LAND COURT OF QUEENSLAND

CITATION:	*Hail Creek Coal Holdings Pty Ltd & Ors v O'Loughlin & Ors (No 2)* [2024] QLC 6
PARTIES:	**Hail Creek Coal Holdings Pty Limited, Marubeni Resources Development Pty Ltd, and Sumisho Coal Development Queensland Pty Ltd** (applicants) v **Michael Thomas O'Loughlin Junior, Clayton Douglas O'Loughlin, Tarquin Michael O'Loughlin, and Jarrod Patrick O'Loughlin** (respondents)
FILE NO:	MER065-23
PROCEEDING:	Application for costs
DELIVERED ON:	28 March 2024
DELIVERED AT:	Brisbane
HEARD ON:	Submissions closed 21 February 2024
HEARD AT:	Heard on the papers
MEMBER:	JR McNamara
ORDER:	**The respondents must pay the applicants costs of the proceeding:** **a) on a standard basis from the commencement of the proceeding to 17 October 2023; and** **b) on an indemnity basis on and from the commencement of the hearing on 18 October 2023.**
CATCHWORDS:	ENERGY AND RESOURCES – MINERALS – PROCEDURE - COSTS – where the Respondents sought costs on a standard basis up until the date of the *Calderbank* offer and costs on an indemnity basis thereafter – where Respondent sought costs of the whole proceeding on the standard basis - where the compensation awarded was in excess of the amount in the Applicants compensation

statement but significantly less than the amount sought in the Respondents compensation statement –- dominant issues – successful party – *Calderbank* offer – genuine attempt to reach negotiated settlement - outcome more favourable to offeror than offeree – offeree had sufficient time and adequate information to consider offer – conditions attached to offer were reasonable – rejection of offer unreasonable - exaggerated claim for compensation – overreach – problems with expert evidence critical to claim apparent at least at commencement of hearing.

Mineral and Energy Resources (Common Provisions) Act 2014 ss 81, 91
Land Court Act 2000 s 27A(2)

Banno v The Commonwealth (1993) 81 LGERA, cited
Calderbank v Calderbank [1975] 3 All ER 33, cited
ERO Georgetown Gold Operations Pty Ltd v Henry (No. 2) (2016) 37 QLCR 186, cited
Hail Creek Coal Holding Pty Limited & Ors v Michelmore (No 2) [2021] QLC 23, cited
Hail Creek Coal Holdings Pty Ltd & Ors v O'Loughlin & Ors [2023] QLC 22, cited
Holloway Nominees (Q) Pty Ltd v George (No 2) [2008] QSC 71, cited
Lonergan v Friese [2020] QLAC 4, cited
Lonergan & Anor v Friese (No 2) [2020] QLAC 4, cited
Michelmore v Hail Creek Coal Holdings Pty Limited & Ors [2021] QLAC 4, cited
Parker v NRMA (1993) 11 ACSR 370, cited
Pastrello v Roads and Traffic Authority of New South Wales (2000) 110 LGERA, cited
Queensland Industrial Minerals Pty Ltd v Younger & Ors [2017] QLC 54, applied

APPEARANCES: Not applicable

Background

[1] On 8 December 2023, I determined the amount of compensation payable by the Applicants, Hail Creek Joint Ventures (**HCJV**), under s 81 of the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCPA), for the effect of the advanced activities to be carried out pursuant to Mineral Development Licence 442 (**the MDL**) on the respondents' (**the O'Loughlin's**) property, Exevale Station. The matter was heard in Brisbane over 18, 19 and 20 October 2023.[1]

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1 *Hail Creek Coal Holdings Pty Ltd & Ors v O'Loughlin & Ors* [2023] QLC 22 (*Hail Creek*).

[2] I also determined the negotiation and preparation costs payable by HCJV pursuant to s 91 MERCPA, consistent with the amount agreed by the parties at the hearing;[2] I made orders concerning a number of disputed terms of the Conduct and Compensation Agreement (**CCA**);[3] and I ordered that any submission as to costs must be filed and served within 28 days.

The costs applications

[3] The date for costs submissions was extended and an application was filed by HCJV on 19 January 2024. The O'Loughlins filed submissions on costs on 15 February 2024 and HCJV filed a reply on 21 February 2024.[4]

[4] HCJV's primary costs submission is that the O'Loughlins should be ordered to pay HCJV's costs of the proceeding on a standard basis from the commencement of the proceeding to 10 October 2023; and on an indemnity basis on and from 11 October 2023, being the date upon which HCJV say that a Calderbank offer was not accepted by the O'Loughlins.[5]

[5] HCJV say that in the event their primary costs submission is not accepted, the O'Loughlins should be ordered to pay HCJV's costs of the entire proceeding on a standard basis.

[6] The O'Loughlins say that it was reasonable not to have accepted the HCJV offers and submit that the compensation awarded exceeded the amount set out in HCJV's compensation statement. They say they were required to "persist to trial to recover the full compensation" and they achieved a more favourable outcome.[6] The O'Loughlins say HCJV should pay costs of the whole of the proceedings on a standard basis; alternatively, up until the expiry of the 11 October 2023 offer on 15 October 2023 on a standard basis.[7]

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2 As I noted in my reasons at [20] the amount claimed by the O'Loughlins pursuant to s 91 MERCPA, as detailed in the affidavit of Mr Gregory John Smart filed 13 October 2023, was accepted by HCJV at the hearing as an appropriate award under s 91 MERCPA.

