SUPREME COURT OF QUEENSLAND

CITATION:	*National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors (No 2)* [2019] QSC 276
PARTIES:	**NATIONAL MANAGEMENT GROUP PTY LTD** **ACN 150 878 158** (applicant) **v** **BIRIEL INDUSTRIES PTY LTD TRADING AS MASTER STEEL** **ACN 625 309 793** (first respondent) **DESMOND DOWLING ADJUDICATOR NO. J1211570** (second respondent) **THE ADJUDICATION REGISTRAR, QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO:	SC No 3414 of 2019
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	8 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions of the applicant and first respondent received 9 October 2019
JUDGE:	Wilson J
ORDERS:	**The order of the Court is:** **1. The applicant and first respondent bear their own costs of and incidental to the proceedings.** **2. There be no order for costs with respect to the second and third respondents.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant applied to set aside two adjudication decisions made under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) on the basis of jurisdictional error – where the applicant was successful in respect of one of the adjudication decisions – where, on an issue by issue analysis, both parties enjoyed some success – whether costs should be disposed of in accordance with the general rule

Uniform Civil Procedure Rules 1999 (Qld) r 681, 684

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor [2013] QSC 216, applied
Hogan v Trustee of the Roman Catholic Church (No 2) [2006] NSWSC 74, cited
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26, cited
Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2) [2013] QSC 170, cited
Monie v Commonwealth of Australia (No 2) [2008] NSWCA 15, cited
Neumann Contractors Pty Ltd v Peet Beachton Syndicate Limited (No 2) [2009] QSC 383, cited
Oshlack v Richmond River Council (1998) 193 CLR 72, cited
West v Blackgrove [2012] QCA 321, cited

COUNSEL: M Steele for the applicant
F Chen for the first respondent

SOLICITORS: McLaughlins Lawyers for the applicant
Colin Biggers & Paisley Lawyers for the first respondent

Introduction

[1] The applicant applied to set aside two purported adjudication decisions (the Lucky Squire decision and the Harbour Town decision), made on 7 March 2019 by the second respondent, on the basis of jurisdictional error.

[2] The applicant sought:

1. A declaration pursuant to section 10 of the *Civil Proceedings Act 2011* or alternatively in the inherent jurisdiction of the Court that the following decisions of the second respondent purportedly given under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) ("the Act") are void or liable to be set aside for want of jurisdiction:

    a. the decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477012 ("the Lucky Squire decision").

    b. the decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477005 ("the Harbour Town decision").

2. An injunction permanently restraining the first respondent from taking any further step to enforce the adjudication decisions.

3. A declaration that any adjudication certificates given by the third respondent based upon the adjudication decisions are void.

[3] The applicant submitted that:

1. In relation to the Lucky Squire decision, there was no valid payment claim, so that jurisdiction did not arise (issue 1);

2. In relation to both decisions:

    a. service of the adjudication application was necessary to confer jurisdiction upon an adjudicator (issue 2);

    b. the first respondent did not serve the applicant with copies of the adjudication application, as required by section 79(3) of the Act (issue 3);

    c. the adjudication application did not identify the payment claim (issue 4); and

    d. the second respondent did not make a proper determination about whether he had jurisdiction, as required by section 84(2)(a)(i) (issue 5).

[4] There was a one day hearing on 29 May 2019 where witnesses were required for cross-examination. Most of the cross-examination related to the service issue (issue 3).

[5] The second respondent filed a Notice of Address for Service submitting to all orders of the Court, save as to costs, and relying upon the protection from liability provisions contained in section 186 of the Act.

[6] The third respondent filed a Notice of Address for Service submitting to all orders of the Court, save as to costs, and relying upon the protection from liability provisions contained in section 197 of the Act, and section 114 of the *Queensland Building and Construction Commission Act* 1991 (Qld).

[7] Both the second and third respondents confirmed prior to the hearing that they did not wish to take part in the proceeding.

[8] No party submits that the second and third respondents are liable for any costs.

[9] On 9 September 2019 I delivered my reasons. In respect of the Lucky Squire decision, I declared that:

1. The decision of the second respondent dated 7 March 2019 in relation to the Lucky Squire application was void.

2. The first respondent was permanently restrained from taking any further step to enforce the Adjudication Decision in relation to the Lucky Squire application.

3. Any adjudication certificates given by the third respondent based upon the Adjudication Decisions in relation to the Lucky Squire application are void.

[10] In respect of the Harbour Town decision, I dismissed the application.

The question of costs

[11] I requested the parties to make submissions on the question of costs, and encouraged the parties to agree on a timetable. The parties requested until 9 October 2019 for the exchange and filing of submissions on the question of costs.

[12] I stated that I would deal with the question of costs on the papers, unless either party requests a hearing. Neither party requested a hearing on the matter of costs.

