and obtained leave to do so, without giving an undertaking not to seek an order for costs against the second defendant.

[36] In all the circumstances, in my view, it is appropriate to exercise the discretion to order costs by an order that the defendants pay 65 percent of the plaintiff's assessed costs the proceeding, as an estimate made on the broad-brush basis.