3 A schedule attached to the order the Court made on 8 December 2023 identifies six terms of the CCA which the Court decided.

4 Order 2 of 31 January 2024.

5 *Calderbank v Calderbank* [1975] 3 All ER 33.

6 Respondent's submissions on costs filed 15 February 2024 [3].

7 Ibid [4].

Negotiations and Offers

[7] HCJV says the parties engaged in mandatory negotiations commencing with the issue of a Negotiation Notice on 16 February 2022.[8] Negotiations were unsuccessful in concluding a CCA; HCJV gave the O'Loughlins an ADR Election Notice on 20 July 2022; and a mediation conference was convened on 13 September 2022. The parties continued negotiations after the mediation and after the statutory ADR period had ended without success, that is, a CCA was not concluded.

[8] Filed with the HCJV costs submissions is the 19 January 2024 affidavit of Mr Zillmann, solicitor for HCJV, the content of which is summarised at [17]-[20] of those submissions as follows:

> 17. As shown in exhibit BJZ-1 of the Affidavit of Mr Benjamin John Zillmann dated 19 January 2024:
>
> (a) between 13 February 2023 and 26 April 2023 (after the ADR period had completed but prior to commencing the Court proceedings), Hail Creek continued to offer to enter a CCA with the O'Loughlins; and
>
> (b) this culminated on 26 April 2023 (the date the originating application in this matter was filed) in correspondence from Hail Creek's solicitor to the O'Loughlins' solicitor repeating an earlier offer of a CCA made in February 2023 that:
>
> (i) was stated to be made on a 'without prejudice basis, save as to costs' basis;
>
> (ii) advised that Hail Creek would be commencing Land Court proceedings that day;
>
> (iii) stated that the offer would remain open for acceptance for a further 7 days; and
>
> (iv) was an offer of $55,000 compensation and a CCA on similar terms to the CCA terms which Hail Creek sought as part of its application to the Court.
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> 18. As set out in exhibit BJZ-2 of the Affidavit of Mr Benjamin John Zillmann dated 19 January 2024 filed with these submissions, Hail Creek made a further offer on a "without prejudice save as to costs" basis to the O'Loughlins on 11 October 2023 to settle this proceeding for a compensation sum of $55,000 (excluding negotiation and preparation costs which would be paid as an additional amount) (***Settlement Offer***). The offer was clearly stated to be a Calderbank offer and that Hail Creek would rely upon the letter in any question of costs in the proceedings.
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> 19. Hail Creek's Settlement Offer remained open for acceptance until 2:00pm on Monday 16 October 2023. The period for which the Settlement Offer was open for acceptance took place prior to the ordered date for the hearing in the proceeding.
>
> 20. The O'Loughlins' solicitor notified Hail Creek on 13 October 2023 that the Settlement Offer was rejected.

[9] This account of the engagement between the parties is not challenged although the O'Loughlins explain in their submissions why they say it was not unreasonable or imprudent not to accept the 26 April 2023 offer, and the 11 October 2023 offer.[9]

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8 Applicant's submissions on costs filed 19 January 2024 [16].

9 Respondent's submissions on costs filed 15 February 2024 [16]-[22] and [23]-[25].

[10] Evidently the O'Loughlins had also made a compensation proposal by email on 24 October 2022. On 13 February 2023, HCJV rejected the proposal and "increased its compensation offer to $55,000 which is a $10,000 increase on its previous offer. It still includes a component for legal fees your client has incurred, even though our client has no liability for those costs that related to a matter it had no role in".[10]

[11] The 11 October 2023 correspondence from Mr Zillmann to Mr Smart, solicitor for the O'Loughlins, was headed "Without Prejudice Save as to Costs"; it noted that the hearing in the Land Court was to commence on 18 October; and it presented "one final attempt to resolve this matter by agreement, by again extending a CCA offer to the Landholders, which is on more favourable terms than the Applicants' will argue for at the hearing".[11] The correspondence stated that it was made in accordance with the principles of *Calderbank v Calderbank*.[12]

[12] The 11 October 2023 correspondence also stated that HCJV's compensation liability (s 81 MERCPA) is separate to the liability to pay negotiation and preparation costs (s 91 MERCPA) that have been necessarily and reasonably incurred. The 11 October 2023 offer of $55,000 was said not to include any amount in respect of negotiation and preparation costs and that an amount claimed under s 91 MERCPA would be separately considered, nor was the offer contingent upon agreement or settlement of an amount in respect of negotiation and preparation costs.

The approach of the Court

[13] The Court has a general power under s 27A of the *Land Court Act 2000* (**LCA**) to order costs of a proceeding "as it considers appropriate", subject to any provision to the contrary in that Act or any other Act. There is no relevant provision to the contrary.

