SUPREME COURT OF QUEENSLAND

CITATION:	*McDermott & Ors v Robinson Helicopter Company (No 2)* [2014] QSC 213
PARTIES:	**GRAHAM JAMES McDERMOTT** (first plaintiff) **JUANITA CAROL McDERMOTT** (second plaintiff) **NTB PASTORAL HOLDINGS PTY LTD** (third plaintiff) **v** **ROBINSON HELICOPTER COMPANY** (first defendant)
FILE NO/S:	BS 4573 of 2007
DIVISION:	Trial Division
PROCEEDING:	Hearing
DELIVERED ON:	29 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2014
JUDGE:	Peter Lyons J
ORDER:	**1. The plaintiffs pay the defendant's costs of the hearings on 19 March 2014 and 25 March 2014, to be assessed on the standard basis.** **2. The plaintiffs otherwise pay 80 per cent of the defendant's costs of the action, to be assessed on the standard basis, including all other reserved costs.** **3. These orders are subject to orders already made in favour of any party.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF ISSUES – whether under r 681 of the *Uniform Civil Procedure Rules 1999* (Qld) the "event" is to be determined distributively by reference to issues and questions – where a helicopter accident was caused by the failure of the flexplate – where the plaintiffs claimed that the helicopter maintenance manual produced by the first defendant did not provide for the detection of loose bolts on the flexplate – where the defendant was ultimately successful at trial – where the defendant raised other issues to

support its contention the manual was adequate, on which it failed – where one of those issues relating to missing palnuts was not raised in the defence and had not been put to the plaintiffs' witnesses before the plaintiffs closed their case – where four to five days of the trial were taken up by this issue – where the trial was adjourned to give the plaintiffs time to investigate the missing palnut issue, with directions about further expert reports and amendments to the defence – whether the first defendant's costs should be decreased to 80 per cent

Civil Proceedings Act 2011 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld), r 681(1), r 684

AGL Sales (Qld) P/L v Dawson Sales P/L & Ors (No 2) [2009] QSC 75, cited
Alborn & Ors v Stephens & Ors [2010] QCA 58, considered
Allianz Australia Insurance Ltd v Swainson [2011] QCA 179, cited
Australand Corporation (Qld) Pty Ltd v Johnson & Ors [2007] QSC 128, considered
Australian Conservation Foundation v Forestry Commissioner Tasmania (1988) 81 ALR 166, considered
BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2) [2009] QSC 64, considered
Colburt v Beard [1992] 2 Qd R 67, considered
Cretazzo v Lombardi (1975) 13 SASR 4, distinguished
Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299, considered
Forster v Farquhar [1893] 1 QB 564, cited
Hughes v Western Australia Cricket Association (1986) ATPR 40-748; [1986] FCA 382, considered
Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, followed
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, distinguished
Reid Hewitt & Co v Joseph [1918] AC 717, considered
Sequel Drill & Blast P/L v Whitsunday Crushers P/L (No 2) [2009] QCA 239, followed
Tabtill Pty Ltd v Creswick; *Creswick v Creswick & Ors* [2012] QCA 78, considered
Thiess v TCN Channel 9 Pty Limited (No 5) [1994] 1 Qd R 156, considered
Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor [2007] QSC 386, considered
Waters v PC Henderson (Australia) Pty Ltd (1994) 254 ALR 328; [1994] NSWCA 338, considered
Wheeler v Riverside Coal Transport Co Pty Ltd and Others [1964] Qd R 113, considered

Windsurfing International Incorporated v Petit (1987) AIPC 90-441, considered
Yara Nipro P/L v Interfert Australia P/L [2010] QCA 164, considered

COUNSEL: M Eliadis for the plaintiffs
M Hickey for the first defendant

SOLICITORS: Shine Lawyers for the plaintiffs
CLS Lawyers for the first defendant

[1] On 17 March 2014, I published reasons for judgment, dealing with liability issues, in which I concluded that the claims of the plaintiffs failed (*March reasons*).[1] On 28 March 2014, I gave judgment dismissing the claims of the plaintiffs. The defendant has applied for its costs of the action on the standard basis. However, the plaintiffs seek to have the order for costs in favour of the defendant reduced to 80 per cent. Alternatively, they seek a number of specific orders, including some orders in their favour. The matter primarily raised in support of their application relates to what is described as the "missing palnut issue".

Background

[2] The March reasons contain much of the background relevant to the applications. However, it may be helpful here to make reference to some matters. The accident arose out of a helicopter crash, caused by the failure of a flexplate. The flexplate failed because the primary nut on one of the bolts (*Bolt 4*) securing the flexplate had not been adequately tightened at some time subsequent to the manufacture of the helicopter. In addition to the primary nut, such a bolt was ordinarily fitted with an additional nut, called a "palnut", described as a secondary locking mechanism. The flexplate was secured by four such bolts. Only one of them clearly had a palnut in place when the wreckage was inspected after the accident.

