SUPREME COURT OF QUEENSLAND

CITATION:	*Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Limited & Anor (No 2)* [2017] QSC 63
PARTIES:	**MICHAEL VINCENT BAKER SUPERANNUATION FUND PTY LTD** **(ABN 26 589 018 610)** (plaintiff) **v** **AURIZON OPERATIONS LIMITED** (first defendant) **STATE OF QUEENSLAND** (second defendant)
FILE NO:	BS12854 of 2008
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	27 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Mullins J
ORDER:	**1. The first defendant pay the plaintiff's costs of the proceeding to be assessed on the District Court scale to and including 21 November 2008 and thereafter on the Supreme Court scale.** **2. The second defendant pay the plaintiff's costs of the proceeding as from 30 September 2014 to be assessed on the Supreme Court scale.**
CATCHWORDS:	COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF THE WHOLE ACTION – where the plaintiff succeeded at trial in obtaining an injunction against the second defendant to restrain nuisance and damages for nuisance against each of the first and second defendants – whether the District Court had jurisdiction to give that relief when the proceeding commenced – whether specific orders should be made in respect of expert reports not tendered or relied on by the plaintiff at the trial – whether specific orders should be made in respect of the plaintiff's costs of amendments made to its pleadings and costs thrown away by the defendants as a result of those amendments – whether the costs order against second defendant should apply only from the effective date of the joinder of the second defendant to the proceeding

District Court of Queensland Act 1967 (Qld), s 68
Uniform Civil Procedure Rules 1999 (Qld), r 22, r 386, r 692, r 697

Body v Mount Isa Mines Ltd [2014] QCA 214, considered
Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Limited & Anor [2017] QSC 26, related
Lotus Projects Pty Ltd v Commissioner of State Revenue [2017] VSC 63, cited

COUNSEL: P W Hackett and D V Ferraro for the plaintiff
J M Horton QC and M A Eade for the first defendant
D M Favell for the second defendant

SOLICITORS: Qld Law Group – A New Direction Pty Ltd for the plaintiff
Gadens Lawyers for the first defendant
G R Cooper, Crown Solicitor for the second defendant

[1] After trial, I published my reasons in this matter on 13 March 2017: *Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Limited & Anor* [2017] QSC 26 (the reasons).

[2] The parties made their submissions on costs in writing.

[3] The plaintiff succeeded in proving that each of the first and second defendants were liable for nuisance, obtaining an injunction against the second defendant, and an award of damages of $75,000 against each of the first and second defendants. The plaintiff seeks an order for costs on the basis they should follow the event, but recognising that the second defendant was only joined to the proceeding as a party on, and with effect from, 30 September 2014, sought separate orders against each of the first and second defendants. The plaintiff therefore proposes that the order against the first defendant be the first defendant pay the plaintiff's costs in respect of the proceeding against the first defendant and the order against the second defendant be the second defendant pay the plaintiff's costs in respect of the proceeding against the second defendant.

[4] The first defendant proposes that it pay the plaintiff's costs of the proceeding until 29 September 2014 and that the second defendant pay the plaintiff's costs of the proceeding from 30 September 2014. The second defendant also seeks to limit the order for costs against it, so that it pay the plaintiff's costs of the proceeding from 30 September 2014.

[5] The issues raised by the written submissions of the defendants which seek to modify the costs order in favour of the plaintiff are otherwise:

(a) whether the costs against the defendants should be assessed as if the proceeding had remained in the District Court;
(b) whether there should be specific orders dealing with the plaintiff's costs attributable to various reports that were never tendered or relied upon;

(c) whether there should be a specific order that the plaintiff should pay the costs thrown away by its pleading amendments;
(d) how the joinder of the second defendant as party to the proceeding only from 30 September 2014 should be reflected in the costs order.

Whether the relief in the proceeding could have been given in the District Court

[6] Some of the history of the proceeding is set out in [14]-[16] of the reasons.

[7] The plaintiff made a separate application to the Supreme Court in proceeding 8732 of 2008 for the transfer of this proceeding from the District Court to the Supreme Court. The order transferring the proceeding was made by the Registrar on 21 November 2008 with the consent of the first defendant. The reason relied on by the plaintiff to seek the transfer was the report obtained by the plaintiff from Mr Lowry on 18 April 2008 that for one option estimated the cost of remediating the soil erosion at $334,000 which was then in excess of the monetary jurisdiction limit of the District Court.

[8] Subrules (3) and (4) of r 697 of the *Uniform Civil Procedures Rules* 1999 (Qld) provide:

> "(3) Subrule (4) applies if the only relief obtained by a plaintiff in a proceeding in the Supreme Court is relief that, when the proceeding began, could have been given by the District Court, but not a Magistrates Court.
>
> (4) The costs the plaintiff may recover must be assessed as if the proceeding had been started in the District Curt, unless the court orders otherwise."