[13] I received written submissions on costs from both the applicant and the first respondent on 9 October 2019.

The law

[14] The general rule for costs is r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the *UCPR*"), which provides that:

> "(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."

[15] In *Oshlack v Richmond River Council*,[1] ("*Oshlack*") McHugh J (with whom Brennan CJ agreed) endorsed a statement of Devlin J in *Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co (No 2)*[2] that:

> "... Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure."

[16] The rationale for that statement of general principle was explained by McHugh J in *Oshlack*[3] in the following terms:

> "... The principle is grounded 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. 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 unsuccessful litigation.
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> 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

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1 (1998) 193 CLR 72 (McHugh J, with whom Brennan CJ agreed) at 96.
2 [1953] 1 WLR 1481 at 1484 (Devlin J); [1953] 2 All ER 1588 at 1590 (Devlin J).
3 (1998) 193 CLR 72 (McHugh J, with whom Brennan CJ agreed) at 97; footnotes omitted.

> often unnecessary, burden on the scarce resources of the publicly funded system of justice."

[17] In *West v Blackgrove*,[4] Muir JA set out the principles as to costs, citing a number of High Court authorities, as to the application of r 681(1) of the *UCPR*:

> "[47] The general rule is that costs of a proceedings are in the discretion of the Court but follow in the event unless otherwise ordered.
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> [48] McHugh J identified the principles underlying provisions such as r 681(1) of the Uniform Civil Procedure Rules as follows:
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> > '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 grounded 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. 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.'
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> [49] As is implicit in r 681(1), the Court has a discretion to make another order if that is required in the interests of justice, where, for example, '… the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; … or obtains relief which the unsuccessful party had already offered in settlement of the dispute'.
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> [50] Another obvious circumstance justifying departure from the general rule is where a party has succeeded on its claims only to a limited extent.
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> [51] A judge has a discretion as to costs which has sometimes been referred to as "unfettered". The discretion, however, must be exercised judicially, without caprice and having regard only to relevant considerations. An exercise of such a discretion having regard to its unfettered nature, is not to be readily or lightly disturbed."

[18] The words "follow the event" in r 681 are to be read "distributively".[5] Where there are two or more issues for determination in a proceeding, each gives rise to an "event" for which the costs are to be determined separately.[6]

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4 [2012] QCA 321 (Muir JA, with whom Holmes JA, as her Honour then was, and Daubney J, agreed) at [47]-[51]; footnotes omitted.

5 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 (MacPherson JA, McMurdo P and Thomas JA agreeing) at 60-61, [83].

6 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 (MacPherson JA, McMurdo P and Thomas JA agreeing) at 60-61, [83].

[19] The phenomenon of each party claiming to have been successful, or to have each enjoyed a substantial measure as success, was noted by Applegarth J in *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2)*:[7]

> "[5] Ordinarily, the fact that a successful plaintiff fails on particular issues does not mean that it should be deprived of some of its costs. As Muir JA observed in *Alborn v Stephens*, "a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs." Still, a successful party which has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them.
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> [6] The proposition that a successful party will be deprived of its costs or be ordered to pay part of the other parties' costs only in special circumstances or for good reason is well-established. Principles or even rules of thumb which refer to "a successful party" beg the question of the standard by which success is to be measured. Is a plaintiff which makes a multi-million dollar claim on a variety of legal grounds but obtains a judgment for nominal damages, namely $10, based upon limited success on only one of the various causes of action pursued by it successful?
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> [7] In one sense such a plaintiff has been successful, namely in establishing the defendant's liability, and unsuccessful in establishing an entitlement to anything of value. Equally, it might be said that the defendant in such a case has been successful, namely in defending the plaintiff's multi-million dollar claim for damages, and that the plaintiff's success in establishing a single breach of contract is no real success at all in litigation which has a commercial objective, namely an award of substantial damages.
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> [8] The phenomenon of each party claiming to have been successful, or to have each enjoyed a substantial measure of success, is familiar."

[20] An order for costs may reflect the success of particular parties in respect of separate events decided in the proceeding.[8]

[21] I note r 684 of the *UCPR* provides:

> "(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
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> (2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."

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7 [2013] QSC 170 (Applegarth J) at [5]-[8]; footnotes omitted.

8 *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 (Jackson J) at [5], citing *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd* (No 3) [2003] 1 Qd R 26 at [79]-[84]; *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 3)* [2013] QSC 95 at [4].