[3] The case conducted at trial by the plaintiffs was based on an allegation that the maintenance manual produced by the defendant did not make adequate provision for the detection of an inadequately secured, or torqued, primary nut on the bolts securing the flexplate. The defendant responded to this by alleging that the requirement for a torque stripe was sufficient to enable detection of movement of the bolt, and thus sufficient to provide warning of the bolt's looseness and to prevent the accident. A torque stripe is a strip of paint which extends across the nuts and the bolt shaft and on to the part being fastened. It was on this basis that the defendant succeeded on liability issues.

[4] However, the defendant raised a number of other issues in support of its contention that the maintenance manual was adequate to prevent the accident. Thus it contended that a loose bolt would rotate against the flexplate, producing fretting dust, which should have been detected in the course of inspection in accordance with the manual, thus preventing the accident. It contended that cracks in the flexplate as a result of the looseness of the bolt and its subsequent rotation would similarly have been detectable in the course of maintenance in accordance with the manual, and thus the accident would have been prevented. It made a similar

---

1 *McDermott & ors v Robinson Helicopter Company* [2014] QSC 34.

contention about the detection of the disbonding of a washer which, at manufacture, had been bonded to the flexplate in the location of Bolt 4. Ultimately, it also alleged that a cause of the accident was the failure of those who carried out maintenance (and the helicopter pilot) to detect the absence of one or more palnuts because the maintenance manual provided proper procedures to detect missing palnuts, and thus a lack of security at Bolt 4. The case advanced in evidence was that a palnut was missing from three of the four bolts which secured the flexplate, and not just from Bolt 4. The defendant failed on these issues.

[5] The defendant also relied upon the defences of voluntary assumption of risk and contributory negligence. It failed on each.

[6] The case was subject to extensive case management. The trial was scheduled to commence on 3 September 2012. It was intended that issues relating generally to liability would be heard and determined then; with, if necessary, a second stage of the hearing for the remaining issues (predominantly relating to quantum). Upon the defendant's application to adjourn the trial for one month, the commencement of the trial was deferred until 13 September 2012. The plaintiffs then called their evidence, and closed their case. In the course of the evidence-in-chief of the first witness for the defendant, Senior Counsel for the plaintiffs expressed concern about the attention being given to the missing palnut issue, and the leading of evidence about whether the palnuts were missing prior to the accident, which had not been put to the witnesses called in the plaintiffs' case.[2] The trial proceeded with other evidence. An application was later made for an adjournment to deal with the missing palnut issue. One of the points made at that time was that it had not been referred to in the defence.[3]

[7] One of the difficulties which had emerged with the conduct of the trial up to this point was that allegations made by the plaintiffs relating to the negligent manufacture and design of the helicopter had been dealt with in the expert reports, but had later been abandoned. The parties had not yet identified what parts of the expert reports remained relevant. Although there had been some discussion of the absence of palnuts in expert reports, it seemed to me that that occurred initially in relation to an allegation of negligent manufacture, a proposition accepted by Senior Counsel for the defendant.[4] It became clear by the end of the first stage of the trial that the defendant then intended to submit that even if the manual had included further directions relating to checking the torque of the bolt, the fact that the palnuts had been missing at the time when maintenance was carried out made it likely that such directions would not have been complied with.[5] Thus the absence of one or more palnuts was relevant to the question whether any inadequacy in the maintenance manual caused the loss claimed by the plaintiffs. Accordingly, I decided to adjourn the trial with directions about further expert reports and amendments to the defence.[6]

[8] The trial was then adjourned, resuming on 20 May 2013. In the lengthy period of the adjournment, substantial investigations were carried out on behalf of the plaintiffs directed to the missing palnut issue. A body of further evidence was

---

2 Transcript of stage one of the trial (*T*) 4-39, lines 26-28; 4-41, lines 31-58.
3 T 6-3 to 6-4.
4 T 6-12, lines 5-30.
5 T 6-32, lines 24-33.
6 T 6-43ff.

called in relation to this issue. Evidence on all remaining issues was given at the resumed hearing of the trial.

Submissions

[9] The defendant, in its initial written submissions, sought an order in its favour for the costs of the whole of the proceedings. That submission was based on r 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*). Initially it also sought to have an order for costs which had been made in favour of the plaintiffs on 18 July 2012 set off against the order that it have the costs of the proceedings; but subsequently accepted that this could appropriately be dealt with on a later occasion (presumably by the Registrar).

