DISTRICT COURT OF QUEENSLAND

CITATION:	*Seilers Transport Pty Ltd v McGrath (No 2)* [2016] QDC 89
PARTIES:	**SEILERS TRANSPORT PTY LTD** **(appellant)** **v** **DESMOND RODNEY McGRATH** **(respondent)**
FILE NO/S:	2251/15
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Brisbane
DELIVERED ON:	26 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Dorney QC DCJ
ORDER:	**1. It is ordered that the appellant pay the respondent's costs of the appeal fixed at 95% of those costs.**
CATCHWORDS:	Appeal – whether the substantially successful respondent should be awarded percentage costs and, if so, at what figure
LEGISLATION CITED:	*Uniform Civil Procedure Rules* 1999 r 189(4), r 681, r 684, r 766(1)(d), r 785
CASES CITED:	*BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 *Murdoch v Lake* [2014] QCA 269 *Seilers Transport Pty Ltd v McGrath* [2016] QDC 75 *Sochorova v Commonwealth of Australia* [2012] QCA 152
COUNSEL:	A F Messina for the Appellant A M Christie for the Respondent
SOLICITORS:	Slade Waterhouse for the Appellant Aden Lawyers for the Respondent

Introduction

[1] On 8 April 2016, when making orders to dismiss this appeal, I gave leave for submissions to be filed and served by either party, or both parties, by 4pm on 15 April 2016. Both parties have emailed to the "court" respective outlines of submissions – and I am happy to receive them in that form.

[2] In *Seilers Transport Pty Ltd v McGrath* [2016] QDC 75 I had stated that I intended to order that the respondent recover his costs, fixed at 95% of those costs, "to reflect the small success of the appellant on one particular question of costs": at [40]. Necessarily, these submissions have been directed to that expressed intention.

[3] The costs in question involved the issue of r 189(4) of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*").

Appellant's submissions

[4] After noting an extract from the decision of McMurdo J (as he then was) in *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 (at [8]), the appellant contended that a partial reduction in the costs payable to one of the parties "is the most efficient and cost effective way of allocating the costs burden in this appeal" – but that it only reflects one side of the equation (namely, the extent to which the respondent had a "loss") and does not reflect the other side (namely, the extent to which the appellant had a "success"). As a consequence, it was argued that, in order to better reflect the "wins and losses of both parties", there ought to be a reduction on the side of the costs equation to a more generous allocation.

[5] With respect to the actual percentage – although I had indicated the figure of 5% – it was stated that it was not reflective of the time and submissions made that were involved in the "question of costs" in the appeal. It was contended that approximately 30% of the respondent's outline and roughly the same percentage of my reasons were "dedicated" to the costs question.

[6] Consequently, it was submitted, the more equitable allocation of the costs burden, which better reflected the appellant's success on one of the two issues litigated, would be made if the appellant was ordered to pay 70% of the respondent's costs of the appeal.

Respondent's submissions

[7] These submissions confirmed that the respondent had no objection to the costs order that I had "intended" to make.

[8] In particular, it was argued that the respondent was successful on the merits "at trial" and costs were a "minor collateral matter" on appeal.

Authorities

[9] In the Court of Appeal in *Murdoch v Lake* [2014] QCA 269 Morrison JA, with whom Boddice J agreed, canvassed both r 681 and r 684 of the *UCPR*. As to the former, after noting that the "usual" rule is that the costs of a proceeding follow the event, he stated that that rule embodies the "general principle" that, subject to certain exceptions, a successful party in litigation is entitled to an award of costs in its favour: at [19]. It was then stated that that principle is reflected in r 766(1)(d) – relevant to appeals – "even though it is not expressly stated". Morrison JA, after referring to an explanation of the "event" in earlier (cited) authority, further noted that the statement that the party which has been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs, was a proposition that had been adopted since 2010 and referred to the latter rule of the *UCPR*: at [20] – [22]. With respect to that, it was held that the Court's discretion to order costs is an unfettered one; but one which "must be exercised without caprice, having regard to relevant considerations and established principles": at [23]. Lastly, Morrison JA, after referring to the primary purpose of an award of costs being to indemnify the successful party, noted that the power to deprive a successful party of "some" costs or, alternatively ordering that the party pay costs, has been long recognised and accepted, referring, in particular, to *Sochorova v Commonwealth of Australia* [2012] QCA 152 (at [13]): at [24]. In *Sochorova*, the Court of Appeal referred to an earlier decision of Toohey J which, among other conclusions, stated that a successful party who has failed in certain issues may not only be deprived of the costs of those issues but also be ordered as well to pay the other party's costs of them, noting that, in this sense, "issue" does not mean a precise issue in the technical or pleading sense but any disputed question of fact or law: also at [24].

[10] It needs to be pointed out that my determination on the general issue of costs ranged far wider than that simply concerning r 189(4). It is, therefore, not really accurate to refer to the time and written submissions on costs covering, implicitly, this particular discrete question of costs. Illustrative of the available outcomes in such a circumstance as just described, in *Murdoch*, one discrete issue was the costs of an application filed on 22 April 2013 in that case. Morrison JA held that in respect of the questions fought in that application, one could rightly be considered to be discrete from the others and "a measure of time and effort was taken to oppose" it, which was successful. It was then stated that, in that respect, one could probably categorise the issues concerning the question as an "event" for the purposes of r 681 of the *UCPR*, holding that, while it "did not occupy the bulk of the proceedings, equally it was not a trivial issue": at [27]. The outcome was that it was seen to be appropriate that success be recognised while, at the same time, it be recognised that the other side was substantially successful in the actual application: at [28]. In the end, the order made, on appeal, was that there be a payment of 75% of the costs of that application: at [30].

Outcome

[11] As I noted, there was a "small" success of the appellant on one particular discrete question of costs. I adhere to that particular description after considering all the recent submissions made to me. The composite issue of success and loss is encompassed in that description.

[12] Accordingly, acknowledging relevant authority, noting the import of the submissions, balancing all relevant factors canvassed, and guided by that conclusion in [11], I will make an order that the appellant pay the respondent's costs of the appeal fixed at 95% of those costs.

[13] It needs to be remarked, finally, that r 776(1) is applicable in this appellate proceeding by reason of the application of r 785 of the *UCPR*.