BAE Systems Australia Ltd v Rothwell (*No 2)* [2012] NTSC 77

PARTIES:	BAE SYSTEMS AUSTRALIA LTD
	v
	ROTHWELL, Mark Edwin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 5 of 2011 (20917242)
DELIVERED:	2 October 2012
HEARING DATES:	Written Submissions on Costs, 13, 26, September 2012
DECISION ON COSTS:	BLOKLAND J

CATCHWORDS:

COSTS - Apportionment

REPRESENTATION:

Counsel:

Appellant:	Mr Boland
Respondent:	Ms Phillis

Solicitors:

Appellant:	Hunt and Hunt Lawyers
Respondent:	Povey Stirk Lawyers & Notaries

Judgment category classification:	C
Judgment ID Number:	BLO 1213
Number of pages:	4

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

BAE Systems Australia Ltd v Rothwell (No 2) [2012] NTSC 77
LA 5 of 2011 (20917242)

BETWEEN:

BAE SYSTEMS AUSTRALIA LTD
Appellant

AND:

MARK EDWIN ROTHWELL
Respondent

CORAM: BLOKLAND J

DECISION ON COSTS

(Delivered 2 October 2012)

[1] The respondent worker was largely, (although not totally), successful in defending this appeal and seeks the costs of the appeal. The appellant employer submits that costs should be apportioned so that the appellant pays 75% of the respondent's costs.

[2] The question of costs is at the discretion of the court. The discretion must be exercised judicially, in light of the nature of the issues raised in the proceedings, the time taken in addressing those issues and the overall importance of the issues to the parties in the context of the case. A global view is to be taken. The general rule is the successful party is entitled to costs.

[3] Of the five primary grounds of appeal the appellant employer was successful on two grounds. As a result, the order of the Work Health Court for penalty interest was quashed as was the order for solicitor/client costs. An error common to both grounds which contributed to the impugned conclusions required a broad ranging review of the material before the Work Health Court and detailed argument from both parties. These two grounds assumed reasonable significance on appeal. Although I found the error had arisen either because certain information about the evidence was not available or was not made clear in the Work Health Court, that is not the same as finding the error was attributable to the appellant employer's conduct of the proceedings such that it is relevant to costs. I reject the argument put here by the respondent worker to that effect.

[4] Clearly the respondent worker was primarily successful. Ground one dealt with the most important of the issues requiring a significant amount of the time available to argue the point. Both parties produced comprehensive authorities and arguments in aid of the construction point.

[5] The respondent was also successful in relation to ground 2 (unreasonable delay) and ground 3 (rate of interest). Argument on ground 2 required a significant review of the material before the Work Health Court; ground 3 did not. There was a deal of overlap between the material reviewed for the purposes of the question of unreasonable delay and the question of punitive interest. Different legal standards however applied to the respective issues.

[6] Three of the five contentions argued were dismissed. Argument associated with the contentions was brief and was primarily subsumed within argument on the more significant grounds. The contentions are not of any tangible significance in relation to the question of costs.

[7] Looking at the matter globally and bearing in mind that apportionment is not automatic and is generally discouraged, in this particular instance, given the significance of the arguments associated with the error in the decision on penalty interest and solicitor/client costs, I find this is a proper case in which to apportion costs. A significant amount of the time and concentration of argument was directed to the two grounds that the appellant/employer was successful on.

[8] I would apportion costs at a slightly different rate from that submitted on behalf of the appellant given the overlap of issues between the two grounds and importantly, given the hearing time was only one day in total. In my view it is appropriate the appellant employer pay 80% of the respondent worker's costs. At this level of apportionment, costs awarded to the respondent worker acknowledging and compensating the respondent as the successful party, are not eroded.

[9] By arrangement with solicitors for each party and to contain further costs, this order and these reasons shall be forwarded to them by email.

Order:

[10] The appellant employer is to pay 80% of the respondent workers costs of and incidental to the appeal at 100% of the Supreme Court Scale to be taxed in default of agreement.

[11] The date of this Order is 2 October 2012.

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