

SUPREME COURT OF QUEENSLAND

CITATION: *Greg Beer t/a G & L Beer Covercreting v J M Kelly (Project Builders) P/L* [2008] QCA 82

PARTIES: **GREG BEER t/a G & L BEER COVERCRETING**
(appellant/applicant)

v

J M KELLY (PROJECT BUILDERS) PTY LTD

ACN 010 280 412

(respondent)

FILE NO/S: Appeal No 10415 of 2007
DC No 2515 of 2007

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal (Further Orders)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 11 April 2008

DELIVERED AT: Brisbane

JUDGES: Holmes and Muir JJA and Mackenzie AJA
Judgment of the Court

ORDERS: **1. The appeal be allowed with costs**
2. The orders made on 22 October 2007 be set aside
3. The costs of the proceedings thus far in the District Court be reserved for determination by a judge of that court

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the respondent opposes the costs orders proposed in the reasons – where the respondent sought to uphold orders of the primary judge which were found to be erroneous – whether costs of the appeal should be costs in the cause or should be reserved pending the outcome of District Court proceedings

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the respondent opposes the costs orders proposed in the reasons – where grounds in the notice of contention were left undecided – where the grounds will be determined in the District Court – whether there should be an order as to costs at first instance

Appeal Costs Funds Act 1973 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld)

COUNSEL: M H Hindman for the appellant
B E Codd for the respondent

SOLICITORS: Clayton Utz for the appellant
Dibbs Abbott Stillman for the respondent

- [1] **THE COURT:** When the reasons in this matter were published on 29 February 2008 the parties were given leave to make further submissions as to the orders which ought to be made consequent upon the findings in the reasons.
- [2] The parties are agreed as to the orders which ought to be made, save in two respects. The appellant wishes to uphold the costs orders proposed in the reasons. The respondent submits that the costs of the appeal should be costs in the cause or that they should be reserved pending the outcome of the proceeding in the District Court. The contention, at least by inference, is that there should be no order as to the costs at first instance.
- [3] The basis for the respondent's submissions is that although the learned primary judge dismissed the appellant's application for judgment on a ground which was found on appeal to be erroneous, the application was resisted on other grounds, the merits of which were left undetermined at first instance or on appeal. Those grounds were the subject of a notice of contention.
- [4] The court sees no good reason why the respondent should not pay the appellant's costs of the appeal. It sought to uphold the orders below on a basis which was found to be erroneous. It is true that the respondent also sought to rely on the grounds in its notice of contention but those grounds, left undecided by the primary judge, involved factual considerations which made their

determination inappropriate on appeal. There is thus no good reason why the giving of the notice of contention should deprive the successful appellant of an order for costs of the appeal.

- [5] Different considerations apply to the costs at first instance. The grounds in the notice of contention were properly before the court and left undecided. If the respondent ultimately succeeds on one or more of these grounds, it would be inappropriate for it to be deprived of the opportunity to argue that it is entitled to some or all of its costs at first instance up to and including the costs of the hearing which led to the making of the order appealed against.
- [6] The respondent applies for an indemnity certificate pursuant to s 15 of the *Appeal Costs Funds Act 1973* (Qld). It is not appropriate to grant such a certificate. The primary judge has accepted arguments on statutory construction advanced by the respondent. The appellant put forward a competing construction which was found to be correct.
- [7] In their agreed orders, the parties propose an order that the originating application filed 5 September 2007 in the District Court, be remitted to the District Court. There is no need for that. The proceeding is before the District Court and the setting aside of the orders at first instance will leave the proceeding on foot to be advanced by the parties in accordance with the *Uniform Civil Procedure Rules 1999* (Qld). There is no need either for the liberty to apply order, the parties are free to apply to a judge of the District Court under the *Uniform Civil Procedure Rules 1999* (Qld). The orders will be:
1. The appeal be allowed with costs;
 2. The orders made on 22 October 2007 be set aside;
 3. The costs of the proceedings thus far in the District Court be reserved for determination by a judge of that court.