[10] The written submissions for the plaintiffs contended that the missing palnut issue was raised after the plaintiffs' case on liability had closed. They submitted that that gave rise to a concern that a positive case was being advanced that the palnuts were missing prior to the accident, and probably at the time of earlier maintenance work; and that that case was advanced upon expert evidence which had not previously been revealed to the plaintiffs. The resulting difficulty took up substantial time on the fifth, sixth and seventh days of the trial, the sixth day being devoted entirely to those difficulties. Directions were made on the seventh day of the trial, as to the pleading of the missing palnuts issue, and evidence about it. When the trial resumed on 20 May 2013, a substantial amount of time was devoted solely to that issue. In total some four to five days of the trial (out of a total of 22 days) related to it. It also became "a focal point of the case", and was dealt with extensively in the submissions of the parties. The defendant had failed on this issue. Reliance was placed on rr 681 and 684 of the UCPR. It was submitted that the issue was definable and severable; it occupied a significant part of the trial; and it generated significant costs which would not have been otherwise incurred. Moreover, the making of an order in favour of the plaintiffs on this issue was supported by its success on the other liability issues, save for those related to the torque stripe.

[11] The oral submissions for the plaintiffs accepted that the defendant was entitled to a general order for the costs of the proceedings, no doubt subject to an order to reflect their success on the palnut issue. Reliance was placed on a statement in *Thiess v TCN Channel 9 Pty Limited (No 5)*[7] to the effect that under the equivalent rules found in the *Rules of the Supreme Court* (Qld) (*RSC*) in force prior to the UCPR, there is "a predilection in favour of distributing costs according to the outcome or 'event' of particular issues in the action".

[12] The written submissions for the defendant took issue with the proposition that the missing palnut issue was first raised after the plaintiffs had closed their case on liability issues. It was submitted that, in any event, it was not appropriate to deprive the defendant of any part of its costs, it being unusual to do so where a defendant has been successful in the outcome, the judgment being in its favour. This was not an unusual case, it being reasonable for the defendant to have advanced the missing palnut issue (no doubt as well the other matters in respect of which it was unsuccessful). The order for costs which it sought was again submitted to be supported by r 681. The defendant further submitted that there was no basis for making an order in favour of the plaintiffs in respect of the adjournment of the

---

7 [1994] 1 Qd R 156 (*Thiess*), 208.

commencement of the trial, from 3 September 2012. Nor had any basis been shown for making an order in their favour in respect of the adjournment ordered on 21 September 2012.

Statutory background

[13] The jurisdiction to award costs is statutory.[8] The statutory source of the power would currently appear to be s 15 of the *Civil Proceedings Act* 2011 (Qld), which is as follows:

> "**15 Power to award costs**
> A court may award costs in all proceedings unless otherwise provided."

[14] Section 85(1)(d) of the *Supreme Court of Queensland Act* 1991 (Qld) gives the Governor in Council power to make rules of court for any law giving jurisdiction to the Supreme Court, District Court or Magistrates Courts. This would appear to authorise the rules in the UCPR which have been relied on in the submissions of the parties. Those rules are as follows:

> "**681 General rule about costs**
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
> (2) Subrule (1) applies unless these rules provide otherwise.
>
> …
>
> **684 Costs of question or part of proceeding**
> (1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
> (2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."

[15] I would also note r 682(1)(b), which provides that the costs a court may award "must be decided in accordance with this chapter". Rules 681 and 684 are found in the same chapter as r 682.

Effect of the rules

[16] The written submissions for the defendant are to the effect that the event to which r 681(1) refers is the outcome of the proceedings; in this case, judgment in favour of the defendant. They are also based on the proposition that ordinarily a successful defendant will be awarded the whole of its costs of the proceeding. Both propositions require examination in light of the rules, and relevant authorities.

---

[8] See *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [63] per McHugh J.

[17] Since some of the authorities are based on rules found in Order 91 the RSC, it is convenient to set them out.[9] They are as follows:

> "**Costs to be in the discretion of the Court**
> **1. (1)** Subject to the provisions of the *Judicature Act 1876* and these rules, the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge.
> **…**
>
> **(3)** In addition, subject to rule 2, when any cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such cause, matter, or issue is tried, or the Court, shall for good cause otherwise order.
> **…**
>
> **Costs of issues to follow event**
> **3.(1)** When several issues, whether of fact or law, are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

[18] Rule 363 of the *District Court Rules* (1968) (Qld)[10] used language similar to that in the RSC, and in particular provided that in default of an order otherwise, costs "shall abide the event". It is unnecessary to set out this rule more fully.