[22] The usual circumstance in which a court will deprive the successful party of the costs relating to an issue on which it was unsuccessful is when that issue is clearly dominant or separable.[9]

[23] In *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Limited (No 2)*[10] White J had dismissed the applicant's application for judgment against the respondent. There were two issues to be determined in the proceedings and the respondent was successful on one of those issues, but found not to have discharged its onus of proof on the second issue. It needed to succeed on only one issue in order to resist the application and it did so. The successful respondent sought its costs of and incidental to the application on the basis of the ordinary rule in r 681 that costs should follow the event unless the court orders otherwise. The applicant, however, argued that costs should be apportioned, as permitted by r 684. White J said:[11]

> "[6] Mr Drysdale for the respondent has referred to observations by McMurdo J in *BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2)*:
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> > "The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule?"
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> With great respect to his Honour I would prefer not to employ the expression "exceptional" to the circumstances which might enliven the discretion in r 684, however, as his Honour noted, the approach to costs must always be the general rule but r 684 empowers the court to make a division of the costs in any particular proceeding where, in the court's discretion, it is appropriate to do so.
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> [7] The presence of r 684 ought not discourage a defendant from raising all appropriate grounds of defence fearful that if he is unsuccessful on some but has success overall, he may not recover all of his costs. It is a matter for the discretion of the judge who heard the proceedings. The analysis in *BHP Coal* and the other cases referred to by his Honour in that judgment bear this out. Nonetheless, it is important to keep in mind the observation of Brereton J in *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)*:
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> > '[10] The starting point is that the plaintiff, having been successful, is entitled to his costs. It is for the defendants to establish a basis for departing from that rule. A successful plaintiff who has failed on certain issues may be deprived of costs on those issues, or even ordered to pay the defendant's costs of them [*Hughes Western Australia Cricket Assn Inc* (1986) ATPR 40-748, 48,136]. But this course, while open, is one on which the court embarks with hesitancy

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9 *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 (Campbell JA, with whom Mason P and Beazley JA agreed (Beazley JA disagreeing with respect to indemnity costs)) at [64]–[65].

10 [2009] QSC 383.

11 [2009] QSC 383 (White J) at [6]-[7]; footnotes omitted.

…

- It may be appropriate to award costs of a separate issue where a clearly definable and severable issue, on which the otherwise successful party failed, has occupied a significant part of the trial.'

Those observations may be applied *mutatis mutandi* to a successful defendant."

[24] As noted by Jackson J in *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor*,[12] 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.[13]

[25] Alternatively, where each party has had a measure of success, in *Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74, there was no order as to costs.[14]

Applicant's submissions

[26] The applicant contends that the first respondent should pay the applicant's costs of the application for the following reasons:

1. the applicant was successful in relation to the largest claim (the Lucky Squire decision);

2. the Harbour Town decision was in relation to a relatively small amount; and

3. in any event, I found that the second respondent wrongly failed to allow the applicant to make submissions about jurisdiction in respect of the Harbour Town decision,[15] albeit that failure did not amount in the circumstances to a denial of natural justice.

[27] The applicant's position is that the first respondent should pay the applicant's costs as the applicant was entirely successful in relation to the decision relating to the greatest monetary sum, and its submissions about the right to make submissions on jurisdiction were accepted. The applicant submits the fact that it ultimately did not succeed on the relatively minor claim should not affect the ultimate costs order.

[28] In the alternative, the applicant submits that the first respondent should pay a proportion of the applicant's costs, because the applicant's arguments were largely successful and it was entirely successful in relation to the larger claim.

First respondent's submissions

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12 [2013] QSC 216 (Jackson J) at [15].

13 *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 (Jackson J) at [15], citing *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] KB 356 at 363-364; *Cocias v Mt Isa Mines Ltd* [1967] QWN 22 at 38-39; cf *McFadzean v CFMEU* (2007) 20 VR 250 at [157]-[160]; [2007] VSCA 289.

14 *Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74 (Bell J) at [40].

15 *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [204].

[29] The first respondent seeks an order that the applicant pay 50%, or a portion of the first respondent's costs of the proceeding (and otherwise bears its costs), on the basis that the applicant was only partially successful on the issues it raised and that a portion of success was on two narrow legal points only.

[30] The first respondent contends that there were five separate issues in the proceeding; the applicant succeeded on two narrow legal points only, and issues 3, 4 and 5 were separate and occupied a significant part of the hearing, warranting an award that the applicant pay some of the first respondent's costs.

[31] The first respondent submits that the quantum of the payment claims was not a factor that effected the incursion of time and legal fees.

[32] In the alternative, the first respondent seeks no order as to costs, or that the parties bear their own costs of the proceeding, as each party has had substantial success. This is on the basis that the applicant and the first respondent were equally successful, in that the applicant successfully declared that one of the adjudication decisions was voided and the first respondent successfully defended setting aside one of the adjudication decisions.

Discussion

Issue 1

[33] The first issue that was determined was whether there was a valid payment claim in relation to the Lucky Squire decision.

[34] The applicant was successful on this issue as I determined that there was no valid payment claim as there were two payment claims with the same reference date.