[14] The following excerpts from paragraphs [4] to [8] (footnotes omitted) from the decision of Kingham P in *Queensland Industrial Minerals Pty Ltd v Younger & Ors* (*QIM*), are instructive:

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10 Affidavit of Mr Zillmann, BJZ-1, pages 4-5.
11 Ibid, BJZ-2, pages 65-67.
12 [1975] 3 All ER 33.

> "Whether the Court is exercising the LCA power or, as in this case, the power conferred by the MRA, its discretion to award costs is unfettered. The Court must judge each case on its own facts and circumstances. It must exercise its discretion without caprice, having regard to relevant considerations and established principles.
>
> Costs are not awarded to punish the unsuccessful party, but are intended to be compensatory. They indemnify the successful party against the expense to which they have been put in the litigation.
>
> … Section 34(2) of the LCA provides that if the Court does not make an order for costs, each party must bear their own.[13] It is sometimes argued this creates a general rule that each party bears their own costs unless the circumstances justify a departure from that position. That argument has been rejected by the Land Appeal Court. …
>
> The rule that costs follow the event is deeply embedded in the law and that is a factor to be considered when exercising the Court's discretion. There is justice in this approach as it "protects those put to unnecessary and substantial expense at the behest of others".
>
> The Court should have regard not only to the orders made, but to the range of issues ventilated in the proceedings and the parties' success in respect of those issues. However, the Court should be cautious about undertaking an issue by issue analysis unless there is a particular issue or group of issues that is clearly dominant or separable from the others."[14]

[15] The Land Appeal Court in *Lonergan v Friese*[15] said that the discretion to award costs is broad and does not create a "general rule that parties bear their own costs" (citing *ERO Georgetown Gold Operations Pty Ltd v Henry (No. 2)*[16]) and, in accordance with orthodox principles, costs orders ought not be made unless the party seeking the costs order demonstrates it has been "successful" so as to engage the ordinary rule that costs follow the event. The Court said that one factor that may be taken into account is the reasonableness or, lack thereof, in attempting to reach an agreement as to the amount of compensation.

Costs on a standard basis

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13 Now s 27A(2) *Land Court Act 2000* (Qld).
14 [2017] QLC 54 (*QIM*).
15 [2020] QLAC 4 [29].
16 (2016) 37 QLCR 186 [24]; [2016] QLAC 3.

[16] HCJV submit that the O'Loughlins should be ordered to pay HCJV's costs of the proceeding on a standard basis from the commencement of the proceeding to 10 October 2023; and on an indemnity basis on and from 11 October 2023. In the event HCJV's primary costs submission is not accepted, they say the O'Loughlins' should be ordered to pay HCJV's costs of the entire proceeding on a standard basis.

[17] The O'Loughlins do not seek indemnity costs, but say HCJV should pay their costs of the whole of the proceedings on a standard basis; alternatively, up until the expiry of the 11 October 2023 offer on 15 October 2023 on a standard basis.

[18] Before turning to a consideration of indemnity costs I will consider and decide the primary issue between the parties, that each seek costs, at least on a standard basis of the whole of the proceedings: having regard to the rule that costs follow the event is a factor to be considered in the exercise of the courts discretion; the orders made; the range of issues ventilated in the hearing; and whether success has been demonstrated.

The outcome of the hearing

[19] HCJV summarise the outcome of the hearing in their submissions as follows: The Court determined the compensation to be paid by the Applicants (HCJV) to the respondents (O'Loughlins) for the "advanced activities" which Hail Creek intends to carry out, pursuant to MDL 442 on the O'Loughlins property, to be an amount of $10,354.50.[17]

[20] The positions of the parties, as set out in their respective compensation statements filed in the proceedings, were:

(a) HCJV - $7,375;

(b) O'Loughlins - $294,702.33.

[21] In closing their written submissions at [37] the O'Loughlins say:

> Ultimately, the O'Loughlins were successful in recovering compensation for the advanced activities in an amount of $10,354.50 which is in excess of Hail Creek's formal position set out in its compensation statement filed in the proceedings in the amount of $7,375.00. This was partly due to the O'Loughlins successfully claiming that it was reasonable for a landowner to check for weeds

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17 Applicant's submissions on costs filed 19 January 2024 [3]-[4].

> both during the period of activities and also during the period of rehabilitation which the Court accepted needed to include at least one wet season. In the circumstances, it was the O'Loughlins who obtained a more favourable outcome in the proceedings and were required to persist to trial to recover its just entitlement to compensation.

[22] In submissions in reply HCJV say that the O'Loughlins sought $294,702.33 in compensation, "something they do not refer to at all in … submissions". HCJV say that the O'Loughlins were unsuccessful on all of the main issues related to compensation in dispute in the proceedings.[18]

[23] In their primary Submissions on Costs, HCJV say they were overwhelmingly successful in the outcome of proceedings, when the determined compensation liability pursuant to s 81 MERCPA, as well as the decision on the CCA conditions, are viewed as a whole.

[24] The say the basis of the assessment and calculation of the monetary compensation in the amount of $10,354.50 was largely consistent with and only slightly more than HCJV's position of $7,375, while the O'Loughlins position after making some reductions in the course of the hearing amounted to $277,363.33.

