

SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Building Services Authority v J M Kelly (Project Builders) Pty Ltd* [2013] QCA 336

PARTIES: **QUEENSLAND BUILDING SERVICES AUTHORITY**
(appellant)
v
J M KELLY (PROJECT BUILDERS) PTY LTD
(respondent)

FILE NO/S: Appeal No 5104 of 2013
SC No 3907 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 8 November 2013

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Chief Justice and Fraser JA and Mullins J
Judgment of the Court

ORDER: **The appellant pay 60 per cent of the respondent’s costs of the proceeding in the Trial Division.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant’s appeal was allowed with costs – where the parties were given leave to make submissions as to the costs of the proceeding in the Trial Division – where the appellant argued that costs awarded to the respondent in the Trial Division should be reduced to reflect the fact that the respondent was only partially successful – where the respondent contended that it should have all of its costs in the Trial Division as it was necessary to go to court to obtain the declaration affirmed on appeal – whether the general rule that costs follow the event should be departed from

Queensland Building Services Authority Act 1991 (Qld), s 72

Alborn & Ors v Stephens & Ors [2010] QCA 58, cited
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: HWL Ebsworth for the appellant
Cooper Grace Ward for the respondent

- [1] **THE COURT:** In the Trial Division the respondent succeeded in its application for a declaration that two directions issued on different dates by the appellant to the respondent under s 72 of the *Queensland Building Services Authority Act 1991* (Qld) to rectify different defective or incomplete building work were void. The appellant's appeal was allowed with costs. The declaration was affirmed only in relation to one of the two directions. The respondent's application for a declaration that the other direction was void was dismissed. Leave was given to the parties to make submissions as to the costs of the proceedings in the Trial Division.
- [2] The respondent submits that it should have all of its costs in the Trial Division because it was necessary for it to go to court to obtain the declaration which was affirmed on appeal. The appellant submits that the costs awarded to the respondent in the Trial Division should be substantially reduced because the issue upon which the respondent was ultimately unsuccessful accounted for more than half of the evidence and about 40 per cent of the oral argument at the hearing in the Trial Division.
- [3] Under r 681 of the *UCPR* costs follow "the event" unless the court orders otherwise. In *Alborn & Ors v Stephens & Ors*,¹ Muir JA (Holmes JA and Daubney J agreeing) affirmed (with reference to authority including *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)*)² that:
"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'."
- Muir JA added, consistently with McPherson JA's reasons in *Interchase*,³ that:
"However, a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs [*Waterman v Gerling (Costs)* [2005] NSWSC 1111; *Todrell Pty Ltd v Finch (No 2)* [2007] QSC 386]."
- [4] The respondent succeeded in the Trial Division upon issues of fact and law which were common to both directions. Each direction bore the date upon which it was posted and stated that the respondent was required to carry out the rectification work within 28 days of the date of the direction, but the respondent did not receive either direction by post until after the date it bore. Posting of the directions was inefficacious because of non-compliance with the requirement in s 72(3) of the Act that the period stated in the direction within which the respondent was required to carry out the rectification work must be at least 28 days. Although the appellant

¹ [2010] QCA 58 at [8].

² [2003] 1 Qd R 26 at 60-61.

³ [2003] 1 Qd R 26 at [84].

acknowledged at the hearing in the Trial Division that the consequence of that non-compliance was that the direction which was sent only by post did not comply with s 72(3), it is not clear that it made any such acknowledgment at any earlier time and it did not acknowledge in the Trial Division that the contravention led to invalidity of that direction.

- [5] Additional and more complex factual and legal issues arose in relation to the other direction, which was also sent by email on the day that it was posted. It does seem that a substantial part of the evidence and argument in the Trial Division concerned the issues relating only to the emailing of this direction, on which the respondent ultimately failed.
- [6] Taking into account both that the respondent was required to commence proceedings to obtain the declaration that one of the directions was void and that it failed on the separate and quite substantial issues relating to the other direction, the appropriate order is that the appellant pay 60 per cent of the respondent's costs of the proceedings in the Trial Division.