SUPREME COURT OF QUEENSLAND

CITATION:	*Mosman Services Pty Ltd (ACN 079 350 744) (Suing in a Representative Capacity as Trustee of the Mosman Services Trust) and Ors v William James McDonald and Ors (2013)(No 2)*[2013] QSC 217
PARTIES:	**Mosman Services Pty Ltd (ACN 079 350 744) (Suing in a Representative Capacity as Trustee of the Mosman Services Trust)** (First Plaintiff) **AND** **Barraigh Pty Ltd (ACN 145 433 272) (Suing in a Representative Capacity as Trustee for the Barraigh Trust)** (Second Plaintiff) **AND** **Terence Kevin Crawford** (Third Plaintiff) **AND** **John Francis MacKinnon** (Fourth Plaintiff) **AND** **William James McDonald** (First Defendant) **AND** **Paul Gerard McDonald** (Second Defendant) **AND** **Fortrus Pty Ltd (ACN 101 141 851)** (Third Defendant) **AND** **Fortrus Resources Pty Ltd (ACN 145 178 070)** (Fourth Defendant)

AND

MCG Civil Pty Ltd (ACN 099 423 088)

(Fifth Defendant)

AND

MCG Coal Holdings Pty Ltd (ACN 143 001 825)

(Sixth Defendant)

AND

MCG Coal Pty Ltd (ACN 142 356 983)

(Seventh Defendant)

AND

MCG Resources Pty Ltd (In Liquidation) (ACN 129 717 531)

(Eighth Defendant)

FILE NO/S:	BS6242/11
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Brisbane
DELIVERED ON:	23 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2013
JUDGE:	Byrne SJA
ORDER:	**The plaintiffs should be awarded 80% of their costs.**
CATCHWORDS:	PROCEDURE – COSTS –DEPARTURE FROM GENERAL RULE – where plaintiffs were ultimately successful – where defendants had some success – consideration of principles relevant to apportionment of costs.
COUNSEL:	W Sofronoff QC and G Handran for the Plaintiffs M.D. Martin for the First to Fifth Defendants
SOLICITORS:	Tucker and Cowen for the Plaintiffs M.S. & Cliff Lawyers for the First to Fifth Defendants
	Uniform Civil Procedure Rules 1999, r 681 *Bar Association of Queensland Barristers' Conduct Rules 2011*, r 42 and r 57

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd [2013] QSC 216, cited.
Ashmore v Corporation of Lloyds [1992] 1 WLR 446, cited.
Chen v Chan (No 2) [2009] VSCA 233, cited.
Commissioner of Australian Federal Police v Razzi (1991) 101 ALR 425, cited.
Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd (1993) 26 IPR 261, folld.
Giannarelli v Wraith (1988) 165 CLR 543, cited.
Hughes v Western Australian Cricket Association Inc. (1986) 19 FCR 10, cited.
Mio Art Pty Ltd v Mango Boulevard Pty Ltd (No 3) [2013] QSC 95, cited.
Perochinsky v Kirschner (No 2) [2013] NSWSC 837, cited.
Pipe Networks Pty Ltd v Commonwealth Superannuation Corporation [2013] FCA 608, cited.
Sochorova v Commonwealth of Australia [2012] QCA 152, cited.
Superyacht Technologies Pty Ltd v Mackeddie Marine Pty Ltd (No 2) [2013] QSC 11, cited.
Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 QdR 156, cited.

Issue

[1] Questions of costs remain.

Starting point

[2] By UCPR 681, "costs of a proceeding…are in the discretion of the court but follow the event, unless the court orders otherwise".

[3] "…[T]he words 'follow the event' are to be read 'distributively', meaning that where there are two or more issues or questions…each of them is, or gives rise to, an event for which the 'costs' are to be determined separately".[1]

Some success on both sides

[4] Of the claims litigated to judgment, the plaintiffs won only some; and during closing addresses, they abandoned a claim against MCG Civil that it pay $2.6M to Resources. So the defendants succeeded on a few claims against them.