[19] Rule 363 was considered by the Full Court in *Colburt v Beard*.[11] Thomas J (as he then was) sought to identify "the event" for the purpose of both the District Court Rules and the RSC. After a review of the authorities, his Honour summarised the view of Bowen LJ in *Forster v Farquhar*[12] as being that the discretion permitted the court to identify "heads of controversy as units of the litigation" and to make specific orders in relation to those heads. His Honour preferred to describe these as "identifiable parts of the litigation".[13] His Honour accepted the submission that the District Court had erred in awarding the whole of the costs of the proceedings to a successful plaintiff when the effect of the rules was that individual events should have been identified, and costs awarded to the party successful on each event.[14] His Honour expressed the view that the same approach should be taken to the meaning of "event" for the District Court Rules, and O 91 rr 1 and 3 of the RSC.[15]

[20] In the same case, Ryan J noted that the language of the District Court rule appeared to be derived from O 91 rr 1 and 3. He then cited passages from the judgment of Lord Finlay LC in *Reid Hewitt & Co v Joseph*[16] (Thomas J had also referred to this judgment). There, Lord Finlay had adopted a passage from the judgment of

---

9 Using the numbering reflected in Reprint 1D, the last reprint before their repeal.
10 Using the numbering reflected in Reprint 2C, the last reprint before their repeal.
11 [1992] 2 Qd R 67 (*Colburt*).
12 [1893] 1 QB 564 (*Forster*), 569-570, cited in *Colburt* at 70.
13 *Colburt* at 70.
14 Ibid at 71.
15 Ibid.
16 [1918] AC 717 (*Reid*); cited in *Colburt* at 74.

Thesiger LJ in *Myers v Defries*,[17] as relevant to the meaning of the expression, "costs shall follow the event". That passage was as follows:[18]

> "The 'event' of an action is complex, and the word (as used in the relevant rule) may be read *distributively* … and, in my opinion, the general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them." (*emphasis added*)

[21] Ryan J then cited the further statement of Lord Finlay[19] as follows:[20]

> "The authorities are all one way. They all decide that the words 'the costs shall follow the event' mean that the costs are to be distributed according to the results of the several issues, while the party who is successful on the whole gets the general costs."

[22] His Honour applied these propositions in the determination of the appeal. McKenzie J, the third member of the court, agreed with the reasons of the other two members.[21]

[23] Earlier, in *Wheeler v Riverside Coal Transport Co Pty Ltd and Others*[22] Wanstall J (as he then was) had applied O 91 r 1 to award costs distributively, by reference to success on issues. His Honour's approach was upheld on appeal.[23]

[24] *Thiess* was an appeal against an order that the defendant pay two-thirds of the costs of the plaintiff who had been successful in the action. There had been a jury trial, so that the relevant provision was O 91 r 1. Accordingly it was necessary for the court to consider the meaning of the expression, "the costs shall follow the event"; as well as the discretion of a judge to "otherwise order". The Court adopted the views of Lord Finlay in *Reid.*[24] It also expressed approval for the view of Thomas J in *Colburt* to the effect that an event may be identified as a head of controversy, or a unit of litigation, for the purpose of making orders for costs.[25] The Court also made the following statement (relied upon by the plaintiffs in the present case):[26]

> "… there is evident in the rules a predilection in favour of distributing costs according to the outcome or 'event' of particular issues in the action".

[25] This analysis was adopted by the Court, which set aside the decision of the primary judge, and ordered the plaintiff to pay one-third of the defendant's costs of the action, by reason of extent of the success of the defendant on "discrete areas of dispute" or "units of litigation".[27]

---

17 (1880) 5 Ex.D. 180.
18 *Reid* at 728.
19 Ibid at 733.
20 *Colburt* at 74.
21 Ibid at 75.
22 [1964] Qd R 113; see at 116-117.
23 Ibid at 123, 125.
24 *Thiess* at 207.
25 Ibid at 208.
26 Ibid.
27 Ibid at 208-209.

[26] The Court of Appeal in *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No 3)*[28] had to consider the effect of r 681(1) (then numbered as r 689(1)). The fourth defendant, a valuer employed by the third defendant, had been sued for carrying out a negligent valuation. The claim against him was dismissed; but an order was made that there be no order with respect to his costs. He appealed against that order, and sought an order that the plaintiff pay his costs of the action. McPherson JA again referred to the judgment of Lord Finlay LC in *Reid* with respect to the provision in the rule that costs "follow the event"; and noted that in *Reid*, the order made on appeal was that the defendants should have the costs of the issue on which they succeeded.[29] His Honour also referred, with apparent approval, to the discussion of Thomas J in *Colburt.*[30] His Honour then stated:[31]

> "These authorities show that the structure and language of the new r. 689(1) has not introduced any marked change in the practice governing awards of costs in Queensland."

[27] His Honour then continued:[32]

> "Costs … follow the 'event' which, when read distributively, means the events or issues, if more than one, arising in the proceedings unless the court makes some other order that is considered 'more appropriate'."

[28] His Honour then observed that it was not inevitable that the costs of separate issues must be determined. He continued:[33]

> "Rule 681(1) may fairly be regarded as producing the same result as prevailed before it came into force, although it now does so in somewhat different language and is structured in a slightly different way … and it ought not to be assumed that … a fundamental change in the practice of awarding costs was intended."

