SUPREME COURT OF QUEENSLAND

CITATION:	*Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 128
PARTIES:	**AUSTRALAND CORPORATION (QLD) PTY LTD (ACN 003 251 803)** (applicant) **v** **EVAN RICHARD JOHNSON AND DEBRA ANN JOHNSON** (seventh respondent) **and** **JOHN DELFORCE AND JULIE CHRISTINE DELFORCE** (tenth respondent) **and** **GREGORY ALLEN MYTTON AND ADRIENNE RUTH MYTTON** (twentieth respondent) **and** **KAH YAO PIH** (forty-third respondent)
FILE NO/S:	BS8521 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	1 June 2007
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2007
JUDGE:	McMurdo J
ORDER:	**1. The seventh, tenth, twentieth and forty-third respondents pay the applicant's costs of and incidental to the preliminary trial of this proceeding conducted pursuant to the order of 8 June 2005 including reserved costs (save for those reserved costs referred to in the next order), but not any costs which relate only to the issues between the applicant and only one of the seventh, tenth, twentieth and forty-third respondents.** **2. The applicant pay the costs of those respondents, if**

any, thrown away by the amendments to the amended statement of claim as handed up to the court on 29 August 2006.

3. **Each of the seventh, tenth, twentieth and forty-third respondents will pay to the applicant such of the applicant's costs of and incidental to the preliminary trial as relate only to the issues between that respondent and the applicant.**

4. **The assessment of the applicant's costs be made on the basis that except so far as they are of an unreasonable amount the following items should be regarded as costs necessary and proper:**

    a. **the fees of Mr Bell QC;**
    b. **the fees of Mr Kelly SC;**
    c. **the fees of Mr DA Kelly of counsel;**
    d. **the costs of the expert reports of Dean Dransfield;**
    e. **the costs of the expert reports of Elia Lytras (relating to the seventh, tenth, twentieth or forty-third respondents as the case may be);**
    f. **the costs of the expert report of Taylor Byrne.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – CO-DEFENDANTS – where many purchasers of apartments purport to rescind contract – where applicant seeks declaration that purported rescission invalid –where preliminary trial between applicant and smaller group of respondents – where applicant successful – whether individual respondent's liability for costs limited to severable liability proportionate to number of respondents in original action

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF THE ISSUES – where applicant unsuccessful on issue of election – where election sole factual issue - whether failure on sub-issue justifies departure from general rule

Currabubula Holdings Pty Ltd v State Bank of New South Wales [2000] NSWSC 232, distinguished

Emanuel Management Pty Ltd (in liquidation) v Foster's Brewing Group Ltd [2003] QSC 299, followed

Ryan v South Sydney Junior Rugby League Club [1975] 2 NSWLR 660, followed

Waterman v Gerling Australia Insurance Co Pty Ltd (No.2) [2005] NSWSC 1111, followed.

COUNSEL: L F Kelly SC with D A Kelly for the applicant

D Collins SC with D A Skennar for the respondents

SOLICITORS: McCullough Robertson for the applicant
Slater & Gordon for the respondents

[1] **MCMURDO J:** On 7 February 2007 I gave judgment declaring that the purported avoidance of their contracts with Australand Corporation (Qld) Pty Ltd by certain respondents was of no effect and I dismissed their counterclaims. I subsequently received extensive oral and written submissions as to costs which are the subject of this judgment.

[2] Before going to the arguments, it is convenient to mention the history and circumstances of this proceeding (BS8521 of 2003) and a related proceeding (BS8523 of 2003). In September 2003, more than 80 purchasers of apartments purported to rescind their contracts. Most purchasers did so upon the basis of the prescribed interest provisions of the *Corporations Law*, which were in force at the time of the making of their contracts. A relatively small number of purchasers purported to rescind upon the basis of the managed investment scheme provisions of the *Corporations Act* 2001. Australand commenced the present proceedings, BS8521, against those purchasers who had relied upon the prescribed interest provisions and commenced BS8523 against those who had relied upon the management investment scheme provisions. In each case, the relief sought was declaratory relief to the effect that the rescission was ineffective. In each proceeding the factual basis for Australand's application was, or ought to have been, uncontroversial. The issues raised for determination were ones of law, and in the present proceedings, they were identical from respondent to respondent.

