SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Nickel Sales Pty Ltd & Ors v Mount Isa Mines Limited* [2019] QCA 99
PARTIES:	**QUEENSLAND NICKEL SALES PTY LTD** **ACN 009 872 566** **(first applicant)** **QNI RESOURCES PTY LTD** **ACN 054 117 921** **(second applicant)** **QNI METALS PTY LTD** **ACN 066 656 175** **(third applicant)** **v** **MOUNT ISA MINES LIMITED** **ACN 009 661 447** (respondent)
FILE NO/S:	Appeal No 5 of 2018 SC No 7515 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 285 (Atkinson J)
DELIVERED ON:	24 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDERS:	**1. There be no order as to costs in respect of the appeal and of the application for an extension of time within which to appeal.** **2. Application for an indemnity certificate refused.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – where the application for the extension of time was successful and the appeal was allowed to a limited extent – where the applicant was unsuccessful in its other grounds of appeal – whether the general rule that costs should follow the outcome of the appeal should apply APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO

GRANT INDEMNITY CERTIFICATE – where the respondent applied for an indemnity certificate – where the respondent contended that the appeal related to an error of the primary judge on a question of law – whether an indemnity certificate should be granted to the respondent

Appeal Costs Fund Act 1973 (Qld), s 15(1)

Firebird Global Master Fund II Ltd v Republic of Nauru (No 2) (2015) 90 ALJR 270; [2015] HCA 53, distinguished
Lauchlan v Hartley [1980] Qd R 149, distinguished

COUNSEL: The applicants' submissions were heard on the papers
The respondent's submissions were heard on the papers

SOLICITORS: Alexander Law for the applicants
Allens for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** When orders were made in this matter on 26 February 2019, the parties were directed to file and serve written submissions with respect to the further orders that ought to be made as to the costs of the application for extension of time within which to appeal and of the appeal. Each party has done so.

Costs of the application for extension of time

[3] The application for the extension of time was successful. However, it was made necessary because, by reason of the illness of a member of the professional staff of the appellants' solicitors and resultant oversight, the notice of appeal was filed some six days after the expiration of the period in which a timely notice of appeal might have been filed. The application was heard at the same time as the appeal.

[4] In its written submissions, the respondent opposed the grant of the extension. However, the opposition was not pursued by cross examination or otherwise at the hearing. The outcome of the application was much influenced, if not determined, by the conclusion that this Court reached on the question of whether appellate intervention by it was warranted.

[5] In these circumstances, the fate of any costs that as may have been incurred in respect of the application and independently of the appeal, should be the same as that of the costs of the appeal itself. None of the parties has suggested otherwise.

Costs of the appeal

[6] The appellants submit that a costs order ought to be made in their favour. They cite the costs decision in *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)*[1] as recent High Court authority in support of the submission.

[7] The respondent submits that given the appellants' limited success in the appeal, no order should be made that requires it to pay their costs. As well, the respondent

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1 [2015] HCA 53; (2015) 90 ALJR 270.

seeks an indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld).

[8] Here, the appeal was allowed to the limited extent for which the orders made on 26 February 2019 provided. They directed that the originating proceeding continue as if started by a claim in respect of one only of the three defences which the appellants' had submitted at the hearing on 18 August 2017 warranted continuation by pleadings. That defence to be pleaded is one of entitlement to relief against forfeiture.

[9] The direction in respect of that defence was complemented by orders that set aside other orders that had been made at first instance for removal of the Equipment from the respondent's leased premises and for the payment of damages referable to costs and expense that the respondent would have to incur in removing the Equipment were the appellants to continue to refuse to do so.

[10] The appellants' limited success in the appeal was, however, balanced by failure in a number of significant respects. First, they failed in their quest to have directions made for the originating application to continue as if commenced by a claim in respect of the other two unsuccessful defences. Secondly, they failed in their challenge to the basis of assessment of damages (Ground (j)). Thirdly, they failed in respect of two grounds of appeal that sought to have this Court adjudicate upon further defences that the appellants' had not raised at first instance (Ground (k) and (l)). In the interests of justice, this Court ordered that the proceeding continue as if commenced by claim also in respect of the defences raised by Ground (k).

[11] In *Firebird*, the High Court confirmed that unless special circumstances warranted a departure from it, the general rule that costs should follow the outcome of the appeal, is to be applied.[2] That rule, their Honours said, is preferable to determining costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like.[3]

[12] Their Honours observed that the case before them was not one where the outcome of the appeal was contestable by reference to how separate issues had been determined. Thus the general rule ought to apply. The outcome was not contestable because despite limited success which saw registration of a foreign judgment in its favour restored, the appellant, Firebird, failed in its challenge to the determination by the New South Wales Court of Appeal that the respondent, Nauru, was immune from execution over its property in Australia. Thus the limited success had no practical benefit for Firebird.

[13] By contrast, in the present appeal, the outcome is contestable. The appellants have achieved a measure of success which will see them have the defence of relief against forfeiture and the newly-raised defences determined upon pleadings at a trial.

[14] However, their failures have also had practical outcomes. The two unsuccessful defences are not to be determined by pleadings and a trial. Further, the damages for trespass are not to be re-assessed on a basis that differs from that which had been applied at first instance.

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2 At [6].
3 Ibid.

[15] In these circumstances, I consider that this is an appeal in which successful outcomes have been relatively evenly shared. It is therefore appropriate, in my view, that there be no order as to costs of the appeal including the application for extension of time within which to appeal.

Indemnity certificate

[16] This is not a case in which the learned primary judge was presented for her determination with a point of law where both sides of the debate were fairly arguable and the appeal has succeeded because this Court has decided the point differently from the decision on it at first instance. That kind of case is one where an indemnity certificate would typically be granted. Nor is it one of the other kinds of case which the Full Court of Queensland in *Lauchlan v Hartley*[4] identified as ones where an indemnity certificate will be granted.

[17] Here, the effective error made by the learned primary judge is apt to be characterised as one of practice and procedure, rather than as one of legal principle. Her Honour was mistaken in her appraisal of whether the combination of issues arising from the evidential material, of construction of legal documents and of applicable legal principle relevant to the defence of relief against forfeiture, justified pleadings and a trial. She erred in determining that it did not and in proceeding to determine the defence summarily.

[18] This is not a case where the respondent conceded that that defence, once raised, warranted pleadings and a trial but the concession was overlooked by the primary judge.

[19] For these reasons, I am unpersuaded that this is an appropriate case for the grant of an indemnity certificate to the respondent.

Orders

[20] I would propose the following orders:

1. There be no order as to costs in respect of the appeal and of the application for an extension of time within which to appeal.

2. Application for an indemnity certificate refused.

[21] **McMURDO JA:** I agree with Gotterson JA.

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4 [1980] Qd R 149 per Connolly J at 150-152 (Wanstall CJ and Lucas J agreeing).