SUPREME COURT OF QUEENSLAND

CITATION:	*Energex Ltd v Elkington & Ors* [2003] QSC 034
PARTIES:	**ENERGEX LIMITED (ACN 078 849 055)** (applicant) v **GORDON BRADLEY ELKINGTON AND OTHERS/ being persons identified in Schedule A of the Originating Application** (respondent)
FILE NO/S:	SC3973 of 2001
DIVISION:	Trial Division
PROCEEDING:	Costs Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2002
JUDGE:	Mackenzie J
ORDER:	**1. I order the applicant to pay to each of the first and twenty-sixth respondents 1/3 of their costs of and incidental to the application to be assessed on a standard basis;** 2. **I make no order as to costs of the application for a stay of proceedings.**
CATCHWORDS:	PROCEDURE – COSTS - RECOVERY OF COSTS – where the applicant was the 90% holder of securities covered by compulsory acquisition – whether the applicant was required to bear all costs of the proceedings – whether the prima facie rule in s 664F(4) of the *Corporations Act* (2001) (Cth) should be departed from – whether the respondents' had acted improperly, vexatiously or otherwise unreasonably – whether an application for stay of proceedings to allow a decision as to whether to lodge an appeal falls within s 664F legal proceedings *Corporations Act* 2001 (Cth), s 664F(4) *Re: NRMA Insurance Ltd (No 1)* (2000) 33 ACSR 595. considered

Winpar Holdings Limited v Goldfields Kalgoorlie Limited [2000] NSWSC 855, considered

COUNSEL: J McKenna for the applicant
C Francis for the 26th respondent
G Elkington for himself

SOLICITORS: Clayton Utz, Lawyers for the applicant
Stephen Blanks & Associates for the 26th respondent

[2] **MACKENZIE J:** Judgment was given in this application on 8 November 2002. Submissions concerning costs were invited in the event that it was to be asserted that the *prima facie* rule in s 664F(4) of the *Corporations Act* 2001 (Cth) should be departed from. Section 664F(4) provides as follows:

> "The 90% holder must bear the costs that a person incurs in legal proceedings in relation to the application unless the court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs."

[3] To justify departure from the obligation to bear the costs of an application of this kind, the applicant 90% holder must satisfy the court positively that the respondent acted "improperly, vexatiously or otherwise unreasonably". The twenty-sixth respondent submits that there is a clear legislative policy of encouraging respondents to participate in proceedings where they do not accept the price offered. Where the issue becomes whether the price represents "fair value" it is of assistance to the court to have the applicant's material tested by ordinary forensic processes and to have the assistance of any contrary views advanced by the respondents.

[4] That may be so in a general way but the propositions must be subject to the limitation that if the conduct of the case for the respondent is shown to involve the respondent acting improperly, vexatiously or otherwise unreasonably, the discretion cannot be circumscribed by the respondent's propositions. Without attempting to be exhaustive the observations of Hansen J in *Re: NRMA Insurance Ltd (No 1)* (2000) 33 ACSR 595, 608-609 and Santow J in *Winpar Holdings Limited v Goldfields Kalgoorlie Limited* [2000] NSWSC 855 about the need for reasonable plausibility of submissions illustrate one possible boundary between an application of the general rule in s 664F and the exercise of a discretion to depart from it.

[5] The twenty-sixth respondent submitted that its conduct in continuing to oppose the application was not unreasonable. The case involved unique facts which had not previously been considered in the earlier decided cases. As an example it was said that the existence of an antecedent takeover by which a market based allocation of values between the classes of shares could be ascertained was an issue which might be properly explored. It was also submitted that there could be no complaint that the respondent wasted time or any substantial costs in relation to purely legal questions. As an example the fact that the submissions relating to the constitutional argument were put very briefly (almost to the point of formality) at trial solely to preserve the respondent's position on appeal was referred to.

[6] It was also submitted that the respondent had relied on its expert in good faith. The majority of the hearing was spent in cross-examination of the expert witnesses. The process of cross-examination was not conducted unreasonably. It was also submitted that the respondent's opposition was not misconceived or hopeless. It was submitted that to the extent that it raised legal issues previously determined, there was a divergence of judicial opinion in respect of those issues. At the time there was no authoritative appellate decision on those issues.

