CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor (No. 2) [2016] NTSC 43

PARTIES:	CH2M Hill Australia Pty Limited (ABN 42 050 070 892) and UGL Engineering Pty Limited (ABN 96 096 365 972) v ABB Australia Pty Ltd (ABN 68 003 337 611) and BOND, Colin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	64 of 2016 (21634407)
DELIVERED:	23 AUGUST 2016
HEARING DATES:	11 AUGUST 2016
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiffs:	R Fenwick Elliott
Defendant:	A Wyvill SC with W Roper

Solicitors:

Plaintiffs:	Squire Patton Boggs (AU)
Defendant:	De Silva Hebron

Judgment category classification:	C
Judgment ID Number:	KEL16011
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor (No. 2) [2016] NTSC 43
No. 64 of 2016 (21634407)

BETWEEN:

CH2M HILL AUSTRALIA PTY LIMITED (ABN 42 050 070 892)
First Plaintiff

AND:

UGL ENGINEERING PTY LIMITED (ABN 96 096 365 972)
Second Plaintiff

AND:

ABB AUSTRALIA PTY LTD (ABN 68 003 337 611)
First Defendant

AND:

COLIN BOND
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 23 August 2016)

[1] By originating motion filed on 25 July 2016 the plaintiffs sought an order in the nature of *certiorari* under O 56 of the *Supreme Court Rules 1987 (NT)* quashing a purported adjudication determination of an adjudicator appointed under the *Construction Contracts (Security of Payments) Act 2004 (NT)*

("the Act") or, alternatively, a declaration that the determination is of no effect, and also an interim injunction restraining the first from enforcing the purported determination.

[2] On 27 July 2016 Grant CJ granted an injunction restraining the first defendant from taking steps pursuant to s 45 of the Act or otherwise to enforce the determination except on two days' written notice to the plaintiffs and the Construction Registrar; made procedural directions in relation to the filing of submissions; and listed the substantive matter for hearing before me on 11 August 2016.

[3] The matter was heard on Thursday 11 August 2016. I handed down my decision on Monday 15 August 2016 granting the order sought by the plaintiffs, and circulated written reasons on Monday 22 August 2016.

[4] The plaintiffs have applied for an order that the first defendant pay their costs of and incidental to the proceeding (including the costs of the injunction application) on the ground that they were successful and costs follow the event.

[5] The first defendant submits that there should be a split costs order on the ground that the plaintiffs advanced five reasons why the purported decision was a nullity and succeeded on only one of them.

[6] In this proceeding, the plaintiffs contended that the purported determination was a nullity on three broad grounds, referred to in submissions and in the

judgment as "the duplicate application ground", "the complexity ground" and "the rubber stamping ground". "The duplicate application ground" was argued on two separate bases: an argument that the adjudication application in question was precluded by s 27 of the Act; and an argument that the application was an abuse of process. In addition to the three main grounds of contention, the plaintiffs raised subsidiary issues of unreasonableness and error of law. However, as the first defendant has conceded, these took up very little time in argument and it was not necessary for me to make a determination in relation to the subsidiary issues as the matters relied on in support of them were covered by "the rubber stamping ground".

[7] The court has a broad and unfettered discretion in relation to costs which must, however, be exercised judicially. The plaintiffs were successful and, as a general rule, costs follow the event. A successful party should only be deprived of its costs in exceptional circumstances.[1]

[8] The first defendant contends that the circumstances in this case are exceptional for these reasons.

(a) The plaintiffs succeeded in only one of the arguments advanced.

(b) The first defendant succeeded in its opposition to the other grounds advanced by the plaintiffs and incurred costs in so doing.

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1 *Wormald International (Aust) Pty Ltd v Aherne* [1995] NTSC 69

(c) Much of the evidence before the Court related to the failed grounds, was wholly irrelevant, and/or was not ultimately relied upon by the plaintiffs.

[9] As the first defendant pointed out in written costs submissions, in *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd (No 3)*[2] Olsson AJ adopted the following excerpt from Dal Pont's *"Law of Costs"*:[3]

> … the courts must seek to give effect to two policies that are likely to collide. On the one hand, they should not adopt an approach so rigid as to dissuade a party, by the risk of an adverse costs award, from canvassing all issues, however doubtful, which might be material to the decision of the case. Conversely, in view of extensive court delays and high legal costs, the courts should encourage parties to consider carefully the matters they will put in issue in their litigation. Litigants who realise that they will not necessarily recover the whole of their costs where they have unsuccessfully raised a discrete issue are more likely to consider whether the raising of that issue is a justifiable course to take. Which policy should prevail in any given case depends on what, according to the court, the justice of the case requires.

[10] I do not think that this is an appropriate case for a split costs order. The different grounds relied upon by the plaintiffs were simply different bases for arguing that the purported determination was of no effect. They were not, as in some cases, separate, stand-alone issues. Moreover, none of them was unarguable. I rejected both limbs of "the duplicate application ground", found it ultimately unnecessary to decide "the complexity ground", and found for the plaintiffs on "the rubber stamping ground". Although "the

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2 [2010] NTSC 13 at [32]

3 Gino E Dal Pont, *Law of Costs*, (Lexis Nexis, 2nd ed, 2008) 241

rubber stamping ground" was the strongest, being the one that ultimately succeeded, I do not think it was unreasonable for the plaintiffs to have relied also on the other grounds. In my view this is a case for the application of the principle (slightly modifying the extract set out above quoted by Olsson AJ) that the court should not "dissuade [litigants], by the risk of an adverse costs award, from canvassing all [reasonable] issues material to the decision of the case."

[11] As for the contention by the first defendant that much of the material filed by the plaintiffs was not relevant and not in fact referred to by the plaintiffs, it seems to me that that matter would more appropriately be dealt with by the Taxing Master.

[12] I see no reason to make a different costs order in relation to the interlocutory application. By Rule 63.18, each party is to pay its own costs of interlocutory matters unless the court otherwise orders. In the case of interlocutory injunction applications however, it is common for those costs to be awarded to the successful party. As the plaintiffs were successful in both the injunction application and the main proceeding, I see no reason why the first defendant should not pay the plaintiffs' costs of both.

[13] I order that the first defendant pay the plaintiffs' costs of and incidental to the proceeding, including the costs of the interlocutory injunction application, to be agreed or taxed on the standard basis.