[25] HCJV submit that their success must also be viewed in light of their offer to settle the matter for $55,000 compensation (excluding 'negotiation and preparation' costs), and that their success is plainly and objectively evidenced in the outcome versus the amounts sought. They say further that the Court accepted HCJVs submitted positions in respect of each disputed CCA condition.

The dominant issues

[26] The three issues which took up most of the hearing time are detailed in the 8 December 2023 decision at [27]-[50], [51]-[96] and [97]-[121].[19] The issues by reference to their subject matter were: a claim for $7433.88 for loss of AE due to a reduced grazing area (ss 81(4)(a)(v) and 81(4)(b)); a claim for $156,388.52 (reduced to $151,068.52 during the hearing) for the reduced income as a result of the loss of calves leading to less animals for sale (s 81(4)(a)(v) and 81(4)(b)); and a claim for $83,306.93 for the reduced value of animals or meat sold due to a reduction in live weight gain (s 81(4)(a)(v) and s 81(4)(b)).

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18 Applicant's submissions in reply on costs filed 21 February 2024 [9].

19 *Hail Creek* [27]-[50], [51]-[96], [97]-[121].

[27] The amounts claimed were all in addition to compensation amounts agreed between the parties.

[28] A 4th point of dispute concerned compensation for management time under s 81(4)(a)(v) and s 81(4)(b). An hourly rate of $101 was agreed, the difference concerned the number of hours to be compensated. HCJV offered compensation for 5 hours at $101 per hour ($505 total). At the hearing the hours claimed by the O'Loughlins was reduced from 403 hours ($40,703) to 284 hours ($28,684). The Court decided a total of 29.5 hours for additional management time was warranted, totalling $3,484.50. HCJV say the difference in the amount offered and the amount determined is modest when compared to the difference between the amount claimed at the start of the hearing and the amount awarded.

Success

[29] While the O'Loughlins submit that overall they were successful on the basis that the amount of compensation determined by the Court was greater than the amount set out in HCJV's compensation statement, they do not claim success in relation to the three dominant issues.

[30] My conclusions on each of the dominant issues are clearly explained in the decision at [45]-[50], [86]-[96], and [113]-[121]. I rely on those conclusions in reaching the view that the O'Loughlins were unsuccessful and that HCJV was the successful party.

[31] I agree with the submissions of HCJV that on any objective and reasonable view the O'Loughlins were unsuccessful on the dominant issues.

[32] On the 4th issue, the O'Loughlins were awarded a greater amount for management time than that set out by HCJV in their compensation statement. The Court did not accept HCJV's position that compensation for 5 hours of additional management time was adequate. The Court found that although the O'Loughlins' weed management strategies were not in evidence, taking into account the evidence of Mr Thompson, Land Use Planning and Agriculture Expert, the additional hours necessary to inspect rehabilitation progress and for weeds was assessed to be 34.5 hours totalling $3,484.50.

[33] HCJV submitted and I accept that when the Court's determination is viewed as a whole and in the context of the management time claimed by the O'Loughlins, HCJV was substantially more successful than the O'Loughlins on this issue.

The CCA

[34] The O'Loughlins say that the CCA the subject of the offer was not in the same terms as finally placed before the Court by HCJV or determined by the Court. In submissions they list six special conditions where this occurred.[20] In submissions in reply HCJV highlight the changes which they assert, and with which I agree are either irrelevant to the offer of and determination of compensation and/or immaterial in the context of the overall CCA offer.[21]

[35] The majority of the terms of the CCA had been agreed prior to the hearing. HCJV amended Schedule 1 to the CCA "to accurately reflect the vehicles and equipment necessary to undertake the drilling as disclosed by the evidence". Six terms were resolved and determined by the Court, including a "new" special condition proposed by the O'Loughlins. The Court accepted the position advanced by HCJV in respect of the six unresolved disputed terms.

Costs in the proceedings

[36] The O'Loughlins say that it was "not unreasonable not to have accepted" either of the CCAs offered by HCJV because "the CCAs forming part of both offers were not in the same terms as either finally placed before the court by Hail Creek or as determined by the Court".[22]

[37] They say: they were afforded insufficient time to consider the offers; the Schedule attached to the draft CCA lacked a reimbursement rate for labour incurred in taking action to control or extinguish any fire; an amount for negotiation and preparation costs was not stated; and uncertainty as to the inclusion or not of legal fees (costs), rendered the offers void.

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20 Respondent's submissions on costs filed 15 February 2024 [21].
21 Applicant's submissions in reply on costs filed 21 February 2024 [24]-[29].
22 Respondent's submissions on costs filed 15 February 2024 [2].

[38] HCJV say that the offers they made were not rejected on the basis of the CCA "uncertainty" claimed, they were rejected because the O'Loughlins sought a higher amount of compensation.

[39] Whether rejection of a Calderbank offer was unreasonable in the circumstances is discussed below when considering indemnity costs.

[40] In their submissions the O'Loughlins assert success simply on the basis that the court determined compensation in an amount greater than the formal position set out by HCJV in its filed compensation statement. Success must be viewed in context. The context is that on the dominant matters in dispute between the parties the Court found in favour of HCJV, and the basis of claim advanced by the O'Loughlins on those issues was rejected.