[29] The fourth defendant having been unsuccessful on all issues save one, his Honour held that the fourth defendant's appeal in respect of the costs order should be dismissed. The other members of the Court agreed with the reasons of McPherson JA in respect of the fourth defendant's appeal.[34]

[30] It appears to me to follow from the decision of the Court in *Interchase* and by reference to the language of rr 681 and 684, that, under the current rules, events in an action are to be identified by reference to individual issues or questions in the action, and the event is not simply the result or outcome of the action;[35] and, at least by implication, that the predilection for making orders for costs by reference to success on individual events within the action remains. In that case, no ground for

---

28 [2003] 1 Qd R 26 (*Interchase*).
29 Ibid at [83].
30 Ibid.
31 Ibid at [84].
32 Ibid.
33 Ibid.
34 Ibid at [7]-[8]; [93].
35 Ibid, in particular at [83].

depriving the fourth defendant, successful in the action, of his costs, other than his failure on a number of issues, was identified.

[31] I have not been able to find any case in which the Court of Appeal has expressly rejected the propositions from *Thiess* referred to earlier in these reasons. *Interchase* has on occasion been cited with apparent approval.[36] There are also cases at appellate level where a successful party has not been awarded its costs in full, by reason of the fact that it did not succeed on all issues, without further discussion of principle.[37]

[32] The predilection in favour of distributing costs according to individual events within the proceeding, identified in *Thiess*, has not, however, been universally adopted. In *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors*,[38] Chesterman J was not prepared to endorse that approach, in favour of a plaintiff against the defendant who had ultimate success in the action.[39] His Honour referred to the statement by McHugh J in *Oshlack v Richmond River Council*,[40] to the effect that a successful litigant is entitled to its costs, the primary purpose of the rule being to indemnify the successful party in the litigation. Chesterman J also referred to the cases discussed by Einstein J in *Mobile Innovations Ltd v Vodaphone Pacific Ltd*,[41] said to show that the making of an order that a successful party pay costs "is a course to be taken in unusual cases and with a degree of hesitancy".[42] His Honour also referred to the decision of Burchett J in *Australian Conservation Foundation v Forestry Commissioner Tasmania*,[43] quoting the following passage from that judgment:[44]

> "A party against whom an unsustainable claim is prosecuted is not to be forced, at his peril in respect of costs, to abandon every defence he is not sure of maintaining, and to oppose to his adversary only the barrier of one hopeful argument: he is entitled to raise his earthworks at every reasonable point along the path of assault."

[33] However, Chesterman J did not regard the matter in respect of which the plaintiff sought an order for costs to be an "event" for the purpose of the rule.[45]

[34] In *Australand Corporation (Qld) Pty Ltd v Johnson & Ors*[46] Philip McMurdo J cited *Emanuel* as supporting the following proposition:[47]

---

36 *Alborn & Ors v Stephens & Ors* [2010] QCA 58 at [8]; *Sequel Drill & Blast P/L v Whitsunday Crushers P/L (No 2)* [2009] QCA 239 at [4]; *Hamcor Pty Ltd & Anor v Marsh Pty Ltd & Anor* [2013] QCA 395 at [13]; *Queensland Building Services Authority v J M Kelly (Project Builders) Pty Ltd* [2013] QCA 336 at [3].

37 See for example *Daley v D A Manufacturing Co P/L & Anor* [2003] QCA 331; *Pertzel v Qld Paulownia Forests Ltd & Anor* [2008] QCA 344.

38 [2003] QSC 299 (*Emanuel*).

39 Ibid at [85]-[88].

40 (1998) 193 CLR 72 (*Oshlack*), 97, cited in *Emanuel* at [85].

41 (2003) NSWSC 423 at para 4.

42 See *Emanuel* at [85].

43 (1988) 81 ALR 166 (*Australian Conservation Foundation*).

44 Ibid at 169; see *Emanuel* at [86].

45 *Emanuel* at [87].

46 [2007] QSC 128 (*Australand*).

47 Ibid at [17].

> "… 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."

[35] That was the basis on which his Honour made the relevant costs orders.[48]

[36] Subsequently, in *Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor*,[49] Chesterman J discussed cases where a plaintiff, who was ultimately successful in the action, did not recover all of its costs, by reason of rules which provided that the cost of individual issues should "follow the event". His Honour observed that the language used in the UCPR had been deliberately chosen to confer a wider discretion than earlier rules, under which orders could be made only in respect of issues.[50] However, his Honour expressed a reluctance to apply this approach against a successful defendant, who has been unsuccessful on some matters raised by its defence.[51] In *Todrell*, Chesterman J concluded that the case was exceptional, warranting an order in favour of the plaintiffs on an issue on which they were successful.[52]