[3] Some purchasers within each of these proceedings brought their own claims against Australand, claiming not only a contravention of the *Corporations Law* or the *Corporations Act*, but also relief under the *Trade Practices Act* 1974 (Cth) and in some cases, damages for negligent misrepresentation.

[4] On 8 June 2005 I ordered that there be a preliminary trial of BS8521 involving the proceedings between Australand and a certain six respondents to be heard with the trial between Australand and the respondents to BS8523 (of whom there were but five). The trial was subsequently set down to commence on 28 August 2006.

[5] At the commencement of the trial I was informed that the entirety of BS8523 had been settled. That left the preliminary trial within BS8521 of the proceedings between Australand and six respondents. They had been put forward by Slater & Gordon, acting for all respondents, as an appropriate group. Those who were not participants in the preliminary trial but who were respondents within BS8521 were not to be bound by the outcome but it was hoped that the litigation involving them might be avoided, or at least reduced in its scope by an outcome one way or the other within the preliminary trial.

[6] Close to the commencement of the trial, there were two relevant developments in Australand's case. The first was that it sought to plead that the claims under the *Trade Practices Act* had been brought outside the limitation period. Australand gave notice of that point on 14 June 2006. The second was its pleading a case of election, i.e. that each of the respondents had made a binding election to affirm the

contract before purporting to rescind it. That was raised by the service of a proposed further amended statement of claim on 17 August 2006.

[7] On 24 August 2006, the respondents filed an application to strike out that further amended statement of claim which was made returnable on 28 August 2006, the first day of the trial. On that date I allowed Australand to so amend to plead an election. As to the limitation period plea, the respondents on 11 August 2006 pleaded various things to the effect that Australand was precluded from relying upon the limitation period. Australand said that those pleas were bad in law and on 24 August 2006 Australand filed an application to strike them out. That application was also made returnable on the first day of the trial. When the trial commenced the respondents consented to the striking out of those pleas. The result was an agreement by the respondents to amend their pleadings to admit that the claims under the *Trade Practices Act* were statute barred. It was then agreed that the costs of Australand's application be reserved. I also reserved the costs of the unsuccessful application by the respondents to strike out the election plea.

[8] On 6 September 2006 Australand settled with two of the respondents, Mr Savage and Mr and Mrs Carey. I then continued to try the case between Australand and the remaining four respondents.

Australand's arguments

[9] Australand seeks an order that these four respondents pay Australand's "costs of and incidental to the costs of the preliminary trial of this proceeding conducted pursuant to the order … dated 8 June 2005 including … the costs of and incidental to the counterclaims [and with one exception] reserved costs …" It concedes that it should be ordered to pay the costs of the four respondents, if any, thrown away by the amendments to the statement of claim which were the amendments to plead the election case. And it seeks a direction that in the assessment of its costs, the fees paid to each of its three counsel and the costs of certain expert reports should be regarded as necessary and proper.

The respondent's arguments

[10] The ultimate submission for the respondents was that there should be no order for costs. That submission was developed as follows.

[11] First, it was said that any order for costs in favour of Australand against a certain respondent should be proportionate, in the sense that if the costs involved a step taken against a certain number of respondents, then the individual respondent's responsibility should be for those costs divided by the number of respondents. So for what the respondents call the first period, when Australand was prosecuting 84 respondents, it is said that by a so-called "rule of thumb", each respondent should be visited with but one-eighty-fourth of the costs. Similarly, in the so-called second period, which is when there were effectively six respondents (after 8 June 2005), each respondent's share should be one-sixth and after when there were but four respondents, it should be one-fourth. In support of this argument, the respondents relied upon a passage from the judgment of Einstein J in *Currabubula Holdings Pty Ltd v State Bank of New South Wales*[1] who said as follows:

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1 [2000] NSWSC 232

> "[95] These decisions reveal that the concern of the rule of thumb is to achieve substantial justice in the awarding of costs as between a partially successful plaintiff and variously successful and unsuccessful defendants. The rule operates upon the premise that defendants are proportionately responsible for and liable for the joint costs involved in mounting the defence. Thus, a successful defendant cannot claim from the plaintiff more than a proportionate share of the joint costs of the action in addition to any costs separately referable to that defendant. Conversely, the partially successful plaintiff is prevented from looking to each of the unsuccessful defendants for more than an equal proportionate share of the costs not solely referable to the plaintiff's case against one or other of the defendants individually, in addition to the costs which are so referable. In this way, the rule of thumb prevents both the unjust enrichment of the partially successful plaintiff or successful defendant and the casting of an unfair burden on the unsuccessful defendants. Where the premise is falsified or the rule does not achieve its intended effect, it finds no application."

They also rely upon this paragraph from GE Dal Pont's *Law of Costs*:

> "[11.6] The general rule assumes that a plaintiff has been successful against all defendants, and is so is able to enforce a costs order arising out of that success against those defendants jointly or severally. But where the plaintiff does not succeed against each defendant costs usually follow the event: the plaintiff pays the successful defendant's costs, but receives an order for costs incurred in suing the unsuccessful defendant. This highlights the notion that an unsuccessful defendant should not be required to pay more than one set of costs merely because he or she proves unsuccessful. The partially successful plaintiff cannot look to each of the unsuccessful defendants for more than an equal proportion and share of the costs not solely referable to his or her case against one or other of the defendants individually, in addition to the costs which are so referable."

But each of these passages concern a different context, which is where the plaintiff succeeds against one defendant but fails against another. What was said by Einstein J as to the position of a "successful defendant" is clearly not relevant here because no defendant has succeeded. Nor is his Honour's comment as to "the partially successful plaintiff" relevant, because Australand has succeeded against each of the defendants who were sued to a judgment.

[12] Australand succeeded because I held that the right to rescind was lost to each respondent at a point some years prior to the purported rescission. There was no difference between the respective positions of these four respondents on that point; nor was there any difference between them and the other 80 respondents. That

question was one of law which was common to all respondents and from the commencement of the proceedings. In substance, the costs of Australand in prosecuting the proceedings upon the basis of that argument should not have been higher for the fact that there were at times as many as 84 respondents. Where there was some difference from one respondent to another was in relation to the factual detail of the counterclaims and in the facts relevant to Australand's election plea. Still in those respects there was also a substantial factual overlap.

[13] Had Australand's claim against all respondents been determined at this trial, Australand would have succeeded in each case upon the ground on which it succeeded against these four respondents, and in that event the usual order would have been that Australand have an order for costs against all respondents. The consequence of such an order is that the liability of the defendants for the plaintiff's costs is joint and several, so that any one of them can be called upon to pay the whole of the plaintiff's costs: *Ryan v South Sydney Junior Rugby League Club*[2], cited for this proposition in *Quick on Costs* at [4.3390], where the author says:

> "[4.3390] …
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> The justification for joint and several liability is that the plaintiff as the successful party is entitled by way of indemnity to its costs and if one of the unsuccessful defendants is unable or unwilling to meet its share of the obligation the misfortune should be that of the remaining defendant or defendants and not of the plaintiff. The form of order will therefore usually be one that all defendants pay the plaintiff's costs. An order that a designated proportion of the plaintiff's costs be paid by each defendant, that is, that each defendant be severally liable for a specified proportion of the plaintiff's costs, will be unusual: *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 28 ALR 201 at 210 per Fisher J. …"

[14] In this context there is no circumstance which warrants the unusual order that each defendant be severally liable for a specified proportion of the plaintiff's costs. And there is no reason to deny this plaintiff the usual order because the claims against most defendants were deferred pending the preliminary trial. Of course, to the extent that there are costs which relate *only* to claims against or by other purchasers, Australand should not recover them against these four respondents.

