

SUPREME COURT OF QUEENSLAND

CITATION: *ESR Investment Management 2 (Australia) Pty Limited v AllRoads Pty Ltd (No 2)* [2023] QSC 258

PARTIES: **ESR INVESTMENT MANAGEMENT 2 (AUSTRALIA) PTY LIMITED (AS TRUSTEE FOR 98 AND 114 GILMORE ROAD TRUST ABN 34 294 606 061)**
ACN 626 831 954
(applicant)
v
ALLROADS PTY LTD
ABN 42 142 378 514
(respondent)

FILE NO/S: BS No 11967 of 2023

DIVISION: Trial Division

PROCEEDING: Application as to costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 November 2023

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers. Applicant's written submissions filed 8 November 2023; respondent's written submissions filed 10 November 2023.

JUDGE: Kelly J

ORDER: **The respondent shall pay one third of the applicant's costs of and incidental to the proceeding, such costs to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant was the principal under a contract entered with the respondent, a civil contractor – where the contract was terminated and the applicant sought specific performance of certain contractual obligations, said to have survived termination, concerned with the provision of documents – where five issues arose for determination in the proceeding – where the applicant was unsuccessful on the first four issues but successful on the fifth issue – where the fifth issue emerged late in the proceeding – whether the applicant won 'the event' of the proceeding – whether the applicant is entitled to costs following the event
PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE:

COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant contends the appropriate order for costs is that the respondent should pay the applicant’s costs on the standard basis until 20 October 2023 and on the indemnity basis thereafter – where the applicant seeks to rely upon without prejudice correspondence to support that submission – whether the applicant is entitled to costs assessed on the standard basis until 20 October 2023 and on the indemnity basis thereafter

Alborn & Ors v Stephens & Ors [2010] QCA 58, cited *ESR Investment Management 2 (Australia) Pty Limited v AllRoads Pty Ltd* [2023] QSC 235, related *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26; [2001] QCA 191, cited *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, cited

COUNSEL: D Keane KC for the applicant
D O’Brien KC for the respondent

SOLICITORS: Mills Oakley for the applicant
HopgoodGanim Lawyers for the respondent

- [1] The applicant was the principal under a contract entered with the respondent, a civil contractor. The contract has been terminated. In this proceeding the applicant sought specific performance of certain contractual obligations, said to have survived termination concerned with the provision of documents. Five issues arose for determination in the proceeding. On 3 November 2023, I delivered judgment in the proceeding and published my reasons.¹ I invited submissions as to costs. These are my reasons in relation to the issue of costs. In these reasons I have adopted defined terms from my earlier reasons.
- [2] The applicant was unsuccessful on the first four issues but successful on the fifth issue. The fifth issue, which concerned cl 31.10, emerged very late in the proceeding, during oral argument on the second day of the hearing. Until that point the applicant had not sought “access ... to inspect and take copies” of documents under cl 31.10 but rather had propounded rights said to arise under cll 44.5 and 44.10 of the Contract. I accept the respondent’s submission that it was not until the second day of the hearing that it could be said that the notice requirements for cl 31.10(b) had been satisfied and that the applicant’s contention that it had an entitlement under cl 31.10 crystallised. Until that point, the applicant, by its affidavit material and written and oral submissions, had been concerned to vindicate alleged entitlements under different contractual obligations, which it wholly failed to establish. From that point, the respondent denied any obligation arising under cl 31.10. In the result, it cannot be said that the applicant won “the event” of the proceeding. Rather, the proceeding is

¹ *ESR Investment Management 2 (Australia) Pty Limited v AllRoads Pty Ltd* [2023] QSC 235.

more accurately characterised as comprising five issues, one of which was raised very late and then won by the applicant.²

- [3] The applicant sought to rely upon without prejudice correspondence in support of a submission that the appropriate order for costs was that the respondent should pay the applicant's costs on the standard basis until 20 October 2023 and on the indemnity basis thereafter. The without prejudice correspondence sent prior to 12 October 2023 was concerned with the production of documents based on alleged entitlements under cll 44.5 and 44.10 which the Court rejected. The *Calderbank* offer contained in the letter dated 20 October 2023 sought production of documents based on entitlements under cll 44.5 and 44.10 but also sought to impose conditions on its acceptance, including a condition that, in exchange for a payment, the respondents, by its staff, for a period of five business days provide reasonable assistance with, and provide information in, the preparation of additional QA documents. That condition was extraneous to the issues in dispute and its inclusion means that it is not possible to compare the outcome of the proceeding with the outcome sought by the *Calderbank* offer. The applicant was unable to demonstrate that the offer contained in the *Calderbank* offer was more favourable than the outcome of the proceeding and imprudently refused by the respondent. Viewed in its totality, the without prejudice correspondence did not demonstrate that any special type of costs order was warranted.
- [4] Ultimately, although the applicant achieved success in relation to the fifth issue, the preponderance of time and costs involved in the proceeding concerned the other four issues in respect of which the applicant was unsuccessful. Having regard to those circumstances and the belated way the fifth issue was raised, in the exercise of my discretion, I consider that it is appropriate to limit the extent of the costs that should be payable by the respondent to one third of the applicant's standard costs.
- [5] The order as to costs is as follows:
1. The respondent shall pay one third of the applicant's costs of and incidental to the proceeding, such costs to be assessed on the standard basis.

² Refer to *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26, 60; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, 615; *Alborn & Ors v Stephens & Ors* [2010] QCA 58, [8].