[41] Overall, I accept the submission of HCJV that the O'Loughlins were unsuccessful and that HCJV were the successful party in the proceedings. HCJV were successful on all the dominant issues in the hearing, despite the amount of compensation determined being greater than the amount set out in HCJV's compensation statement. The ordinary rule that costs follow the event has been engaged.

Indemnity costs

[42] The observations of Kingham P in *QIM* at paragraphs [10] to [11] (footnotes omitted) are relevant, in particular:

> "Indemnity costs are all costs incurred by a party to litigation in undertaking proceedings, provided they have not been unreasonably incurred or are not of an unreasonable amount.
>
> Each of the offers made by the landowners were marked "without prejudice save as to costs". That is sufficient to put QIM, which was legally represented, on notice that the principles relating to a Calderbank offer would be invoked if the offers were rejected. A Calderbank offer is a without prejudice offer in which the offeror reserves the right to waive the confidential nature of the offer to rely on it for the purposes of making an application for indemnity costs. Those principles should be applied in determining the costs orders in these proceedings."

[43] The applicant in submissions says that the Calderbank offer was made on 11 October 2023, and formally rejected on 13 October 2023.[23]

[44] Two formal written offers were made by HCJV after the ADR period had ended. The first on 26 April 2023, the day the originating application was filed in the Land Court, the second on 11 October 2023, a week prior to the commencement of the hearing.

[45] The O'Loughlins discuss both in their submissions under the heading "Hail Creek's Calderbank Offers".

[46] It is clear that the 11 October 2023 offer was marked "Without Prejudice Save as to Costs" and at paragraph 7 of the correspondence that the offer was made in accordance with the principles of *Calderbank v Calderbank*.[24] I accept that the 11 October 2023 offer was a Calderbank offer.

[47] In *QIM,* her Honour noted that it is a matter of discretion whether indemnity costs are ordered.[25]

[48] The key questions, drawn from the QIM decision (and the cases referred to in that decision), are:

> *Was the offer "a genuine attempt to reach a negotiated settlement and not just a means of triggering a costs sanction" (in both the context of success, and in the context of indemnity costs)?*[26]
>
> *Was the offer more favourable than the determination of compensation "indicating that they were real, not trivial or contemptuous"?*[27]
>
> *Was the rejection of the offer unreasonable in the circumstances? The relevant factors include:*
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> *(a) Whether there was sufficient time to consider the offer;*
> *(b) Whether the offeree had adequate information to enable it to consider the offer; and*

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23 Applicant's submissions on costs filed 19 January 2024 [70]-[71].
24 Affidavit of Mr Zillmann, BJZ-2, pages 65-67.
25 *QIM* [12].
26 Ibid [17].
27 Ibid [18], citing *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 [14]-15].

> *(c) Whether any conditions are attached and if so, whether those conditions are reasonable.*[28]

Was the offer "a genuine attempt to reach a negotiated settlement"?

[49] HCJV submit that on its face, the answer to the question of whether the HCJV offer was a genuine attempt to compromise the proceedings, in the context of indemnity costs, is yes.

[50] The O'Loughlins say that the offer was made only a week before the hearing, and was set to expire at 2pm, Monday 16 October 2023, an unreasonably short period of time. They say that by that time the majority of preparation and trial costs had been incurred. I note that the O'Loughlins solicitor notified HCJV on 13 October 2023 that the settlement offer was rejected.

[51] The offers made by HCJV were more favourable than the determination of compensation, which is an indication that they were real, not trivial or contemptuous.[29] The offers, being more favourable than the determination of compensation, place the persuasive burden on the O'Loughlins to demonstrate their failure to accept the offer was "objectively reasonable".[30]

[52] In my view the evidence, including the correspondence from HCJV to the O'Loughlins and compliance with the relevant MERCPA provisions; and the structure and content of the offers made, satisfy me that the attempts to reach a negotiated settlement were genuine and not a means of triggering a costs sanction.

[53] I accept that the HCJV 11 October 2023 offer in particular was a genuine attempt to compromise the proceedings in the context of both costs generally, and in the context of indemnity costs. The answer to the question of whether it was unreasonable for the O'Loughlins to reject the offer, in either context, however is more nuanced.

Was the outcome more favourable to the offeror than the offeree?

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28 *QIM* [20], citing *ERO Georgetown Gold Operations Pty Ltd* [2016] QLC 17 [67].
29 *QIM* [18].
30 Ibid [19].

[54] In submissions HCJV say they were overwhelmingly successful in the outcome of the proceedings regarding the determination of s 81 compensation liability and the decision regarding the CCA conditions, viewed as a whole.[31]

[55] The 11 October 2023 offer was for $55,000 and a CCA on similar terms to the CCA terms which HCJV sought as part of its application to the Court.

[56] The Court's determination of s 81 compensation was $10,354.50. The Applicant says that "the basis of the assessment and calculation of the compensation amount was largely consistent with, and slightly more than, Hail Creek's position of $7,375 at the hearing; and substantially different and less than the amount sought by the O'Loughlins.