[37] In *BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2)*[53] Philip McMurdo J took an approach similar to his approach in *Australand*.[54] His Honour first referred to r 684, and concluded that the general rule "remains that costs should follow the event and r 684 provides an exception".[55] His Honour went on to say (in a case in which the defendants, unsuccessful in the action, nevertheless sought an order in their favour in respect of certain aspects of the case) that the circumstances which would engage r 684 (and accordingly in which an order could be made against a party which had succeeded in the result, but not on all issues) "are exceptional circumstances".[56] His Honour also referred to the judgment of McHugh J in *Oshlack*; and to the passage from *Todrell* in which Chesterman J had said that the making of an order to deprive the successful party of costs, or ordering the successful party to pay costs, "is a course to be taken in unusual cases and with a degree of hesitancy".[57] Nevertheless, his Honour ultimately considered that notwithstanding his statement about the ordinary case, it might 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".[58] His Honour took a similar approach in *AGL Sales (Qld) P/L v Dawson Sales P/L & Ors (No 2)*.[59]

[38] In *Yara Nipro P/L v Interfert Australia P/L*,[60] the Court of Appeal adopted the proposition that ordinarily, a successful party is not denied its costs because it has succeeded on one argument and not on an alternative case, citing *Australand*,

---

48 Ibid at [19].
49 [2007] QSC 386 (*Todrell*).
50 Ibid at [13].
51 Ibid at [18]-[23].
52 Ibid at [23]-[24].
53 [2009] QSC 64 (*BHP Coal*).
54 Ibid at [7]-[8].
55 Ibid at [6]-[7].
56 Ibid at [7].
57 *Todrell* at [21]; *BHP Coal* at [7]-[8].
58 *BHP Coal* at [8].
59 [2009] QSC 75 at [15].
60 [2010] QCA 164 (*Yara Nipro*) at [8].

Todrell and *BHP Coal*. *Yara Nipro* was itself applied by the Court of Appeal in *Tabtill Pty Ltd v Creswick*; *Creswick v Creswick & Ors.*[61] In the latter case, the relative success of the party which had failed at trial was said to be recognised by the fact that the award of costs against it was on the standard basis, not the indemnity basis.[62]

[39] In *Alborn & Ors v Stephens & Ors*[63] Muir JA (with whose reasons the other members of the Court agreed) said:[64]

> "[7] The usual rule is that costs of a proceeding follow the event.
>
> [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'. However a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs." (citations omitted)

[40] If these passages were intended to express the propositions that costs usually follow the event, an event being an issue in a proceeding; and a party which has been successful in the result, but not on all events, is not normally deprived of any of its costs, I would respectfully find it difficult to reconcile them.

[41] In *Sequel Drill & Blast P/L v Whitsunday Crushers P/L (No 2)*[65] the Court referred to the judgment of McHugh J in *Oshlack* as supporting the general principle under which a successful appellant is usually given costs in its favour, and then stated:[66]

> "The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the court considers that some other order is more appropriate: see *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at [84], per McPherson JA."

[42] On that basis, the Court reduced the order for costs in favour of the successful appellant by 50 per cent.[67] The Court was constituted by the Chief Justice, Fraser JA and Chesterman JA. *Sequel Drill* was cited with apparent approval in *Allianz Australia Insurance Ltd v Swainson.*[68]

[43] In my respectful opinion, the view taken in *Sequel Drill* reflects the language of the rules, and in particular r 681. That language is important, not only as a matter of principle, but in particular because of r 682. *Sequel Drill* is consistent with the

---

61 [2012] QCA 78 at [6].
62 Ibid at [10].
63 [2010] QCA 58.
64 Ibid at [7]-[8].
65 [2009] QCA 239 (*Sequel Drill*).
66 Ibid at [4].
67 Ibid at [7].
68 [2011] QCA 179 at [5].

views taken in *Interchase* and *Thiess*. It therefore seems to me to state the correct approach to the application of the rules relating to costs.

[44] McHugh J's judgment in *Oshlack* has been referred to in a number of contexts, including in support of the proposition that the party enjoying ultimate success in the action ordinarily will be awarded its costs in full. However, *Oshlack* was not concerned with the question whether costs should be awarded in a way which reflects the partial success of each party in a proceeding. The question in that case was whether a defendant who had been wholly successful in the proceedings should be deprived of an order for costs, in litigation which was described as "public interest litigation". In *Sequel Drill*, the Court of Appeal indicated that the view expressed by McHugh J could be applied to "separate events or issues" where a party has had success on some but not all of these.[69] It therefore seems to me that the defendant's reliance on *Oshlack* as an answer to the plaintiffs' submissions is misplaced.

