

SUPREME COURT OF QUEENSLAND

CITATION: *Superyacht Technologies Pty Ltd v Mackeddie Marine Pty Ltd & Ors No 2* [2013] QSC 11

PARTIES: **SUPERYACHT TECHNOLOGIES PTY LTD**
ACN 102 464 531
(plaintiff)
v
MACKEDDIE MARINE PTY LTD
ACN 059 870 129
(defendant)

SUPERYACHT TECHNOLOGIES PTY LTD
ACN 102 464 531
(plaintiff)
v
MACKEDDIE MARINE PTY LTD
(first defendant)
and
PENINSULA SEAROAD TRANSPORT PTY LTD
ACN 064 897 025
(second defendant)
and
NIGEL BURGESS LIMITED
(third defendant)
and
OCEANSTYLE YACHTING LTD
(fourth defendant)

FILE NOS: 4097 of 2010
11982 of 2010

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 12 February 2013

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Applegarth J

ORDERS: **1. In proceeding 4097 of 2010, the plaintiff pay the defendant's costs of and incidental to the proceeding, including reserved costs, to be assessed on the standard basis.**

2. In proceeding 11982 of 2010, the first and second

defendants pay 60 per cent of the plaintiff's costs of and incidental to the proceeding, including reserved costs, to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – GENERALLY – where two proceedings heard together – where plaintiff failed in first proceeding and succeeded in second proceeding – whether to depart from the general rule that costs follow the event.

Uniform Civil Procedure Rules 1999 (Qld), rr 5(1), 681(1)

Alborn & Ors v Stephens & Ors [2010] QCA 58, cited

Hughes v Western Australian Cricket Association (Inc) [1986] FCA 382; (1986) ATPR 40-748, cited

Superyacht Technologies Pty Ltd v Mackeddie Marine Pty Ltd & Ors [2012] QSC 401, cited

COUNSEL: M D Alexander for the plaintiff in both 4097 of 2010 and 11982 of 2010
J B Sweeney for the defendant in 4097 of 2010 and the first and second defendants in 11982 of 2010

SOLICITORS: Felix Law for the plaintiff in both 4097 of 2010 and 11982 of 2010
Phil Shakespeare for the defendant in 4097 of 2010 and the first and second defendants in 11982 of 2010

- [1] Upon delivering my reasons for judgment in these proceedings on 13 December 2012¹, I indicated my provisional view on costs, but reserved them in order to enable the parties the opportunity to agree appropriate costs orders or, failing that, to make submissions. My provisional view was that the defendant in the first proceeding was entitled to its costs of successfully defending that proceeding, and that the plaintiff was entitled to at least some of its costs of the second proceeding in which it succeeded on the issue of construction against the first and second defendants (who I shall refer to as “the defendants”). I wished to give the active parties the opportunity to agree a global costs order to avoid the costs associated with there being two costs assessments. The parties were unable to agree on appropriate orders, and submissions have now been made in writing.
- [2] The plaintiff seeks an order that the defendants pay its costs of both proceedings, reduced by 25 per cent on account of the outcome in the first proceeding.
- [3] The defendants submit that the first proceeding having been lost, the plaintiff should pay the defendants’ costs of that proceeding, including reserved costs. In respect of the second proceeding, the defendants point to what is said to be its “tortured history” whereby the plaintiff:
- (a) initially pleaded that it was the effective cause of the sale, and raised substantial factual matters in attempting to prove it;

¹ *Superyacht Technologies Pty Ltd v Mackeddie Marine Pty Ltd & Ors* [2012] QSC 401.

- (b) later abandoned issues which it had raised as to whether its efforts were an effective cause of the relevant sale and the authority of officers or agents of Mackeddie to do certain things for Superyacht; and
 - (c) subsequently joined Burgess, but not Oceanstyle, and resisted joinder of Oceanstyle until part way through the trial after substantial argument about the necessity for joinder and the proper basis for joinder.
- [4] The defendants submit that if the second proceeding had been properly constituted as to parties from the outset, and properly pleaded without raising false issues, the single issue of construction that was raised in it could have been resolved in a hearing in the Applications List. They submit that the costs of the second action should be as follows:
- (a) that the defendants should pay the plaintiff's costs, fixed at \$15,000 (being the cost of such an application); and
 - (b) there be set off against that an order that the plaintiff pay the defendants' costs thrown away by the amendments to the pleadings and concerning the issue of joinder of the third and fourth defendants.
- [5] The defendants further submit that the costs orders proposed by the plaintiff are unjust in that:
- (a) the plaintiff was wholly unsuccessful in the first action;
 - (b) the parties in the second action are not the same as the parties in the first action; and
 - (c) even putting aside the issue of parties, the matters submitted by them concerning the plaintiff's conduct of the proceedings make such an order unjust.

