SUPREME COURT OF QUEENSLAND

CITATION:	*BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors (No 2)* [2015] QSC 228
PARTIES:	**BRB MODULAR PTY LTD** ACN 114 678 349 (applicant) **v** **AWX CONSTRUCTIONS PTY LTD** ABN 118 400 098 (first respondent) **THE ADJUDICATION REGISTRAR (QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION)** (second respondent) **JORAM (JOHN) MURRAY** (third respondent)
FILE NO/S:	SC No 7073 of 2015
DIVISION:	Trial Division
PROCEEDING:	Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers; written submissions received 5 August 2015
JUDGE:	Applegarth J
ORDER:	**The first respondent pay one half of the applicant's costs of and incidental to the hearing before Bond J on 22 July 2015 to be assessed on the standard basis unless otherwise agreed.**
CATCHWORDS:	PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – COSTS RESERVED – where the applicant succeeded in obtaining an interlocutory injunction – where the costs of the interlocutory application were reserved – where the originating application was subsequently dismissed and a costs order made in the first respondent's favour, excluding the reserved costs – where the parties agree that the general principle that costs follow the event applies – whether the

	"event" is the granting of the interlocutory application or the dismissal of the substantive proceeding – what order should be made as to the reserved costs
	Uniform Civil Procedure Rules 1999 (Qld) r 681(1)
	BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors [2015] QSC 218, cited *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 222, cited
COUNSEL:	P R Franco QC for the applicant D P O'Brien QC for the first respondent
SOLICITORS:	Holding Redlich for the applicant McInnes Wilson Lawyers for the first respondent

[1] On 31 July 2015, I dismissed BRB's originating application and ordered that it pay AWX's costs of and incidental to the proceedings, other than the reserved costs of the hearing of BRB's application for an interlocutory injunction.[1] Those costs were reserved by Bond J.[2] Each party seeks them, and invokes the general principle, reflected in r 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld), that costs follow the event, unless the court orders otherwise.

[2] BRB argues that it should have a costs order made in its favour in respect of its application for an interlocutory injunction, which was the subject of a contested hearing before Bond J on 22 July 2015. It succeeded in persuading Bond J that the balance of convenience favoured the granting an injunction on terms. According to BRB, the costs should follow the event of its success in obtaining a restraint on AWX from doing certain things, including asking the adjudicator to provide an adjudication certificate and from filing it.

[3] AWX takes a different view of the relevant "event". It identifies the event as the disposition of the substantive proceeding, not the application for interlocutory relief, and submits that BRB should be required to pay its costs of the interlocutory injunction unless it discharges the onus of showing that a different order should be made.

[4] It is unnecessary to recite the various arguments that were made to Bond J. AWX was prepared, for the purpose of the interlocutory application only, to concede that BRB had established a prima facie case, as that term is used in the context of interlocutory injunctions. The hearing before Bond J was a protracted one, and issues were raised about the worth of the usual undertaking as to damages proffered by BRB. Bond J had some concern about this in the absence of evidence. Ultimately, that concern and the concern

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1 *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218.

2 *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 222.

that AWX might not get paid its money if ultimately it succeeded, was addressed at the conclusion of the argument when BRB offered a bank guarantee for $4 million.

[5] BRB sought the restraint and argued that there was a risk that AWX would be unable to repay the adjudicated amount if BRB succeeded on the originating application. Bond J did not consider that there was a high risk. His Honour considered a variety of matters relating to the balance of convenience and a significant matter, which occupied a substantial amount of time before him, was arguments about the policy of the Act. Bond J declined to adopt the approach taken in some earlier decisions and one reason for doing so was AWX's concession for the purpose of the application only that there was a prima facie case that the adjudication determination was void for jurisdictional error.

[6] Ultimately, Bond J was required to decide which course carried the lower risk of injustice. The primary considerations which influenced his decision to grant an injunction were:

1. that the matter could be heard in the Civil List within the week and did not involve any significant factual disputes; and
2. the certainty provided by the bank guarantee, as opposed to the uncertainty and attendant risks involved in leaving BRB in a position where it might have to sue for the return of any moneys it was required to pay over.

[7] The fact that Bond J reserved costs should not be taken as indicating that the costs which he reserved should follow the outcome of the substantive application. If he had reached that view, after hearing argument on costs, then he would have ordered that the costs of the interlocutory application be costs in the proceeding. Instead, Bond J was not invited to do anything other than reserve costs at the end of a lengthy hearing which went beyond normal court hours.