[45] It is convenient at this point to make brief mention of the approach taken in New South Wales to awarding costs to the party successful in the result, where that party is unsuccessful on some issues. For many years, the relevant rules in that State have been expressed in language which is to the same effect as the rules in Queensland. At one point there was a view that the costs of the proceedings should follow the verdicts on the issues.[70] However, in a later influential decision of Waddell J in *Windsurfing International Incorporated v Petit*,[71] his Honour said that in recent years the approach had been that a successful party should have the whole cost of the proceeding, including the costs of an issue on which it has failed, unless in respect of that issue the successful party has "unfairly, improperly, or unnecessarily increased the costs".[72] Waddell J also said:

> "It is, I think, probably generally accepted that the words 'follow the event' refer to the event of the claim or counterclaim".[73]

[46] Another influential decision in that jurisdiction is the decision in *Waters v PC Henderson (Australia) Pty Ltd*.[74] There, Mahoney JA (with whose reasons Kirby P agreed) adopted a note, apparently from *Ritchie's Supreme Court Procedure New South Wales*[75] which included the following proposition:[76]

> "… unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed."

---

69 *Sequel Drill* at [3]-[4].

70 See *Keith Bray Pty Ltd v Hamburg-Amerikanische & ors* [1970] 3 NSWR 226, 227-228; see also *Armstrong v Landmark Corporation Ltd* [1967] 1 NSWR 13 at 15-16, where Street J deprived an otherwise successful plaintiff of the cost of one day of the hearing; both cited in G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) (*Dal Pont*) at [8.4].

71 (1987) AIPC 90-441 (*Windsurfing International*); cited in *Australian Receivables Ltd v Tekitu Pty Ltd & Ors* [2011] NSWSC 1425 (*Australian Receivables*).

72 See *Australian Receivables* at [54].

73 In *Windsurfing International* at pp 37,861 – 37,862, quoted in *Australian Receivables* at [54].

74 (1994) 254 ALR 328 (*Waters*).

75 See the online discontinued service at [52A.11.2].

76 *Waters* at 330-331.

[47] More recently *Waters* was said to be authority for the following proposition:[77]

> "Where there are multiple issues in a case the Court generally does not attempt to differentiate between the issues on which a party was successful and those on which it failed. Unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed."

[48] In that State, it has also been held appropriate to reduce the costs of the party enjoying ultimate success, but unsuccessful on some matters, where the matters upon which that party was unsuccessful took up a significant part of the trial, either by way of evidence or argument;[78] or where a successful party on the appeal was unsuccessful on a separate issue which increased the time taken in hearing the appeal.[79]

[49] Also influential in New South Wales has been the decision of Toohey J in *Hughes v Western Australia Cricket Association*,[80] where his Honour said:

> "It seems to me that the only basis on which it would be appropriate to depart from the general rule that *costs follow the event*, by reason of the circumstance that the appellant lost what might be regarded as the dominant issue, is that the judgment is made that, had that issue been excluded then, although the dominant issue was not clearly separable, the costs incurred on the appeal would be likely to have been substantially less …" (*emphasis added*).

[50] Although the circumstances in which a successful party might not be awarded all of its costs (or, indeed, might be ordered to pay some cost to the other party) have been extended from those identified by Mahoney JA in *Waters*, nevertheless the predilection in that State would appear to be to award to the party which is successful in the result, the whole of its costs.

[51] There are statements in some of the cases to the effect that a defendant, successful in the result but unsuccessful on some issues, is to be treated more favourably than a plaintiff who achieves a similar outcome.[81] The basis for this view appears to be that a defendant has little choice, short of settlement, but to defend the plaintiff's claim.[82] The validity of taking a different approach seems to me to be open to question. A plaintiff who is successful in the result, though unsuccessful on some issues, has, *ex hypothesi*, established that the defendant has committed a legal wrong against it. Presumably it could get no remedy, save by litigation. It is not

---

77 See *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 (*Bostik*) at [38]; itself cited in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [22].

78 See *Sabah Yazgi v Permanent Custodians Ltd (No 2)* [2007] NSWCA 306 at [24], cited in *Bostik* at [38].

79 *Sydney City Council v Geftlick & Ors (No 2)* [2006] NSWCA 374 at [27].

80 (1986) ATPR 40-748 (*Hughes*); cited in *Australian Receivables* at [57]; and in *James v Surf Road Nominees (No 2)* [2005] NSWCA 296 at [22].

81 Some of the cases are identified in *Dal Pont* at [8.9], with respect to depriving the successful party of its costs; and [8.64], with respect to making an order for costs against the successful party.

82 See *Dal Pont* at [8.9] and [8.64].

self-evident that, as a matter of principle, such a party should be treated differently on the question of costs from a successful defendant, who was unsuccessful on some issues.[83]

[52] If the correct approach under the UCPR is that there is a predilection to award costs by reference to success on separate issues or question, then it seems to be that an exception in favour of defendants, however formulated, would be inconsistent with this approach. It appears not to have been recognised in cases which take that view of the rules. Nevertheless, at least in other jurisdictions, there is a clear preponderance of judicial statements in favour of it.[84]

[53] Reference should also be made to the passage from the judgment of Burchett J in *Australian Conservation Foundation*,[85] cited earlier in these reasons, dealing with the position of a successful defendant.

