

SUPREME COURT OF QUEENSLAND

CITATION: *Aurizon Network Pty Ltd v Queensland Competition Authority & Ors (No 2)* [2018] QSC 250

PARTIES: **AURIZON NETWORK PTY LTD ACN 132 181 116**
(applicant)
v
QUEENSLAND COMPETITION AUTHORITY
(first respondent)
and
ANGLO AMERICAN METALLURGICAL COAL PTY LTD ACN 076 059 679
BM ALLIANCE COAL OPERATION PTY LTD ACN 096 412 752
BHP BILLITON MITSUI COAL PTY LTD ACN 009 713 875
CORONADO CURRAGH PTY LTD ACN 009 362 565
GLENCORE COAL PTY LTD ACN 082 271 930
IDEMITSU AUSTRALIA RESOURCES PTY LTD ACN 010 236 272
JELLINBAH MINING PTY LTD ACN 052 251 000
LAKE VERMONT RESOURCES PTY LTD ACN 114 286 841
PEABODY ENERGY AUSTRALIA COAL PTY LTD ACN 001 401 663
YARRABEE COAL COMPANY PTY LTD ACN 010 849 402
(second respondents)

FILE NO: SC No 4539 of 2018

DIVISION: Trial Division

PROCEEDING: Application for costs

DELIVERED ON: 5 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 30 October 2018

JUDGE: Jackson J

ORDER: **The applicant pay 75 percent of the second respondents' costs of the proceeding.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE:

COSTS FOLLOW EVENT – PARTIAL SUCCESS – where second respondents unsuccessful in opposing extension of time but successful in outcome of proceeding – where opposition to extension of time was significant part of submissions of second respondents – whether costs should be discounted

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – UNNECESSARY PARTY – PARTY UNNECESSARILY APPEARING – INTERVENOR, RELATOR, AMICUS CURIAE – where second respondents not a necessary party but had a real interest in proceeding – where not clear when applied to be joined if first respondent would defend proceeding on all grounds – where second respondents did not duplicate submissions or evidence of first respondent – whether second respondents to be characterised as intervenors – whether second respondents should have their costs – whether costs should be discounted

ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – where second respondents joined under *Judicial Review Act* 1991 (Qld) s 28 – whether second respondents to be characterised as intervenors – whether second respondents should have their costs – whether costs should be discounted

Judicial Review Act 1991 (Qld), s 28, s 49

Uniform Civil Procedure Rules 1999 (Qld), r 681

Arnold v Queensland & Anor (1987) 73 ALR 607, cited

Aurizon Network Pty Ltd v Queensland Competition

Authority & Ors [2018] QSC 246, related

Australian Conservation Foundation & Ors v Forestry

Commission & Ors (1988) 81 ALR 166, cited

City of Burnside v Attorney-General of South Australia

(1994) 63 SASR 65, cited

Harrigan v Department of Health & Ors (1986) 72 ALR 293,

cited

Hytch v O'Connell (No 2) [2018] QSC 99, cited

Liverpool City Council v Weir & Ors (1984) 53 ALR 77,

cited

Moseley v AB (No 2) [2017] NSWSC 1812, cited

Re Octaviar Ltd (No 8) [2010] QCA 57, distinguished

Smyth v State of Queensland & Ors [2005] QSC 193,

distinguished

Speno Rail Maintenance Australia Pty Ltd v Metals &

Minerals Insurance Pte Ltd [2009] WASCA 31 (S), cited

Tonto Home Loans Australia Pty Ltd v Tavares (No 2) [2012]

NSWCA 129, cited

United States Tobacco Company v Minister for Consumer

Affairs & Ors (1988) 20 FCR 520, cited

COUNSEL: E Goodwin for the applicant
P O'Shea QC for the second respondents

SOLICITORS: Quinn Emanuel Urquhart & Sullivan for the applicant
Herbert Smith Freehills for the second respondents

JACKSON J:

- [1] On dismissal of the applicant's originating application for judicial review,¹ both respondents applied for an order for costs of the proceedings. The applicant did not resist an order that it pay the first respondent's costs of the proceeding and such an order was made.
- [2] However, the applicant resists any order that it pay the second respondents' costs of the proceeding and, alternatively, submits that any order for costs in favour of the second respondent should be limited to 50 percent of its costs. The grounds are that the second respondents were intervenors in the proceeding who were unnecessary parties and who the applicant did not join as respondents; and, alternatively, the second respondents were unsuccessful on one of the two issues or a substantial part of the issues on which they participated at the hearing.