Costs of the first proceeding – 4097 of 2010

- [6] The plaintiff lost this proceeding, and the starting point is that costs should follow the event. I am not persuaded that there is any good reason to displace the general principle that costs should follow the event. Accordingly, the order for costs will be:

The plaintiff pay the defendant's costs of and incidental to the proceeding, including reserved costs, on the standard basis.

Costs of the second proceeding – 11982 of 2010

- [7] Costs are in the discretion of the Court, but follow the event, unless the Court orders otherwise.² The "event" is not to be determined merely by reference to the judgment or order obtained by the plaintiff, but is to be determined by reference to "the event or issues, if more than one, arising from the proceedings".³ A party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs.⁴ However, a successful party which has failed on

² *Uniform Civil Procedure Rules 1999* (Qld), r 681(1).

³ *Alborn & Ors v Stephens & Ors* [2010] QCA 58 at [8].

⁴ *Ibid.*

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.⁵

- [8] Strictly speaking, in the second proceeding the plaintiff did not fail on the issue of whether it was the effective cause of the relevant sale. It effectively abandoned that issue. No explanation has been given as to why it abandoned that issue. It may have assessed that its prospects of succeeding on that factual issue were poor. It may have considered that it was unnecessary to seek to prove that issue. In any event, its raising of the effective cause issue generated substantial cost, and the cost consequences to the defendants in the second proceedings of litigating that issue should be reflected in the final order as to costs.
- [9] Parties should be encouraged to concede or abandon issues. Depriving a successful plaintiff of part of its costs where it has abandoned or not pressed issues may deter plaintiffs in future cases from conceding issues. As against that, a defendant should not always be required to meet the costs of pleading to issues that a successful plaintiff subsequently abandons, and the costs of preparing for trial in respect of such issues. Unless there are some cost consequences to a plaintiff in such circumstances, false issues will be raised and unnecessary costs generated, contrary to the philosophy of civil litigation which is "the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".⁶ In all the circumstances, I consider that the order for costs should reflect the fact that costs were wasted by the first and second defendants in litigating the effective cause and authority issues which the plaintiff raised, but subsequently abandoned.
- [10] The defendants also raised legitimate issues concerning the necessity to join Burgess and Oceanstyle. Counsel for the defendants prepared substantial arguments on these points and time was wasted at the trial over the issue of joinder. There was substantial argument about whether the proceedings were properly constituted. It was only during the trial that the plaintiff, in effect, conceded that the joinder of Oceanstyle was appropriate. This removed the need to resolve the issue. A more timely joinder of Oceanstyle would have avoided these costs. The costs order should reflect the fact that the defendants were occasioned unnecessary costs in arguing issues of joinder and whether the proceedings were properly constituted.
- [11] Ultimately, the second proceeding turned on an issue of construction. This issue occupied a relatively small part of the evidence and a relatively small part of the parties' written submissions.
- [12] I am not persuaded that the second proceeding would have been resolved in an application in the Applications List if the action had been fully constituted as to parties from the outset and without the plaintiff raising additional issues concerning the authority of officers and agents of Mackeddie and the issue of effective cause. It seems likely that the two proceedings would have been heard together in any event.
- [13] I am not persuaded that it is appropriate to make the order for costs sought by the defendants. The order for costs should reflect the success of the plaintiff in the second proceeding on the only issue that was finally litigated at trial, namely the issue of construction. The order for costs should also make adjustments in respect

⁵ *Hughes v Western Australian Cricket Association (Inc)* [1986] FCA 382; (1986) ATPR 40-748 at 48, 136.

⁶ *Uniform Civil Procedure Rules 1999* (Qld), r 5(1).

of the plaintiff's conduct of the proceedings in relation to issues which were raised and later abandoned and the costs generated by the late joinder of necessary parties.

- [14] I consider that a fair and reasonable order in all the circumstances is that the first and second defendants in the second proceeding, number 11982/2010 pay 60 per cent of the plaintiff's costs of and incidental to that proceeding, including reserved costs, to be assessed on the standard basis.
- [15] The third and fourth defendants have not sought their costs. They did not appear at the trial and I make no order in respect of their costs.

Conclusion

- [16] It is unfortunate that there should be two orders for costs which, if the parties cannot resolve matters, will necessitate two separate assessments. However, in circumstances in which the parties in the first action are not the same as the parties in the second action and the parties have been unable to resolve their differences there is no satisfactory alternative. It will be necessary in the course of the assessment to resolve issues concerning common costs and the costs that can be said to be referable to only one proceeding. The material and submissions before me do not make it possible to make a global costs order covering both proceedings. Accordingly, the orders will be:
1. In proceeding 4097 of 2010, the plaintiff pay the defendant's costs of and incidental to the proceeding, including reserved costs, to be assessed on the standard basis.
 2. In proceeding 11982 of 2010, the first and second defendants pay 60 per cent of the plaintiff's costs of and incidental to the proceeding, including reserved costs, to be assessed on the standard basis.