[8] I do not accept AWX's contention that the relevant "event" which governs the reserved costs is the final disposition of the substantive proceeding. Instead, the relevant event should be viewed as the disposition of BRB's separate application for interlocutory injunctive relief. The fact that AWX went on to win the war after losing that interlocutory battle cannot be ignored. However, it cannot be decisive. Successful parties in interlocutory applications are routinely awarded their costs, notwithstanding that they may, and often do, go on to lose the main case.

[9] The assessment made on 22 July 2015 about the balance of convenience was not falsified at the later hearing on 28 July 2015. No occasion arose to revisit the issue of the balance of convenience. Instead, a matter which Bond J was not called upon to assess, namely the strength of BRB's case about jurisdictional error, was assessed and its case was found to be wanting. The fact that, as matters transpired, BRB was found not to have the case it was assumed on 22 July 2015 to have, does not mean that it was not successful on 22 July 2015. It does not mean that its success that day was erroneously secured. Instead, an assumption was made for the purpose of the interlocutory application, namely that BRB had a prima facie case. The determination at the final hearing, after argument about the merits of BRB's case, that jurisdictional error had not been established, does not alter the success it had at the interlocutory stage.

[10] BRB was successful in establishing that the balance of convenience was in favour of granting an interlocutory injunction restraining AWX from doing certain things for six days. BRB was successful in obtaining an interlocutory injunction for that period and its success in that regard would ordinarily be reflected in an order that the unsuccessful party pay its costs of and incidental to the application for interlocutory relief unless there was good reason to do otherwise.

[11] The fact that AWX succeeded in the substantial application is not a sufficient reason. Nor is the fact that on the interlocutory application BRB failed to establish that the risk of not being able to recover any sum paid by it was as high as it contended.

[12] A relevant factor, pointed to by AWX, is that BRB only obtained the interlocutory injunction after proffering, late in the day, a bank guarantee which alleviated certain concerns of Bond J.

[13] In addition, AWX acted reasonably in opposing the application for an interlocutory injunction leading up to the hearing. It reasonably sought identification of the alleged jurisdictional error and until the eve of the hearing was concerned that it might be restrained for a lengthy period. The prospect of an early final hearing was not raised by BRB's lawyers until around 3:40 pm on the day before the interlocutory hearing and only after AWX filed material which confirmed that it was a profitable and solvent company.

[14] AWX also acted reasonably in relying upon earlier decisions about the policy of the Act and the role which it plays in the disposition of applications for interlocutory injunctions.

[15] AWX's concession that a serious question was raised about jurisdictional error was reasonable and avoided prolonging an otherwise lengthy interlocutory hearing.

[16] The fact that a party has acted reasonably in resisting an application and has reasonable arguments at its disposal is not ordinarily sufficient to displace the general rule that costs follow the event.

[17] It is appropriate to have regard to the primary considerations which influenced Bond J to conclude that the balance of convenience favoured the granting of an injunction. The first was that the matter could be the subject of an early final hearing. That issue did not emerge until the eve of the hearing. The second matter was the certainty provided by the bank guarantee which was proffered late in the day. Without the offer of a bank guarantee, the application may have been determined differently.

[18] Ultimately, having regard to the course of the interlocutory application, the reasonableness of AWX's resistance to it, the primary considerations which led Bond J to grant an injunction and BRB's success in obtaining such an injunction on terms, I consider that the appropriate order is that AWX should pay one half of the applicant's costs of and incidental to the hearing before Bond J on 22 July 2015.

[19] The determination of those costs, absent agreement of the parties, is a matter for assessment. In my view, they should not include the substantial costs of preparing and

filing the voluminous material which was required for the purpose of the substantive application about jurisdictional error. That material had to be filed in any event and AWX conceded that there was a prima facie case for the purpose of the interlocutory application. The costs of and incidental to the hearing before Bond J on 22 July 2015 would include affidavit material which related to the balance of convenience. I would encourage the parties to attempt to agree the quantum of BRB's costs of and incidental to the contested hearing before Bond J on 22 July 2015, as well as the costs which I ordered BRB to pay on 31 July 2015.

[20] The additional order for costs will be:

> "The first respondent pay one half of the applicant's costs of and incidental to the hearing before Bond J on 22 July 2015 to be assessed on the standard basis unless otherwise agreed."