[9] The plaintiff argues that there is no evidence before the court that the plaintiff's land had a value within the monetary jurisdiction of the District Court at the time the proceeding was commenced.

[10] At the time the proceeding was commenced, the District Court's jurisdiction to restrain nuisance to land was relevantly where the value of the land did not exceed the monetary limit which was specified as $250,000: s 68(1)(b)(xii) and s 68(2) of the *District Court of Queensland Act* 1967 (Qld) (the Act). Under the terms of s 68(3)(b) of the Act at the time the proceeding commenced (Reprint 5B), for the purpose of determining whether or not the District Court had jurisdiction in the case of proceedings to restrain a nuisance to land, the value of the land was the most recent valuation made by the Chief Executive of the Department administering the *Valuation of Land Act* 1944 (Qld) or, if there were no such valuation, the current market value at that time of the land, exclusive of improvements. The first defendant submits that the value of "land" must correspond to the land affected by the nuisance and not some larger parcel. The plaintiff submits that the term "land" must be the land the subject of the Valuer-General's valuation and not some relevant portion of the land and relies as support for that proposition on the approach in *Lotus Projects Pty Ltd v Commissioner of State Revenue* [2017] VSC 63 to the construction of the term "land" in the Victorian *Land Tax Act* 2005.

[11] The term "land" must be construed in the context of s 68 of the Act. The description of "land" that has been selected for the purpose of determining jurisdiction is the land that

is the subject of "the most recent valuation" and if there is no such valuation then the current market value at the relevant time. Valuation of land is undertaken in relation to lots of land usually comprised within one or more title references rather than portions of a lot that are a fraction of what is covered by the land comprised within a title reference such as a certificate of title. The decision in *Lotus Projects* depends on the context of the use of "land" in the Victorian Act and is not necessarily determinative of the construction of "land" in s 68(1)(b)(xii) and s 68(3)(b) of the Act. I consider that the term "land" for the purpose of determining the jurisdiction of the District Court must be the land the subject of the Valuer-General's valuation and not that part of the land affected by the nuisance within the lot or lots of land the subject of the Valuer-General's valuation which part might only be determined after the trial. Reliance on the Valuer-General's valuation or the current market value of the whole parcel which can be identified as containing the land the subject of the claim for an injunction restraining nuisance to the land allows some objective determination of jurisdiction at an early stage of the proceeding. That is also consistent with the early determination of jurisdiction within the proceeding in the District Court that is anticipated by s 68(4) of the Act.

[12] On the basis of the first defendant's (incorrect) assumption that the reference to "land" was the land affected directly by the nuisance and not the larger parcel the subject of the valuation by the Valuer-General of which the land affected by the nuisance formed part, the submission was made that the value of the land could not have exceeded $250,000 in 2004 when the proceeding commenced. There was no evidence adduced at the trial, however, from which it could be inferred that the unimproved value of the relevant land for the purpose of s 68 of the Act was less than $250,000 when the proceeding commenced.

[13] It does not follow from the fact that the plaintiff relied on its claim for damages exceeding $250,000 for the transfer to the Supreme Court that there was jurisdiction in the District Court at the time the proceeding commenced to grant an injunction in respect of the nuisance to the subject land. In the claim that commenced the proceeding, there was an assertion in purported compliance with r 22(2)(c) of the *UCPR* that "The Court at Southport has jurisdiction to hear the claim.". That assertion does not determine the issue or bind the plaintiff, as shown by s 68(4) of the Act.

[14] The position at the conclusion of the trial was that there was no evidence before the court that would enable a finding to be made the land had an unimproved value within the monetary jurisdiction of the District Court at the time the proceeding was commenced. It is the defendants who are asserting reliance on r 697. It was for the defendants therefore to adduce the evidence to invoke r 697. When the reasons were published, it was apparent from the submissions made on that occasion that the question of whether the District Court had jurisdiction at the time the proceeding commenced to grant the relief the plaintiff obtained ultimately would be an issue in relation to costs of the proceeding. The defendants did not then seek to adduce evidence on this issue. They have therefore not succeeded in showing that r 697(3) is applicable. As the issue of whether r 697(3) applies has been the subject of submissions in relation to costs, I propose to conclude that matter by specifying that in relation to the costs against the first defendant, they be assessed on the District Court scale until the transfer of the proceeding to the Supreme Court, when they will be assessed on the Supreme Court

scale. The costs recoverable against the second defendant should be assessed on the Supreme Court scale.

