SUPREME COURT OF QUEENSLAND

CITATION:	*AGL Sales (Qld) P/L v Dawson Sales P/L & Ors (No 2)* [2009] QSC 75
PARTIES:	**AGL SALES (QLD) PTY LIMITED (ACN 121 177 740)** Plaintiff **v** **DAWSON SALES PTY LTD (ACN 087 886 913)** First Defendant **ANGLO COAL (DAWSON) LIMITED (ACN 100 155 342)** Second Defendant **MITSUI MOURA INVESTMENT PTY LTD (ACN 088 091 356)** Third Defendant
FILE NO:	10731 of 2007
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2009
JUDGE:	McMurdo J
ORDER:	**That the defendants pay to the plaintiff its costs of the proceedings, including any reserved costs, to be assessed.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where defendants rejected plaintiff's Calderbank offer – whether rejection unreasonable – whether judgment more favourable to plaintiff than terms of its offer – whether ordinary rule as to costs should be departed from PROCEDURE – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where factual issues relating to Good Engineering and Operating Practice which were ultimately unnecessary occupied most of the trial – where plaintiff failed

on many of its arguments about Good Engineering and Operating Practice but succeeded on its principal argument – whether plaintiff should have all or only a proportion of its costs

Uniform Civil Procedure Rules 1999 (Qld), r 681(1), r 684(1)

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

Commonwealth of Australia v Gretton [2008] NSWCA 117

Oshlack v Richmond River Council (1998) 193 CLR 72

SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323

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

COUNSEL: Mr P O'Shea SC with Ms S Brown for the Plaintiff

Mr GA Thompson SC with Mr S Cooper for the defendants

SOLICITORS: Brian Bartley & Associates as town agents for Gilbert & Tobin for the plaintiff

Mallesons Stephen Jaques for the defendants

[1] After a 20 day trial of these proceedings, I gave judgment for the plaintiff and dismissed the counterclaim.[1] The plaintiff obtained effectively all of the relief which it sought. This judgment concerns the costs of the proceedings.

[2] The plaintiff argues that it should have its costs and upon the indemnity basis from the commencement of the trial. The defendants argue that the plaintiff should have no more than 20 per cent of its costs and assessed on the standard basis.

[3] It is convenient to discuss first the argument for indemnity costs. This is based upon a Calderbank offer made by the plaintiff. It was contained in a letter dated 25 July 2008, which was the working day prior to the commencement of the trial. The offer was rejected on 30 July.

[4] At para [11] of the principal judgment, I referred to the so called Remedy Amount, which the first defendant was to pay should it fail to deliver in any month the required quantity of gas. It was to be that amount which was 40 per cent of the contract price per gigajoule times the quantity of the shortfall in supply. The plaintiff had been withholding sums equivalent to the Remedy Amount on the basis of its case, which was successful, that there had been no reduction in the quantity of gas (the so called MDQ) which the first defendant was required to deliver. The defendants' case was that the MDQ had been effectively reduced pursuant to the force majeure provisions of the contract, so that it had fallen from 18 terajoules (TJ) to 9.116 TJ. It was in the context of that dispute that the plaintiff's offer was expressed as follows:

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1 [2009] QSC 8.

> "1. AGL retains the Remedy Amount deducted or to be deducted for deliveries up to and including 30 June 2008 on the basis that the MDQ under the GSA to 30 June 2008 is 18 TJ (Approximately $3.3M - $3.4M);
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> 2. MDQ under the GSA be reduced to 9.116 TJ effective 1 July 2007;
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> 3. AGL waives any right to delivery of accumulated Deferred Gas to the extent that it has accumulated up to and including 30 June 2008 (estimated to be approximately 4.5PJ);
>
> 4. The Defendants pay AGL $18 M within 7 days from the date of acceptance of this offer;
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> 5. Clause 14.8 of the GSA be amended so only the 'non-affected' party ie the party not relying on the FM Event and clause 14.1.1 can reduce MDQ pursuant to clause 14.8 for any 'FM' event;
>
> 6. Each party bears their own costs.
>
> 7. A confidential settlement agreement be entered into by the parties documenting the settlement."