[54] To somewhat similar effect, though not limited to the position of a defendant, is the statement of Jacobs J in *Cretazzo v Lombardi*:[86]

> "The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case… I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues."

[55] The passage has been referred to on a number of occasions (although the citation has not always been correct).[87] It might however be noted that his Honour was careful to point out that the case involved the exercise of the "general discretion" of the court to award costs, being careful to distinguish *Forster* as a case involving a rule that costs are to follow the event unless the judge for good reason otherwise orders.

[56] The rationale for this approach is not difficult to understand. However, the statement of Jacobs J was not intended to represent the application of rules such as r 681. While in a particular case, the desirability of not discouraging a party from advancing a reasonably arguable, though ultimately unsuccessful, issue may be influential, it seems to me that it cannot ordinarily determine the order for costs that should be made.

The present case

---

83 See *Byrns & Anor v Davie & Ors* [1991] 2 VR 568, 569 (discussed in *Dal Pont* at [8.9]); *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd & Anor (No. 5)* (2010) 87 IPR 234 at [44]; *HP Mercantile Pty Ltd v Dierickx & ors (No. 2)* [2012] NSWSC 1430 at [17]-[21].

84 See the passages from *Dal Pont* referred to earlier.

85 At 169, cited for example in *Emanuel* at [86].

86 (1975) 13 SASR 4 at 16.

87 See *Hughes* at 48,136; [1986] FCA 382 at [10]; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* [1993] FCA 259 at [28]; (1993) 26 IPR 261, 271; *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 423 at [4]; *Waterman v Gerling (Costs)* [2005] NSWSC 1111 at [10]; *Australian Receivables* at [59]; *HP Mercantile Pty Ltd v Dierickx & ors (No. 2)* [2012] NSWSC 1430 at [26].

[57] The plaintiffs were successful on the palnut issue. On the basis of the view to which I have come about the effect of r 681, it would follow that they should have the costs of that issue, unless reason were shown to order otherwise.

[58] In the present case, even if it is incorrect to conclude that the relevant rules display a predilection for awarding costs by reference to the success on particular issues or questions, there are nevertheless reasons for making an award which reflects the success of the plaintiffs on this issue. Unlike the other matters on which the defendant relied in support of the adequacy of the maintenance manual, the palnut issue was not pleaded until after the first stage of the trial. Even then it was raised in a way not ultimately reflected in its amended pleading. The allegations did not squarely match the position of the defendant that emerged towards the end of the first stage of the hearing. Moreover, relatively extensive case management had involved the exchange of expert reports, and conferences between experts in which they were able to discuss their views, and identify matters on which they agreed and disagreed. The raising of the palnut issue in relation to the alleged inadequacy of the maintenance manual, during the first stage of the trial, meant that this process was not followed in respect of this issue. It also meant that additional reports had to be prepared on behalf of each side, which no doubt had to be considered by the experts of the opposing side; and the reports from both sides would have had to be considered by the legal advisers for both parties. I would also infer that additional conferences became necessary. While some of this work would have been necessary had the issue been raised earlier, it seems to me that it is likely that it was carried out far less efficiently, and at substantially greater expense, than would have been the case if the issue had been raised well before the commencement of the first stage of the hearing.

[59] Accordingly, on this approach it seems to me the order for costs should recognise the success of the plaintiffs on this issue. The fact that the plaintiffs were successful on many other issues, in respect of which they do not seek any adjustment of a costs order in their favour, it seems to me, gives sufficient recognition to the principle that a successful party should not ordinarily suffer any penalty in costs in respect of an issue which it has reasonably, but unsuccessfully, advanced.

[60] Orders could be made awarding the plaintiffs the costs of the palnut issue, and otherwise awarding the defendant the costs of the action. That would increase the cost, and complexity, of the taxation, sometimes said to be a reason for not depriving the party which was successful in the action of any of its costs. Nor is that the approach for which the plaintiffs primarily contend. Accordingly I do not propose to adopt it.

[61] It has been said that if an adjustment is to be made to reflect the relative success of each party, it should be "based largely on impression".[88] It seems to me that, bearing in mind the time taken up at the trial, and the likely costs by way of preparation, associated with the palnuts issue, the plaintiffs' submission that the defendant should recover only 80 per cent of its costs of the action is not unreasonable; and may, perhaps, err in favour of the defendant rather than the plaintiffs. Although this would not be a direct application of the principle in r 681

---

88 *Beagle Holdings Pty Ltd v Equus Financial Services Ltd* [2000] WASC 128 at [32], cited in *Dal Pont* at [8.7].

that costs follow the event, it achieves a result which has some consistency with it. Accordingly I propose to make an order that effect.

Conclusion

[62] I propose to order that the plaintiffs pay to the first defendant 80 per cent of its costs of the proceedings, to be assessed on the standard basis.