[35] Although, the Lucky Squire decision related to the greater monetary sum, this issue took up relatively little time of the hearing as compared to the other issues as it involved the resolution of a discrete legal issue. There was no oral evidence in relation to this issue.

[36] The other issues raised in the hearing related to both the Lucky Squire and the Harbour Town decisions. However, since I determined that the Lucky Squire decision was void as there were two payment claims with the same reference date, the focus of the remaining issues was on the Harbour Town decision.

Issue 2

[37] Issue 2 related to both adjudication decisions. This issue considered whether service of the adjudication application was necessary to confer jurisdiction. I accepted the applicant's submission and found that service of the adjudication application was necessary to confer jurisdiction.

Issue 3

[38] The issue of whether service had occurred was the subject of significant submissions and evidence.

[39] I found that the applicant had been served with the adjudication application documents. I found that a copy of the Harbour Town adjudication application was given to the applicant.[16] In any event, even on the applicant's evidence I found that there had been substantial compliance as the applicant had sufficient information to consider the adjudication applications.

[40] The majority of the oral evidence went to the service issue; credit findings were made against the applicant's witness as not being convincing, credible or forthright.[17] It is noted that I found that the first respondent's witness was credible and to be preferred over the applicant's witness.[18]

Issue 4

[41] Issue 4 was whether the adjudication applications identified the payment claims and related to both adjudication decisions. However, I noted that only the Harbour Town decision needed to be considered, as I had already determined the Lucky Squire decision was void.[19] This issue was found in favour of the first respondent.

Issue 5

[42] Issue 5 was whether the second respondent made a proper determination about his jurisdiction. This issue related to both adjudication decisions. However, I focused only on the Harbour Town decision as I had already determined that the Lucky Squire decision was void.

[43] I found, as per the applicant's submissions, that the second respondent did not make a proper determination about his jurisdiction. However, this did not impact the ultimate conclusion. As noted in my reasons, I accepted that even if the second respondent had considered the submission made by the applicant, then there would have been no difference to the outcome.[20]

A mixed bag of success enjoyed by both parties

[44] So, in this case, there was a mixed bag of success enjoyed by both parties. The applicant was successful on the Lucky Squire application, however, was unsuccessful on the Harbour Town application. Further, on an issue by issue analysis, both parties enjoyed some success.

[45] I do not accept the applicant's submission that the first respondent should pay the applicant's costs of the application on the basis that:

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16 *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [97] of my judgment I noted that my finding that the applicant was served with the adjudication application was equally applicable to the Lucky Squire project.

17 For example, see *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [149] and [153].

18 For example, see *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [101], [138] and [154].

19 *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [169].

20 *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [207].

1. the applicant was entirely successful in relation to the decision relating to the greatest monetary sum;

2. its submissions about the requirements of the Act in relation to the right to make submissions on jurisdiction were accepted; and

3. the fact that the applicant ultimately did not succeed on the relatively minor claim should not affect the final costs order.

[46] In my view the quantum of the payment claims is unlikely to have been a factor that effected the incursion of time and legal fees. This is particularly considering the majority of the hearing was devoted to oral evidence on the issue of service; an issue which related to the applications to set aside both of the adjudication decisions.[21]

[47] Furthermore, although I found that the second respondent wrongly failed to allow the applicant to make submissions about jurisdiction, this did not impact the ultimate conclusion.

[48] In my view, it is desirable to avoid the difficulties of assessment of costs based on separate events or questions decided in the application.[22] An order which divides the costs according to the events of the relief sought, or the questions raised, would be difficult or potentially difficult to assess.[23] As such, I am satisfied that it is appropriate to depart from the general rule that costs follow each event.

[49] I accept the appropriate costs order, in these circumstances, is in accordance with the first respondent's alternate submission, i.e. no order as to costs or that the parties bear their own costs of the proceedings.

[50] This is on the basis that each party has had a measure of success,[24] in that the applicant successfully declared that one of the adjudication decisions was voided and the first respondent successfully defended setting aside one of the adjudication decisions.

[51] I accept that it was reasonable for the first respondent to defend the proceeding, being adjudication decisions in its favour, and was ultimately successful in defending the Harbour Town decision. It is noted that the majority of this proceeding was taken up with the service issue (issue 3) where the applicant was unsuccessful and credit findings were made against the applicant's witness.

[52] In my view, a fair and reasonable outcome, in the circumstances, is for each party to bear their own costs.

Order

[53] The applicant and first respondent bear their own costs of and incidental to the proceedings.

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21 *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [97] of my judgment I noted that my finding that the applicant was served with the adjudication application was equally applicable to the Lucky Squire project.

22 *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 (Jackson J) at [16].

23 *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 (Jackson J) at [12].

24 *Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74 (Bell J) at [40].

[54] There be no order for costs with respect to the second and third respondents.