[15] Next, the respondents argue that they conducted their counterclaims on the basis that no limitation defences were relied upon, so that it is unfair that they should have to pay all of the costs of the counterclaims which they abandoned at the trial. I accept that Australand has not volunteered an adequate explanation for why it did not rely upon the limitation defence earlier. I infer that it was through oversight. I see no basis for thinking that Australand deliberately withheld the point until close to the trial.

[16] The respondents' argument proceeds upon the premise that had the limitation defences been pleaded earlier then they would have promptly abandoned their counterclaims. I am not persuaded about that. Their initial reaction to the raising of the limitation defence was to claim that for various reasons the defence could not be

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2 [1975] 2 NSWLR 660, 663

relied upon, rather than to abandon their counterclaim. This argument does not provide a sufficient reason for denying Australand the costs of defending counterclaims to which, as was ultimately conceded, there was a complete defence.

[17] Next, the respondents argue that it would be appropriate, if any orders for costs are to be made, that Australand should be ordered to pay their costs in relation to the election issue. Rule 682 of the *Uniform Civil Procedure Rules* provides that an order may be made for costs in relation to a particular question in, or a particular part of, a proceeding. But 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. In *Emanuel Management Pty Ltd (in liquidation) v Foster's Brewing Group Ltd* [3], Chesterman J said[4]:

> "[85] The rule is, I suspect, more likely to find application where a plaintiff has been partially successful. The defendant who has restricted the plaintiff's success may have an argument, the strength of which will depend on the circumstances, that it should pay only part of the costs or indeed be paid part of the costs. Where, however, a defendant has been completely successful it would be unusual to require it to pay any part of the plaintiff's costs. There may be exceptional cases where the defendant by its conduct has made it appropriate that it should be deprived of its costs or even pay its opponent's costs, but cases in which a successful defendant has not recovered costs are rare. The general rule is that a successful litigant is entitled to its costs the primary purpose of which is to indemnify the successful party because 'fairness dictates that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation.' Per McHugh J in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97. …"

Similarly in *Waterman v Gerling Australia Insurance Co Pty Ltd (No.2)*[5] Brereton J said[6]:

> "[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 v 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 [*Mobile Innovations v Vodafone Pacific Land* [2003] NSWSC 423 at [4]; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16; *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261; *Trade Practices Commission v Nicholas*

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3 [2003] QSC 299
4 [2003] QSC 299 at [85]
5 [2005] NSWSC 1111
6 [2005] NSWSC 1111 at [10]

> *Enterprises Pty Ltd (No 3)* (1979) 28 ALR 201; *Waters v PC Henderson (Aust) Pty Ltd* (NSWCA, 6 July 1994 unreported); *NRMA Ltd v Morgan (No 3)* [1999] NSWSC 768]. From these cases emerge consistent themes that:
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> - Justice may not be served if parties are dissuaded by the risk of costs from canvassing all issues which might be material to the decision in this case; but
> - 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."

[18] The issue of election was ultimately the only factual issue at the trial. But, although Australand was unsuccessful, there was a reasonable basis for its attempting to prove that each of the respondents had the requisite knowledge of the facts relevant to the asserted right to rescind. The respondents complain that the trial had to be adjourned for a few days to enable them to prepare their response to the election case because it was raised so late. But this simply means that the costs of defending the claim in relation to this issue were incurred at that time rather than earlier. The costs should not have been greater because they were incurred then. Ultimately I am not persuaded that Australand's failure to prove the requisite knowledge on the part of each respondent should deprive Australand of the usual order for costs in favour of a successful plaintiff.

[19] I conclude that these four respondents should be ordered to pay Australand its costs, as it seeks in paragraph 1 of its draft order, save for any costs which are referable only to proceedings between Australand and some other respondent or respondents.

