

SUPREME COURT OF QUEENSLAND

CITATION: *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 11)*
[2020] QSC 5

PARTIES: First Plaintiffs: **SANRUS PTY LTD AS
TRUSTEE OF THE QC
TRUST ACN 097 049 315**

AND

Second Plaintiffs: **EDGE DEVELOPMENTS
PTY LTD AS TRUSTEE OF
THE KOWHAI TRUST ABN
26 010 309 529**

AND

Third Plaintiffs: **H&J ENTERPRISES (QLD)
PTY LTD AS TRUSTEE OF
THE H&J TRUST ACN 077
333 736**

AND

First Defendants: **MONTO COAL 2 PTY LTD
ACN 098 919 414**

AND

Second Defendants: **MONTO COAL PTY LTD
ACN 098 393 072**

AND

Third Defendants: **MACARTHUR COAL
LIMITED ACN 096 001 955**

FILE NO/S: SC No BS8609/07

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED: 31 January 2020

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Bond J

ORDER: **The orders of the Court are:**

- 1. The plaintiffs have leave *nunc pro tunc* to discontinue the whole of the claim against the first and second defendants.**

2. **By consent, there be no order as to costs of the proceeding as between the plaintiffs and the first and second defendants.**
3. **By consent, there be no order as to costs in respect to the claim against the third defendant.**

COUNSEL: On the papers
 SOLICITORS: Holding Redlich for the plaintiffs
 Allens for the defendants

BOND J:

[1] In this proceeding, judgment was given in favour of the third defendant on 29 November 2019, but the question of the appropriate costs order was adjourned: see *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd & Ors (No 10)* [2019] QSC 297. Argument in relation to the issues which remained as between the plaintiffs and the first and second defendants was concluded on 12 December 2019, and I reserved my judgment.

[2] By email dated 24 January 2020, the parties advised the Court that they had agreed to discontinue the proceeding with no order as to costs. To effect that settlement, the plaintiffs filed a notice of discontinuance in a form generally in accordance with form 27 which was signed by both the plaintiffs' solicitors and the defendants' solicitors and dated 24 January 2020. The form provided, relevantly:

TAKE NOTICE that the First Plaintiff, Second Plaintiff and Third Plaintiff (**the Plaintiffs**) discontinue the whole of the claim against the First Defendant and Second Defendant (**the Defendants**) with no order as to costs.

...

The First Defendant and the Second Defendant consent to this discontinuance.

[3] By their email the parties enquired of the Court whether any further information was required from them.

[4] Once the email and the notice was drawn to my attention, I caused my associate to raise the following matters with the parties:

First, rule 304 does not appear to authorise the plaintiffs to "discontinue the whole of the claim ... with no order as to costs", notwithstanding that the first and second defendants consent to that course. That outcome could presumably have been obtained if leave was sought to discontinue and the court invited (because all parties consented to that course) to grant leave to discontinue and then to make an order that "there be no order as to costs". His Honour invites suggestions as to the correctness of this observation, and, if so, the appropriate procedural course to ensure that the discontinuance has been brought about in a regular way. It occurs to His Honour that an order *nunc pro tunc* that the plaintiffs have leave to discontinue, and a consent order that "there be no order as to costs of the proceeding as between the plaintiffs and the first and second defendants" might be an acceptable course.

Second, judgment was given in favour of the third defendant in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd & Ors (No 10)* [2019] QSC 297, but the question of the appropriate costs order adjourned. It seems to His Honour that some order should be made finally disposing of that question. His Honour invites the parties' submissions on the appropriate course.

[5] As to the first matter, the parties agreed with my suggestion and communicated that they would consent to an order in these terms:

THE COURT ORDERS THAT –

1. The plaintiffs have leave *nunc pro tunc* to discontinue the whole of the claim against the first and second defendants.

BY CONSENT THE COURT ORDERS THAT –

2. There be no order as to costs of the proceeding as between the plaintiffs and the first and second defendants.

[6] As to the second matter, the parties proposed an order in these terms:

BY CONSENT THE COURT ORDERS THAT –

1. Pursuant to paragraph 3 of the judgment made in *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 10)* [2019] QSC 297, there be no order as to costs in respect to the claim against the third defendant.

[7] In light of the parties' settlement and their response to the matters which I raised, this is undoubtedly an appropriate occasion to grant leave to discontinue. Rule 307(2) provides that "If a party discontinues or withdraws with the court's leave, the court may make the order for costs it considers appropriate." Again, in light of the parties' settlement and their response to the matters I raised, the only appropriate exercise of that power is to do so in a way which gives effect to the parties' settlement. The same conclusion applies in relation to the costs of the claim against the third defendant.

[8] For the foregoing reasons, I make the following orders:

1. The plaintiffs have leave *nunc pro tunc* to discontinue the whole of the claim against the first and second defendants.
2. By consent, there be no order as to costs of the proceeding as between the plaintiffs and the first and second defendants.
3. By consent, there be no order as to costs in respect to the claim against the third defendant.