[57] They say the amount claimed by the O'Loughlins through the course of the hearing, after some reductions, was $277,363.33, "well in excess of what the Court awarded".[32] They say that "The Court did not accept the O'Loughlins arguments on the substantive issues in dispute relating to compensation".[33]

[58] In my earlier consideration of "success" in the proceedings I referred to the outcomes of the proceedings.

[59] Viewed in light of the HCJV settlement offer of $55,000 (exclusive of negotiation and preparation costs) and the amount sought by the O'Loughlins at the hearing, the outcome was more favourable to the offeror HCJV than the offeree O'Loughlins.

[60] As for the disputed conditions of the CCA, HCJV say the Court accepted HCJV's positions in respect of each disputed condition.[34]

Was the rejection of the offer unreasonable in the circumstances?

[61] The relevant factors include: whether there was sufficient time to consider the offer; whether the offeree had adequate information to enable it to consider the offer; and whether any conditions are attached and if so, whether those conditions are reasonable.

Did the offeree have sufficient time to consider the offer?

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31 Applicant's submissions on costs filed 19 January 2024 [34].
32 Ibid [35]-[36].
33 Ibid.
34 Ibid [38].

[62] The amount of the 'final' offer made by HCJV on 11 October 2023 was $55,000. The offer was open for acceptance until 2pm Monday 16 October, two days before the matter was listed for hearing. HCJV say the O'Loughlins had five full days to consider the offer. They say that the time allowed to consider the offer was sufficient which is "self-evident from the fact that the O'Loughlins responded to, and rejected, the Calderbank Settlement Offer on 13 October 2023".[35]

[63] The O'Loughlins say that in the context of the overall litigation and issues in dispute, the 11 October 2023 offer "was too late in the proceedings and too short a period of time for acceptance, particularly given the additional details referred to below that emerged later at trial."[36]

[64] The "details" appear to be that the 11 October 2023 offer (according to the O'Loughlins) failed to provide for "legal costs"; failed to deal with negotiation and preparation costs at all; that the CCA was uncertain due to an omission in a Schedule concerning the rate of reimbursement for fire control; and was uncertain concerning the inclusion or otherwise of an historic invoice (not included as part of the O'Loughlins compensation claim).

[65] The O'Loughlins say that the 11 October 2023 offer was not clear as to whether it was inclusive or exclusive of the costs of the dispute.[37] HCJV say that while the 11 October offer did not expressly state that each party was to bear their own costs, that position was readily apparent on the basis that the 11 October offer was not made on the condition that either party pays the costs of the other.[38] HCJV say that the O'Loughlins would have been aware of their own costs at that point in time, and they would have known the strengths and weaknesses of their case, including their prospects of success, when deciding whether to accept the offer.

[66] Negotiation and preparation costs are those reasonably incurred in entering or seeking to enter into a CCA. The resource authority holder is liable to pay those costs. These costs are separate to the s 81 right to compensation for the effect of the advanced activities on the respondents' land and can be the subject of a separate Land Court determination pursuant to s 96 MERCPA.

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35 Ibid [72].
36 Respondent's submissions on costs filed 15 February 2024 [24].
37 Ibid [25].
38 Applicant's submissions in reply on costs filed 21 February 2024 [33(c)].

[67] The originating application was filed on 26 April 2023. At that time any claimable negotiation and preparation costs had been incurred. In the event, Mr Smart, solicitor for the O'Loughlins, annexed invoices dated 14 September 2022, 25 October 2022 and 30 March 2023 for work performed to an affidavit filed 13 October 2023. The invoices totalled $25947.33. During opening submissions Senior Counsel for HCJV said he had had the opportunity to see the affidavit in advance and said the total of the invoices was an appropriate amount under s 91 MERCPA.[39]

[68] As to the other matters, HCJV say that these were irrelevant as to whether the O'Loughlins were acting reasonably in not accepting the offer. The assertion that it was uncertain whether the amount of $55,000 included the amount of a historic legal invoice cannot be sustained when the legal bill was itemised in Schedule 3 Item 3. The 13 February 2023 HCJV correspondence referred to above at [10] also makes the position concerning the historic invoice clear. HCJV say the amount attributable to the compensation offer made by HCJV was clearly ascertainable, being $55,000. I agree.

[69] It is difficult to accept the primary contention of the O'Loughlins that they had insufficient time to consider the offer. The quantum was the same as the 26 April offer, and the 11 October 2023 offer was swiftly rejected, in writing, before the offer expired.

Did the offeree have adequate information to enable it to consider the offer?

[70] HCJV say the O'Loughlins had sufficient information to enable them to consider the offer. All statements and expert reports had been filed by late September 2023. The agreed list of issues of fact and law, and issues in dispute were filed on 10 October 2023. The 11 October 2023 compensation offer was identical to the 26 April 2023 offer, save for the latter being expressly made a Calderbank offer.

[71] The "additional details" the O'Loughlins say they needed in order to consider the offer, as discussed above, were not in my view significant enough to challenge their consideration of the offer. The most significant of the issues raised being the amount reasonably incurred in "negotiation and preparation" costs was in their

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39 T1-26, lines 11-14.

hands. HCJV are statutorily liable to pay negotiation and preparation costs which are not in any case compensation within the meaning of s 81.