[20] With the exception conceded by Australand, that should include reserved costs. The costs of Australand's successful application to strike out the respondents' rejoinders to the limitation period pleas were reserved. There is no reason why Australand should not have these costs: its application was successful when the respondents consented to their pleadings in that respect being struck out. Next, there is the respondents' application to disallow the amended statement of claim insofar as it raised the issue of election. The respondents were unsuccessful in that pleading argument and there is no reason for their not bearing the costs of that application. The exception so far as reserved costs are concerned are the costs thrown away by the election amendments. Australand concedes that it should pay these costs. There will be an order to that effect according to paragraph two of its draft.

[21] I turn to paragraph three of the draft. There is an affidavit from the solicitor for Australand to the effect that he considered that in order to properly prepare each case for trial it was necessary to engage, as he did, three counsel, including two senior counsel. So in late May 2006 he engaged Mr Kelly SC to appear with Mr Bell QC and Mr DA Kelly who had been retained from the outset. Mr Kelly SC was instructed to prepare matters relating to the valuation evidence and more generally the quantum of the various counterclaims. It is said that Australand had to respond to a large number of valuation and other expert reports in consequence of which it procured expert reports from valuers, accountants and others.

[22] I heard some of that evidence at the trial before the proceedings involving those respondents, who had counterclaimed for negligence, were settled. The subject matter was relatively complex and involved more than simply a valuation of the present value of the apartments. That evidence also concerned whether there was a reasonable basis for the representations which were alleged to have been made to purchasers, a matter requiring an extensive factual investigation with the assistance of expert evidence. I am persuaded that it was reasonably necessary and appropriate that three counsel be retained and that there should be an order in terms of paragraph three of Australand's draft so far as counsel are concerned.

[23] According to the affidavit of the solicitor for Australand, upon which there was no cross-examination, Australand was served with a large number of expert reports to which it was necessary to respond by expert reports of Mr Dransfield, Mr Lytras and a report from Taylor Byrne, valuers. At the trial, Mr Dransfield gave evidence which was then still relevant because although the *Trade Practices Act* claims had been abandoned, there were still the negligence claims by Mr Savage and Mr and Mrs Carey. I am satisfied that it was necessary and appropriate to retain Mr Dransfield and to obtain his reports. The reports of Mr Lytras or of Taylor Byrne were not tendered. Mr Lytras appears to have prepared a separate report for each of the eleven purchasers and in each case the report is dated 21 August 2006. Australand should have no more than the costs of the reports relevant to these four respondents. I would expect that the costs of the report in relation to, for example, Mr Pih, would be incurred solely in relation to the proceedings between him and Australand so that those costs should be ordered only against Mr Pih. They should fall within the exception to paragraph one of the orders set out below. Although I have not seen the Taylor Byrne valuation there was no submission that it was inappropriate to obtain that valuation evidence. I am persuaded to make a direction in relation to the accountants' reports involving these four respondents and the Taylor Byrne valuation, substantially as sought by Australand's draft.

[24] The orders will be as follows:

1. The seventh, tenth, twentieth and forty-third respondents pay the applicant's costs of and incidental to the preliminary trial of this proceeding conducted pursuant to the order of 8 June 2005 including reserved costs (save for those reserved costs referred to in the next order), but not any costs which relate only to the issues between the applicant and only one of the seventh, tenth, twentieth and forty-third respondents.

2. The applicant pay the costs of those respondents, if any, thrown away by the amendments to the amended statement of claim as handed up to the court on 29 August 2006.

3. Each of the seventh, tenth, twentieth and forty-third respondents will pay to the applicant such of the applicant's costs of and incidental to the preliminary trial as relate only to the issues between that respondent and the applicant.

4. The assessment of the applicant's costs be made on the basis that except so far as they are of an unreasonable amount the following items should be regarded as costs necessary and proper:

(a) the fees of Mr Bell QC;
(b) the fees of Mr Kelly SC;
(c) the fees of Mr DA Kelly of counsel;
(d) the costs of the expert reports of Dean Dransfield;
(e) the costs of the expert reports of Elia Lytras (relating to the seventh, tenth, twentieth or forty-third respondents as the case may be);
(f) the costs of the expert report of Taylor Byrne.