The letter continued:

> "As you know, if AGL receives a favourable judgment in the Dispute it would ordinarily receive a costs order in its favour. AGL's offer proposes that it will bear its own costs as part of the settlement effectively in exchange for the amendment to clause 14.8 of the GSA.
>
> As this offer is substantially similar to the proposal discussed in our telephone conversation on 17 July, 2008 this offer is open for acceptance for a period of five days from the date hereof."

[5] The plaintiff argues the result of the judgment is more favourable to the plaintiff and unfavourable to the defendants than would have been the settlement which it proposed and that, in all the circumstances, it was unreasonable for the defendants not to have accepted it. The question is whether the ordinary basis for the assessment of costs should be departed from, which does not follow in every case simply because the offeree ends up worse off than if the offer had been accepted[2]: the present context is different from that under *UCPR* r 360.

[6] The offer set out a so called "valuation" of the extent to which the plaintiff was offering to reduce its claim. The "effective discount" was said to be $3.99M. That was derived by a calculation of the net present value of the payments which would have to be made for the Remedy Amount if the quantity which was delivered was 9.116 TJ against a required quantity of 18 TJ per day over the remaining life of the

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2 *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37] per Giles JA; *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [43] per Beazley JA.

contract. The implicit assumption within the calculation was that at no time during that period (which would expire at the end of 2014) would the defendants be able to supply more than the amount to which they had purported to reduce the MDQ. However, it is far from established that that will be the case. It does not follow from the purported reduction of the MDQ to 9.116 TJ that the defendants will not be able to supply more than that quantity. The figure of 9.116 TJ was derived from the quantities supplied in late 2007, when the defendants were heavily reliant on production from the unsuccessful Ridgedale field. According to the evidence at the trial, by June 2008 the defendants were extracting gas from other parts of their mining lease and in particular from the area called Pretty Plains. In the judgment I noted that by the end of 2007 six wells had been completed there with another five being drilled and that the production had been successful.[3] To the extent that the evidence does throw some light on the matter, it indicates that the production from other fields will be more successful than at Ridgedale and that the plaintiff will be able to provide more than 9.116 TJ per day.

[7] The relevant comparison is between the respective positions of the parties had the offer been accepted and their present positions. At present the defendants have the opportunity of supplying all of the gas required by the contract, if necessary by resort to other sources than the area of the mining lease. It is not at all unrealistic to think that they will be able to supply at least enough gas to reduce their payments of the Remedy Amount to much less than was assumed within this offer of settlement. Accordingly, even on this basis alone, it was not unreasonable for the defendants to have refused the offer.

[8] But there was a further basis for their doing so, which was the condition by which cl 14.8 of the contract was to be amended. The relevant parts of cl 14 are set out in the principal judgment.[4] The proposed condition was that only the "non-affected" party, the party not relying on the force majeure event, would be able to permanently reduce the MDQ for any force majeure event. In the context of cl 14, that party could only be the plaintiff. This was a substantial amendment which was being proposed. It was not simply to clarify the effect of some ambiguous term. The amendment had the potential to significantly affect the defendants' position if there was an occurrence which was truly a force majeure event. The suggested *quid pro quo* was the plaintiff's offer to bear its own costs. However, that may not have proved to be a sufficient benefit for the loss of the important right within cl 14.8.

[9] Of course, the offer as a whole had to be considered. The plaintiff was also agreeing to waive its right to delivery of accumulated Deferred Gas to an extent. On the other hand, the offer required payment of $18,000,000 within seven days from the date of acceptance, and the offer was open only for five days.

[10] Overall, it is far from demonstrated that the outcome from the judgment was more favourable to the plaintiff than an agreement in terms of the offer. There is no basis for awarding indemnity costs.

[11] I turn to the issue of whether the plaintiff should have all or only a proportion of its costs. The defendants argue that most of the trial was unnecessarily taken up with

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3 [2009] QSC 8 at [150].

4 [2009] QSC 8 at [12].

factual issues relating to Good Engineering and Operating Practice and that the plaintiff was unsuccessful in much of that contest.