Nature of the proceeding

- [3] The originating application was for judicial review of conduct of the first respondent. It was brought under the *Judicial Review Act* 1991 (Qld) ("JR Act"). Only the first respondent was made the respondent.
- [4] The second respondents applied to be added as respondents to the application under s 28 of the JR Act because they were persons "interested in" the conduct in relation to which an application was being made to the Court under the JR Act. Over the applicant's opposition, the second respondents were joined as respondents in the exercise of the discretionary power under s 28(2). At that time, no party made an application for an order in relation to costs under s 49.
- [5] Accordingly, under s 49(4) of the JR Act, the rules of court made in relation to the awarding of costs apply to the proceeding, including r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") under which costs are in the discretion of the court, but follow the event unless the court orders otherwise.
- [6] The applicant submits that because the second respondents applied to be joined as parties, they are to be regarded as "intervenors". There is some authority that supports that characterisation.²

¹ *Aurizon Network Pty Ltd v Queensland Competition Authority & Ors* [2018] QSC 246.

² *United States Tobacco Company v Minister for Consumer Affairs & Ors* (1988) 20 FCR 520, 526 and 534-535.

- [7] At a broad level, the applicant next submits that a party who applies to be joined to a proceeding as an additional party is also to be treated as an “intervenor” for the purposes of deciding the question of costs. There is a long line of cases that deal with the costs of intervenors differently from the costs of the original parties to the proceeding, whether the order applied for is one to be made in favour of the intervenor as a successful party or against the intervenor as an unsuccessful party.³ Some, but not a majority, of the cases concern an intervenor who has a right of intervention, rather than one who is joined as a party to a proceeding under a discretionary power (such as s 28 of the JR Act).
- [8] It follows that in the exercise of the discretion of the court under UCPR r 681, to make an order that the applicant pay the second respondents’ costs, the usual or ordinary rule that costs follow the event may be displaced because the second respondents are intervenors.
- [9] The second respondents rely on two decisions that relate to whether the court will order separate sets of costs to separately represented defendants where there is no conflict of interest between them and the question is raised whether they should have been separately represented.⁴ However, those cases did not relate to the costs of an intervenor, as such.
- [10] In the present case, it is true to say that the second respondents had a real interest in the outcome of the proceeding. It is also true to say at the time of the joinder of the second respondents to the proceeding, it was not clear whether the first respondent would defend it on all grounds or precisely what position it would take. In my view, it was reasonable, in the circumstances of this case, for the second respondents to intervene in order to protect their interests, which are not the same as the interests of the first respondent, even though both sought to defend the application on similar grounds as matters turned out.
- [11] Another significant factor, in my view, is that the second respondents did not seek to duplicate either the evidence tendered or submissions made by the first respondent, in their conduct of the proceeding. Their involvement in the hearing was efficient and appropriate, and adapted to the determination of the questions on which the application was decided.
- [12] However, the second respondents did oppose the application for an extension of time for the applicant to bring the originating application and were unsuccessful in that opposition. In the hearing of the proceeding, only an hour or part thereof was devoted

³ *Hytch v O’Connell (No 2)* [2018] QSC 99; *Moseley v AB (No 2)* [2017] NSWSC 1812, [99]; *Tonto Home Loans Australia Pty Ltd v Tavares (No 2)* [2012] NSWCA 129, [8]-[11]; *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* [2009] WASCA 31 (S), [7]-[9]; *City of Burnside v Attorney-General of South Australia* (1994) 63 SASR 65, 67-69; *Australian Conservation Foundation & Ors v Forestry Commission & Ors* (1988) 81 ALR 166, 169-170; *Arnold v Queensland & Anor* (1987) 73 ALR 607, 621-622; *Harrigan v Department of Health & Ors* (1986) 72 ALR 293, 296-297; and *Liverpool City Council v Weir & Ors* (1984) 53 ALR 77, 83.

⁴ *Re Octaviar Ltd (No 8)* [2010] QCA 57, [2]-[6]; *Smyth v State of Queensland & Ors* [2005] QSC 193, [5]-[8].

to the argument upon that question. Still, significant parts of the second respondents' written submissions were devoted to it.

- [13] It follows, in my view, that the second respondents should not receive the benefit of an order for costs in respect of the application for an extension of time, particularly having regard to the circumstance that the first respondent did not oppose the extension sought. Second, it seems to me that it is appropriate to give some recognition to the principle that an intervenor does not necessarily or ordinarily obtain the benefit of an order for costs against an unsuccessful opposite party, to some extent, because as matters turned out, the first respondent conducted a full defence of the proceedings. The point is that the applicant was not required to join the second respondents as necessary parties and did not choose to bring the proceeding against them.
- [14] Accordingly, in my view, it is appropriate to make an order that the applicant pay 75 percent of the second respondents' costs of the proceeding, in the exercise of a broad discretion.