[72] Somewhat surprisingly the O'Loughlins say it was not unreasonable or imprudent for them not to have accepted the 11 October 2023 offer because it was not until after the close of the offer and well into the hearing that HCJV produced evidence to demonstrate that the facts which supported a theory proffered by the O'Loughlins expert witness were fundamentally flawed.[40] This error undermined the "mismothering" theory which was the basis of the claim for (initially) $156,388.52. The O'Loughlins also say that "unusually" joint expert meetings and reports did not occur in this matter.

[73] HCJV say that it is unreasonable to attribute fault to HCJV for the O'Loughlins reliance on false and incorrect evidence.

[74] The mistaken facts concerned the timing of construction work carried out on the O'Loughlins property by Powerlink, unrelated to HCJV, over 10 years earlier. The evidence concerned an apparent reduced number of calves (below the 10 year average) in a particular year when Powerlink were carrying out activities. The expert evidence proffered a theory that similar consequences would arise from the proposed HCJV activities; and the likely compensable loss was calculated on that theory.

[75] The issue which challenged the theory was brought to the attention of the Court and the O'Loughlins on day 2 of the hearing, and after Mr Clayton O'Loughlin had given evidence. Senior Counsel for HCJV introduced it this way:

> MR HOLT: Your Honour, there's just a slight change of plan, if we might. There's just been an issue that's arisen, but my friend and I have discussed what we hope is a sensible way through it. Following on from Mr O'Loughlin's evidence about timing of the Powerlink projects yesterday and perhaps some uncertainty about its start and end points, and the significant of that in the context of the case by comparison to the 2010 data, we have done some more work into that question, and are in a position to tender some evidence which will demonstrate, with precision, what that period of time the Powerlink project is. …

[76] The following documents were then tendered: the Powerlink 2009-2010 annual report which included "major plot projects" completed in 2009-2010 including the

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40 Respondent's submissions on costs filed 15 February 2024 [33].

Nebo to Strathmore transmission line which was commissioned in late 2009;[41] some government mapping;[42] and Queensland Globe images.[43]

[77] It was put to the O'Loughlin's expert witness Dr Seksel, Veterinary Behaviour Specialist, by Senior Counsel for HCJV, and accepted by Dr Seksel, that the annual report demonstrated that the Powerlink construction was completed before the calving season commenced in late 2009. This evidence caused the "mismothering" theory which was the basis of the compensation related to the loss of cattle to be unsustainable - although that aspect of the claim not completely abandoned as Dr Seksel maintained that there would nevertheless be loss due to reduced fertility. This is discussed at length in the decision.

[78] If the O'Loughlins' expert was briefed with incorrect information that is hardly the fault of HCJV. The source of that incorrect factual information was the O'Loughlins. The information with which the expert was briefed was not sourced from HCJV.

[79] The fact that there was not a joint expert meeting and report in this matter is due to the fact that there was no counterpart expert to Dr Seksel being called by HCJV.

Were any conditions attached reasonable?

[80] The 26 April offer was "an offer of $55,000 compensation and a CCA on similar terms to the CCA terms which Hail Creek sought as part of its application to the Court".

[81] The basis of the 11 October 2023 offer was payment of the sum of $55,000 in full and final satisfaction of its compensation liability under s 81 MERCPA "and the Applicants and the Landholders to enter into a CCA in the attached form".

[82] HCJV say they did not attach any unreasonable conditions to their offer. HCJV say that the CCA attached to the 11 October 2023 offer was: a) in the same form as the CCA submitted by HCJV with closing submissions "save for minor amendments to the equipment listed in Schedule 1 and the compensation liability noted in Schedule 3"; and b) not materially different to the terms of the CCA determined by the Court.

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41 Ex 29.
42 Ex 30.
43 Ex 31.

[83] The O'Loughlins characterise the 11 October 2023 offer as an "all inclusive" offer citing Martin J in *Holloway Nominees (Q) Pty Ltd v George (No 2)* to the effect that there are sound reasons to discourage offerors from drafting Calderbank offers on an "all in" basis. [44] They say they were unable to make an informed decisions regarding the "all inclusive offer".

[84] HCJV say it was not an "all inclusive offer", it was clear the offer entailed each party to bear its own costs and the O'Loughlins were clearly able to ascertain the amount of compensation being offered.

[85] While specificity around some aspects of the work program might not be provided, such as start dates, that does not in my view render it "not unreasonable" to proceed with the agreement. The conditions were reasonable.

[86] Was the rejection of the offer unreasonable in the circumstances? In my view the O'Loughlin's had sufficient time to consider the offer, they had adequate information to consider the offer, and the conditions attached to the offer were reasonable. In the circumstances the rejection of the offer was unreasonable.

Should indemnity costs be awarded?

[87] HCJV note that the Land Appeal Court in *Lonergan & Anor v Friese (No 2)* awarded indemnity costs against a landowner where they advanced a compensation claim for an exaggerated sum.[45] The indemnity costs concerned the appeal, and not the hearing at first instance. However, the Court said that "a claim for compensation which was exaggerated or demonstrably inflated, constitutes conduct which is plainly unreasonable, thus warranting an indemnity order as to costs".

