SUPREME COURT OF QUEENSLAND

CITATION:	*Alborn & Ors v Stephens & Ors* [2010] QCA 58
PARTIES:	**RICHARD MOLLISON ALBORN** (first plaintiff/first appellant) **ALBORN FAMILY CORPORATION PTY LTD** ACN 080 955 595 (second plaintiff/second appellant) **SHAYKAR PTY LTD** ACN 076 868 552 (third plaintiff/third appellant) **v** **RAY STEPHENS** (first defendant/first respondent) **GLENYS MARGARET STEPHENS** (second defendant/second respondent) **A S & L PTY LTD** ACN 087 729 048 (third defendant/third respondent)
FILE NO/S:	Appeal No 9392 of 2009 SC No 7795 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2009
JUDGE:	Holmes and Muir JJA and Daubney J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. The respondents pay half of the appellants' costs of the appeal;** **2. The primary judge's order that the plaintiffs pay the defendants' costs on a standard basis of and incidental to the action (including reserved costs), except for so much of the trial taken up with the need to obtain supplementary disclosure by the defendants, be set aside, and that the costs of the proceeding incurred on and prior to 20 November 2009 be reserved to the primary judge for determination by reference to the reasons of this Court delivered on 11 December 2009 upon determination of the proceeding, or at such other time as the primary judge may order;**

3. The Order that "The defendants are to pay the plaintiffs' costs on the standard basis of so much of the trial as was taken up by the need to obtain supplementary disclosure by the defendants" will stand.

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF THE ISSUES – where the appellants failed on one of the two main issues on appeal – whether to depart from the general rule that costs follow the event – whether the respondents should be awarded an indemnity certificate

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – GENERALLY – where proceeding remitted to primary judge for hearing and determination in accordance with the reasons given on appeal – whether costs orders at first instance should be set aside and costs matters remitted to the primary judge for determination

Appeal Costs Fund Act 1973 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld), r 681

Byrns v Davie [1991] 2 VR 568, cited
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Rosniak v Government Insurance Office (1997) 41 NSWLR 608, cited
Todrell Pty Ltd v Finch (No 2) [2008] 2 Qd R 95; [2007] QSC 386, cited
Waterman v Gerling (Costs) [2005] NSWSC 1111, cited

COUNSEL: A J H Morris QC, with K A M Greenwood, for the appellants
P J Dunning SC, with L J Nevison, for the respondents

SOLICITORS: Londy Lawyers for the appellants
Gateway Lawyers for the respondents

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA:** When the appeal in this matter was disposed of on 11 December 2009, the parties were afforded the opportunity of making further submissions on costs. The respondents' counsel submitted, in effect, that there should be no order for the costs of the appeal. The rationale behind the submission was that the parties' dispute concerned whether the appellants had a beneficial interest in two businesses. The primary judge held that the appellants had an interest in neither business, whereas it was determined on appeal that the appellants had an interest in one of the businesses. Honours were thus roughly evenly divided.

[3] It was also argued that the appellants' success resulted from an error of reasoning by the primary judge and did not arise from contentions made by the respondents.

Consequently, it was submitted that if the respondents were ordered to pay any of the costs of the appeal, they should be awarded an indemnity certificate pursuant to section 15 of the *Appeal Costs Fund Act* 1973 (Qld).

[4] The respondents' submission in respect of the costs at first instance was that the costs orders at first instance should be set aside and that the matter should be remitted to the primary judge for determination following findings of fact on outstanding issues and the making of final orders for relief. This approach was said to be warranted on the basis that until there has been a determination of all relevant facts and until final orders are made, it will not be possible to make an accurate assessment as to the relative successes of the parties in the litigation, especially having regard to a substantial offer of settlement made by the respondents prior to the trial. Counsel for the respondents accepted that the Order made at first instance that "the defendants are to pay the plaintiffs' costs on a standard basis of so much of the trial as was taken up by the need to obtain supplementary disclosure by the defendants" should remain.

[5] Counsel for the appellants submitted that there was no reason to depart from the usual rule that costs follow the event: the respondents sought to uphold a judgment which was overturned and should pay the costs of the appeal.

[6] In relation to the costs at first instance, counsel for the appellants took issue with the contention that the parties had an equal measure of success. He submitted that the central issue in this litigation was whether Shaykar Pty Ltd had a beneficial interest in the businesses arising from a joint venture agreement between the parties. The respondents denied the existence of any agreement under which Shaykar Pty Ltd had acquired a beneficial interest in the businesses. That central contention was found to be wrong: the primary judge finding that both businesses were beneficially owned by Shaykar Pty Ltd initially. Moreover, the respondents succeeded at first instance on an unpleaded contention first advanced in addresses that agreements were made to transfer the beneficial ownership of the stores. Because the basis on which the respondents succeeded in respect of one store, it was never possible for the appellants to admit part of the respondents' case and thus resolve the proceedings relating to that business.

[7] The usual rule is that the costs of a proceeding follow the event.[1]

[8] The "event" is not to be determined merely by reference to the judgment or order obtained by the plaintiff or appellant, but is to be determined by reference to "the events or issues, if more than one, arising in the proceedings".[2] However, a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs.[3]

[9] In general terms, the central issues on the trial and on the appeal concerned the respective interests of the parties in two businesses, one at Morayfield and one at Clontarf. The appellants alleged that both businesses were joint venture property

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 681 and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] to [70].

2 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at 60; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 615; and *Byrns v Davie* [1991] 2 VR 568 at 570, 571.

3 *Waterman v Gerling (Costs)* [2005] NSWSC 1111; *Todrell Pty Ltd v Finch (No 2)* [2007] QSC 386.

and that any interest in them held by the respondents had been held on behalf of the venturers. The primary judge held that both businesses had become the property of the respondents. On appeal, the appellants succeeded in setting aside the primary judge's finding in respect of one of the businesses but failed to disturb the findings in respect of the other. The appellants thus failed on one of the two major issues on the appeal and I accept the submission that the appellants should not be entitled to all their costs of the appeal. It seems to me that an order that the respondents pay half of the appellants' costs of the appeal would appropriately recognise the extent of the appellants' success.

[10] There is merit in the submission that the question of the parties' costs below should be remitted to the primary judge for determination as future findings by the primary judge and the relative success of each side in the litigation is likely to bear on the question of costs. The effect, if any, of any offers to settle can also best be determined at the time the matter is finally resolved.

[11] It is not appropriate that an indemnity certificate be awarded. The respondents succeeded with respect to the Clontarf business by virtue of a finding which they did not seek. However, they urged the primary judge to find for them in relation to the Clontarf business on another and equally erroneous basis which they continued to advance on appeal.

[12] Accordingly, I would order that:

(a) The respondents pay half of the appellants' costs of the appeal.

(b) The primary judge's order that the plaintiffs pay the defendants' costs on a standard basis of and incidental to the action (including reserved costs), except for so much of the trial taken up with the need to obtain supplementary disclosure by the defendants, be set aside, and that the costs of the proceeding incurred on and prior to 20 November 2009 be reserved to the primary judge for determination by reference to the reasons of this Court delivered on 11 December 2009 upon determination of the proceeding, or at such other time as the primary judge may order.

(c) The Order that "The defendants are to pay the plaintiffs' costs on the standard basis of so much of the trial as was taken up by the need to obtain supplementary disclosure by the defendants" will stand.

[13] **DAUBNEY J:** I respectfully agree with the reasons of Muir JA and with the orders proposed by his Honour.