Orders dealing with the plaintiff's costs of reports that were not relied on by the plaintiff

[15] The first defendant lists in paragraph 23 of its submissions on costs a number of reports which were neither tendered by the plaintiff nor relied on by the plaintiff at the trial. The plaintiff responds that, as its costs will be assessed on a standard basis, the question of whether the costs of those reports are recoverable will be determined by the costs assessor performing the assessment. If a report was not tendered by the plaintiff nor relied upon by the plaintiff in the proceeding or at the trial, then it cannot recover the costs of that report on an assessment of costs on the standard basis. No specific order is required to achieve this result. That is a matter for the costs assessment.

Costs of the amendments by the plaintiff to its pleadings

[16] On the basis that the defendants are entitled to the benefit of r 386 and r 692 of the *UCPR*, the defendants seek a specific order that they not be liable for the costs incurred by the plaintiff in amending the statement of claim. The plaintiff's position is that specific orders are not required in respect of the costs thrown away by the plaintiff's pleading amendments, by virtue of r 692(2) of the *UCPR*.

[17] Where r 386 and/or r 692 operate to require the amending party to pay the other party's cost thrown away by the amendments, a specific order that the costs of the success of amendments to the statement of claim be excised from the costs payable by the defendants otherwise to the plaintiff is not required. It is superfluous to spell out the consequence that the amending party cannot recover its costs of the amendment from the other party. That follows as a matter of course from the application of r 386 or r 692.

Costs thrown away by the plaintiff's pleading amendments

[18] The defendants rely on the observation by Holmes JA (as the Chief Justice then was) in *Body v Mount Isa Mines Ltd* [2014] QCA 214 at [46] to assert that it is "entirely unremarkable" for a court to make an express order in terms of r 692(1) that the costs thrown away by amendments to the statement of claim be paid by the amending party. That case which concerned the amendments that had been made on various occasions to the statement of claim, and Holmes JA (with whom the other members of the court agreed) observed at [46]:

> "The order that the plaintiff pay the defendants' costs thrown away by reason of its amendments to the statement of claim of 26 April 2012, 20 June 2012, 26 March 2013 and 31 May 2013 was entirely unremarkable. As the respondent pointed out, that was the position which would obtain under Rule 386 of the *Uniform Civil Procedure Rules* 1999, absent a different order by the court. There was no reason for the primary judge in this case to make a contrary order."

[19] What was unremarkable was the fact that the order made by the primary judge accorded with the default position under r 386. The observation was not directed at describing the fact of making the order (rather than allowing the default position to operate) as unremarkable.

[20] The specific order proposed by the first defendant that the plaintiff pay the first defendant's cost thrown away as a result of the successive of amendments to the statement of claim has been formulated without regard to any orders that were made in relation to those amendments for the purpose of the amendments. By way of example, the amendment made to the statement of claim on 17 March 2009 was made in conjunction with an amendment to the claim permitted by a consent order made by the Registrar on 4 March 2009 pursuant to which the plaintiff was ordered to pay the first defendant's costs of the application to amend the claim, the amendment of the claim and to consequential amendments to the statement of claim that were fixed at $2,000.

[21] On the basis the defendants were seeking to limit the plaintiff's recoverable costs to the District Court scale, the defendants are seeking costs thrown away by amendments to the plaintiff's pleading to be assessed on the Supreme Court scale by virtue of the plaintiff's choice to litigate in the Supreme Court. In view of the fact that the plaintiff will recover its costs on the Supreme Court scale from the time when the proceeding was transferred to the Supreme Court, it is unnecessary to make this order sought by the defendants in relation to the costs thrown away by the plaintiff's amendments which are payable by the plaintiff to the relevant defendant pursuant to r 386 and/or r 692, in the absence of any other order.

Orders to accommodate the joinder of the second defendant with effect from 30 September 2014

[22] The plaintiff argues that a costs order entitles a plaintiff to costs properly incurred before the commencement of the proceeding which are incidental to instituting the proceeding against the defendant. The second defendant argues that such costs are insignificant, as the case the plaintiff pursued against it was essentially the same as that which the plaintiff had originally brought against the first defendant, but it became necessary to pursue the second defendant, because it had inherited the cause of the nuisance. I accept the second defendant's argument that this was not the usual case and, in these circumstances, where the second defendant was joined to an existing proceeding as a result of its transaction with the first defendant where the proceeding against the first defendant had been ongoing for some 10 years at the time of the joinder, it is appropriate to limit the costs against the second defendant to the date the joinder took effect.

[23] There is no justification for limiting the costs order against the first defendant to 29 September 2014, as after the joinder of the second defendant the first defendant continued with its defence of the proceeding.

Orders

[24] I will make the following orders:

1. The first defendant pay the plaintiff's costs of the proceeding to be assessed on the District Court scale to and including 21 November 2008 and thereafter on the Supreme Court scale.
2. The second defendant pay the plaintiff's costs of the proceeding as from 30 September 2014 to be assessed on the Supreme Court scale.