SUPREME COURT OF QUEENSLAND

CITATION:	*Neumann Contractors P/L v Peet Beachton Syndicate Limited (No 2)* [2009] QSC 383
PARTIES:	**NEUMANN CONTRACTORS PTY LTD** **ACN 009 695 747** (applicant) v **PEET BEACHTON SYNDICATE LIMITED** **ACN 117 351 514** (respondent)
FILE NO/S:	BS 9682 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	27 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions 20 and 26 November 2009
JUDGE:	White J
ORDER:	**The applicant pay 75 per cent of the respondent's costs of and incidental to the proceedings.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – FAILURE IN PORTION OF A CASE – where the applicant's application for judgment against the respondent was dismissed – where there were two issues to be determined in the proceedings: whether a payment claim complied with s 17 *Building and Construction Industry Payments Act* 2004 (Qld) and whether the applicant, through its employee, had engaged in misleading and deceptive conduct – where the respondent was successful on the first issue but failed to discharge its onus of proof on the second issue – where the applicant contends for a costs order pursuant to r 684 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether costs should follow the event *Building and Construction Industry Payments Act* 2004 (Qld), s 17 *Trade Practices Act* 1974 (Cth) *Uniform Civil Procedure Rules* 1999 (Qld), r 681, r 684

BHP Coal Pty Ltd & Ors v O&K Orenstein & Koppel AG & Ors (No 2) [2009] QSC 64, cited
Waterman v Gerling Australia Insurance Co Pty Ltd (No 2) [2005] NSWSC 1111, cited

COUNSEL: G D Beacham for the applicant
M Drysdale for the respondent

SOLICITORS: Clayton Utz for the applicant
Hopgood Ganim Lawyers for the respondent

[1] On 20 November 2009 I dismissed the applicant's application for judgment against the respondent.[1] The parties were given an opportunity to make submissions about costs.

[2] There were two issues to be determined in the proceedings, namely, whether the payment claim which founded the application for judgment complied with s 17 of the *Building and Construction Industry Payments Act* 2004 (Qld) and whether the applicant through its employee had engaged in misleading and deceptive conduct in connection with the service of the payment claim.

[3] The respondent was successful on the first issue but was found not to have discharged its onus of proof on the second issue. It needed to succeed on only one issue in order to resist the application and it did so.

[4] The successful respondent now seeks its costs of and incidental to the application, submitting that the general provision about costs should prevail, namely, that they follow the event unless the court orders otherwise.[2]

[5] The applicant, however, contends that the disposition of the costs should be governed by r 684. It provides:

> "(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
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> (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."

[6] Mr Drysdale for the respondent has referred to observations by McMurdo J in *BHP Coal Pty Ltd & Ors v O&K Orenstein & Koppel AG & Ors (No 2)*:[3]

> "The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule?"

With great respect to his Honour I would prefer not to employ the expression "exceptional" to the circumstances which might enliven the discretion in r 684. However, as his Honour noted, the approach to costs must always be the general rule but r 684 empowers the court to make a division of the costs in any particular proceeding where, in the court's discretion, it is appropriate to do so.

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1 *Neumann Contractors P/L v Peet Beachton Syndicate Limited* [2009] QSC 376.
2 *Uniform Civil Procedure Rules* 1999 (Qld), r 681.
3 [2009] QSC 64 at [7].

[7] The presence of r 684 ought not discourage a defendant from raising all appropriate grounds of defence fearful that if he is unsuccessful on some but has success overall, he may not recover all of his costs. It is a matter for the discretion of the judge who heard the proceedings. The analysis in *BHP Coal* and the other cases referred to by his Honour in that judgment bear this out. Nonetheless, it is important to keep in mind the observation of Brereton J in *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)*:[4]

> "[10] The starting point is that the plaintiff, having been successful, is entitled to his costs. It is for the defendants to establish a basis for departing from that rule. A successful plaintiff who has failed on certain issues may be deprived of costs on those issues, or even ordered to pay the defendant's costs of them [*Hughes v Western Australia Cricket Assn Inc* (1986) ATPR 40-748, 48, 136]. But this course, while open, is one on which the court embarks with hesitancy [*Mobile Innovations v Vodafone Pacific Ltd* [2003] NSWSC 423 at [4]; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16; *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261; *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 3)* (1979) 28 ALR 201; *Waters v P C Henderson (Aust) Pty Ltd* (NSWCA, 6 July 1994 unreported); *NRMA Ltd v Morgan (No 3)* [1999] NSWSC 768]. From these cases emerge consistent themes that:
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> - Justice may not be served if parties are dissuaded by the risk of costs from canvassing all issues which might be material to the decision in the case; but
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> - It may be appropriate to award costs of a separate issue where a clearly definable and severable issue, on which the otherwise successful party failed, has occupied a significant part of the trial."

Those observations may be applied *mutatis mutandi* to a successful defendant.

[8] Here the *Trade Practices Act* issue was plainly severable from the construction of the payments claim and whether it fell within the terms of s 17 of the *Building and Construction Industry Payments Act*. The proceedings were heard in the Civil list because, what would otherwise have been heard in the Applications jurisdiction, involved a longer period than is usually allowed for hearings in that jurisdiction. This was because oral evidence was required from the two men involved in the conversation the subject of the *Trade Practices Act* defence.

[9] This circumstance makes it appropriate for the application of the discretion founded in r 684. However, the reduction in the respondent's costs should not be of the order proposed by the applicant, namely, three-quarters. It is important to recognise that the respondent has been successful in resisting the application for judgment and much of the argument and material went to the construction issue. It is, therefore, appropriate that the reduction to its costs be relatively modest. I would reduce the costs that the respondent obtains by 25 per cent.

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4 [2005] NSWSC 1111 at [10].

Order

[10] The applicant pay 75 per cent of the respondent's costs of and incidental to the proceedings.