[12] The defendants are correct in saying that most of the case was taken up with that factual inquiry and that the plaintiff succeeded on the basis of an interpretation of the contract which made that inquiry ultimately unnecessary. It does not follow, however, that it was unreasonable for the plaintiff to present the wider case which it did. That case was advanced because the defendants strongly disputed the interpretation of the contract for which the plaintiff contended. Had the defendants' arguments as to the interpretation of cl 14 and the definition of Force Majeure Event been upheld, the plaintiff would have had to advance the case that it was the defendants' fault that they could not supply as the contract required. The defendants can hardly suggest now that the plaintiff should have been so confident of disposing of their arguments about the meaning of the contract that it should have abandoned its case about Good Engineering and Operating Practice.

[13] The plaintiff might have applied for summary judgment upon the basis of its arguments as to the meaning of the contract. As I held in the principal judgment, the facts which were relevant to the proper interpretation of the contract were largely undisputed.[5] But that is how the case had developed by the trial. The plaintiff would have had considerable difficulty in seeking summary judgment, at least at any early stage of the proceedings, because it did not know much of the relevant facts. It knew that the defendants had claimed that there was a force majeure event involving the failure of wells and the deterioration in productivity of wells. It did not know which were the wells involved, what had been their history and whether there had been any simultaneous failure of wells. The defendants say that an application for summary judgment might have been made after disclosure. That was a possibility, but the plaintiff was not unreasonable for instead proceeding to a trial. I may or may not have been persuaded to hear a relatively late summary judgment application, which might well have taken more than a day to hear and which might have delayed the ultimate determination of the proceeding by the prospect of an appeal from the outcome of that application.

[14] Then it is said that the plaintiff failed on many of the components of its case about Good Engineering and Operating Practice. Clearly the plaintiff did fail on many of those arguments. Yet it succeeded on what was probably its principal argument which was that the defendants had failed to undertake proper exploration at Ridgedale. Depending upon who bore the onus of proof, that point might have been sufficient to produce effectively the same outcome for the plaintiff.

[15] Although ordinarily costs should follow the event,[6] 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.[7] I have recently considered the circumstances in which the ordinary rule should be 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)*.[8] 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

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5 [2009] QSC 8 at [4].
6 *Uniform Civil Procedure Rules* r 681(1).
7 *Uniform Civil procedure Rules* r 684(1).
8 [2009] QSC 64.

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.[9] In *BHP Coal*, the ordinary rule was departed from in respect of one part of the litigation, which was a distinct component of the plaintiffs' claim, formed a substantial part of the amount claimed, had involved some days of hearing and, importantly, was flawed for a reason that did not depend upon any controversial fact.

[16] In the present case, the plaintiff's arguments about Good Engineering and Operating Practice were analogous to a common law claim in negligence. It is often the case that a plaintiff in such a claim succeeds in proving negligence in some respects but not in others, and in such cases it does not usually follow that the plaintiff loses some of its costs. This is because, as McHugh J explained in *Oshlack v Richmond River Council*:[10]

> "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."

[17] Had the questions of Good Engineering and Operating Practice mattered, the outcome of the case would have depended upon the incidence of the burden of proof. That depended not only upon the proper interpretation of the definition of "Good Engineering and Operating Practice" but also upon whether the alleged force majeure event was within the general words of that definition and not within the specific inclusion of para (h).[11] Accordingly, it was at least reasonable for the plaintiff to advance the case which it did about Good Engineering and Operating Practice, because at least one real possibility, as the plaintiff might have seen things, was that this factual inquiry would be decisive, although the plaintiff was not able to prove that the defendants' failures to employ good practice were a cause of its inability to supply.

[18] There is no suggestion here that the unsuccessful arguments were advanced in bad faith or that they were so irrelevant to the real issues as to warrant some special order as to costs.

[19] In my conclusion, there is no demonstrated basis for departing from the ordinary rule. The plaintiff should have all of its costs. It will be ordered that the defendants pay to the plaintiff its costs of the proceedings, including any reserved costs, to be assessed.

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9 [2009] QSC 64 at [8] adopting the words of Brereton J in *Waterman v Gerling Australia Insurance Co. Pty Ltd (No 2)* [2005] NSWSC 1111 at [10].

10 (1998) 193 CLR 72 at 97.

11 [2009] QSC 8 at [73].