[88] In *Hail Creek Coal Holding Pty Limited & Ors v Michelmore (No 2) (Michelmore)*,[46] when considering indemnity costs the hearing member said that an escalation from costs on a standard basis to indemnity costs from the date of the offer in that case would be an unreasonable exercise of her discretion unless satisfied the unsuccessful party was acting vexatiously or dishonestly. The member said there was no evidence the unsuccessful party himself acted inappropriately.

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44 [2008] QSC 71.
45 [2020] QLAC 4 [16]-17].
46 [2021] QLC 23 [31].

[89] Again in *Michelmore*, in response to the submission that an order for costs should not erode the benefit of the compensation determined in reliance on *Pastrello v Roads and Traffic Authority of New South Wales*,[47] the hearing member noted that that matter involved a determination of compensation for compulsory acquisition, and the comparison was not completely pertinent (citing *Lonergan v Friese*).[48]

[90] The member said in *Michelmore*: "As Hail Creek observes, the Court will allow just compensation to be eroded by a costs order if a party pursues a vexatious, dishonest or grossly exaggerated claim",[49] citing *Banno v The Commonwealth*.[50]

[91] I note that the passage relied on in *Banno* is prefaced by: "I have reached no firm view about costs … it may assist the parties if I make some observations.", and it is postfaced by: "As I say, these are tentative comments made without hearing from counsel." The relevant statement is: "I distinguish the situation of resumees who pursue a vexatious, dishonest or grossly exaggerated claim or present their case in such a way as to impose unnecessary burdens on the Commonwealth or the Court." Wilcox J went on to say: "The present applicants' case was arguable. It was presented efficiently and economically, the hearing occupying only two days."

[92] As I was the member of the Court who witnessed the whole hearing, including the conduct of the parties, the evidence adduced, the submissions made and the "shifts" that took place during its course, I am best placed to determine an appropriate costs order.[51]

[93] From that position I observed that there were problems with the expert evidence the O'Loughlins intended to rely on from the outset of the hearing – though not the particular factual error which caused the "mismothering" theory to be abandoned. That error was brought to the attention of the Court and the O'Loughlins by HCJV after Mr Clayton O'Loughlin had completed his evidence. Although it is not raised in the submissions on costs, there were also significant evidentiary problems with the with the claim for compensation for the reduced value of animals or meat due to

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47 (2000) 110 LGERA 223, 225.
48 *Michelmore* [12], [32].
49 Ibid [32].
50 (1993) 81 LGERA 34, 53.
51 *Michelmore v Hail Creek Coal Holdings Pty Limited & Ors* [2021] QLAC 4 [135]; *Parker v NRMA* (1993) 11 ACSR 370, 401.

a reduction in live weight gain, which came out during the hearing – but could or should have been anticipated.

[94] I do not have any evidence to conclude that the O'Loughlins were vexatious or dishonest in their pursuit of compensation from HCJV, but their claim was exaggerated. There was overreach. There were clear and obvious problems with the O'Loughlin's key witness which ought to have been apparent before the hearing commenced. The unusual nature of the expert evidence of the Veterinary Behavioural Expert alone ought to invited care and caution however it was embraced with seemingly little scrutiny and its conclusions applied with no apparent caution. There were "red flags". The 11 October 2023 offer was rejected because the O'Loughlins chose to take their chances and rely on, what was shown to be, discredited expert evidence, without moderation. The claim, as taken to the hearing was inflated and unrealistic, and although in closing submissions for the O'Loughlins the Court was invited to make alternative calculations, that did not demonstrate a willingness to compromise.

[95] In the circumstance indemnity costs are warranted. HCJV submit that indemnity costs should be paid on and from 11 October 2023 being the date upon which the Calderbank offer was not accepted. In my view indemnity costs should be paid from the commencement of the hearing on 18 October 2023. It was clear then, at least at the commencement of the hearing, that any doubts or concerns that the O'Loughlin's ought to have held concerning the expert evidence of the Veterinary Behaviour Specialist, which evidence was central to the O'Loughlin's compensation claim, were being realised and were only compounding.

Conclusion

[96] I accepted at [41] that HCJV were the successful party in the proceedings. HCJV were successful on all the dominant issues despite the amount of compensation determined being greater than the amount set out in the HCJV's compensation statement. I concluded that the ordinary rule that costs follow the event has been engaged. The O'Loughlin's application for costs is rejected.

[97] The 11 October 2023 offer was a *Calderbank* offer. It was a genuine attempt to reach a negotiated settlement. The outcome was more favourable to HCJV than to the O'Loughlins. The O'Loughlins had adequate information and were afforded

sufficient time to consider the offer. The offer was clear. The terms of the CCA proposed by HCJV and which had not been agreed at the time of the offer were not unreasonable. Ultimately the terms proposed were not materially different to the terms of the CCA determined by the Court. Indemnity costs are warranted and should be paid from the commencement of the hearing on 18 October 2023.

Orders

The respondents must pay the applicants costs of the proceeding:

a) on a standard basis from the commencement of the proceeding to 17 October 2023; and

b) on an indemnity basis on and from the commencement of the hearing on 18 October 2023.