General significance of partial success

[5] In *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd*[2], a Full Court[3] of the Federal Court of Australia said[4]:

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1 *Mio Art Pty Ltd v Mango Boulevard Pty Ltd (No 3)* [2013] QSC 95, [4]; cf *Sochorova v Commonwealth of Australia* [2012] QCA 152, [11].
2 (1993) 26 IPR 261.
3 Gummow, French and Hill JJ.

> "…the demands of the community for greater economy and efficiency in the conduct of litigation may properly be reflected in a qualification of the presumption that a successful party is entitled to all its costs"

referring, with apparent approval, to *Commissioner of Australian Federal Police v Razzi*[5], where Wilcox J said[6]:

> "…the court should use all proper means to encourage parties to consider carefully what matters they will put in issue in their litigation. If parties come to realise that they will not necessarily recover the whole of their costs, even though they have unsuccessfully raised a discrete issue, they are likely better to consider whether the raising of that issue is a justifiable course to take."[7]

[6] To approach an award of costs in that way would also conform with the duty incumbent on a barrister under both the general law[8] and the *2011 Barristers' Rule*[9] to exercise discrimination in deciding on the issues, legal and factual, to be agitated.

Apportionment

[7] Importantly, at least the great bulk of the evidence at trial related to causes of action on which the plaintiffs succeeded: indeed, no significant body of evidence was shown to relate only to issues on which the defendants succeeded.

[8] Moreover, so far as the pre-trial phase is concerned:

- there is no reason to suppose that the defendants' burden of disclosure was increased by reason of claims on which the plaintiffs failed;
- there was no attempt by the defendants to demonstrate that they actually incurred additional expense in investigating, or in otherwise responding to, any of the plaintiffs' unsuccessful claims.

[9] There should, however, be some allowance, in the defendants' favour, for the probabilities that:

- The defendants sustained some (albeit modest, in all likelihood) additional expense in successfully resisting unsuccessful claims against them: e.g. in taking instructions, in pleading, and in considering pertinent law.
- the plaintiffs will have incurred some additional cost in prosecuting claims on which they failed: expense for which they should not be compensated[10].

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4 At 272.
5 (1991) 101 ALR 425.
6 At 430.
7 See also *Pipe Networks Pty Ltd v Commonwealth Superannuation Corporation* [2013] FCA 608, [11]-[16]; *Perochinsky v Kirschner (No 2)* [2013] NSWSC 837, [16]-[18].
8 *Giannarelli v Wraith* (1988) 165 CLR 543, 556; *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446, 448, 453-454.
9 Rules 42 and 57.
10 cf *Hughes v Western Australian Cricket Association Inc.* (1986) 19 FCR 10, [15].

[10] On the other hand, some pleaded defences were abandoned at trial. Presumably, the defendants incurred a little expense in pursuing them. There is no good reason to compensate the defendants for that[11]. And the plaintiffs probably will have incurred some additional expense in dealing with those contentions before abandonment: a consideration that supports compensating the plaintiffs on those issues, if that can fairly be achieved.

[11] In the circumstances, to award costs solely by reference to the parties' success on the several events litigated would produce an unjust outcome, overly compensating the defendants.

One, global assessment

[12] It would complicate the process of assessment unduly if costs were to be ordered other than:

- on a global[12] basis; and
- by way of a reduction in the costs allowed to the plaintiffs[13], to ensure that there is but one assessment.[14]

Disposition

[13] An appropriate balance is struck by awarding the plaintiffs 80% of their costs.

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11 cf *Superyacht Technologies Pty Ltd v Mackeddie Marine Pty Ltd (No 2)* [2013] QSC 11, [9].

12 *Tabtill Pty Ltd v Creswick* [2012] QCA 78, [9].

13 cf *Mio Art* at [5]; *Chen v Chan (No 2)* [2009] VSCA 233, [10].

14 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 QdR 156, 208-210; *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd* [2013] QSC 216, [10], [13]-[15].