[7] The first respondent, Dr Elkington, submitted that he should have his costs which, he said, would be limited to filing fees and fares to and from Brisbane because he was self-represented. He argued that the costs should be indemnity costs on the basis that the *Corporations Act* is Commonwealth legislation, that the phrase "costs that a person incurs" should have the same operative effect in each State and that because of the different treatment of costs in different jurisdictions that would not be the case if standard costs were awarded and assessed. I do not accept this argument. In the absence of specific provision to the contrary it is my view that an award of costs should be governed by the procedure applicable in the jurisdiction where the hearing occurs.

[8] Dr Elkington also submitted that it would be wrong to say that he relied on the same arguments as the twenty-sixth respondent. The principle bases of his opposition were firstly, that no value had been assigned to voting rights attaching to shares sought to be acquired and secondly, that there had been no allocation of value as between the two classes which he had submitted required a market based allocation.

[9] He said that neither argument had been adequately put by the twenty-sixth respondent nor rejected in previous authority and it was therefore appropriate for him to rely on them. He submitted that he did not traverse unnecessarily matters that had been adequately dealt with by counsel for the twenty-sixth respondent and that his contribution had been positive, responsible and economical.

[10] The applicant accepted that s 664F(4) is intended to have a beneficial operation in favour of dissident shareholders but submitted that it has the potential to be an engine of injustice. It was submitted that, firstly, the applicant must bear its own costs and can avoid paying a respondent's costs only if the respondent has acted improperly, vexatiously or otherwise unreasonably. The point of making this submission which, in reality, can only be addressed usefully in the political arena, not in the courts, is to focus on the potential for dissident shareholders to litigate issues that do not fairly call for a determination by the court at the applicant's cost and with the potential for exposure to delay in achieving finality. It was submitted that the courts should seek to avoid those effects.

[11] In relation to the costs of the application itself, three propositions were advanced. The first was that costs referred to were costs on the standard basis, relying on *Austrim Nylex Ltd v Kroll* [2002] VSC 290; (2002) 42 ACSR 479. It was submitted, secondly, that a party could act improperly, vexatiously or otherwise unreasonably if it sought to continue to agitate questions which have been cogently resolved by prior authority, in reliance on *Pauls Ltd v Elkington* [2001] QCA 414; (2001) 39 ACSR 397. Thirdly, it was submitted that a party can act improperly, vexatiously or otherwise unreasonably by appearing separately in the proceedings where this duplication could have been avoided, in reliance on *Pauls Ltd v Dwyer*

[2001] QSC 103 and *Austrim Nylex* (No 3) [2002] VSC 290. Applying these propositions, it was submitted that there was unreasonable conduct because the respondents' resistance to the application was founded on contentions which were, by the time of the hearing, contrary to authority. Further, it was submitted that Dr Elkington's appearance was unnecessary and for that reason no order as to costs should be made.

[12] With respect to the former proposition, by the time of the hearing there was authority in three jurisdictions, referred to in the principal judgment, rejecting the principles relied on. To the extent that there was perceived conflict between decisions, it was in a real sense unnecessary to the decision to resolve it because the expert's report proceeded on the most favourable view to the respondents in that regard, resulting in a higher determination of "fair value" than if the other view, which was reflected in a later opinion by the same expert, had been used as the basis for the operative expert's report. It was, in my view, unreasonable to pursue that aspect of the matter. It was, of course not unreasonable to test the validity of the conclusion reached about what was fair value in other respects. It is not necessary to finally conclude whether a series of decisions, but only at first instance, rejecting propositions relied on would make reliance on them in a subsequent case a ground for enlivening the discretion to refuse costs.

[13] There was one novel issue, dependent on the particular facts of the case. That was concerned with the treatment of taxation advantages accruing to the ultimate shareholder, the State of Queensland, because of money otherwise payable to the Commonwealth accruing to the State. In a sense it was an extension of the proposition, rejected in a series of authorities, concerning taxation benefits but also involved other issues as well.

[14] The first respondent's contribution at the hearing did not prolong it except to a minimal degree, but he did not resile from relying on the submissions in the major propositions relied on by the twenty-sixth respondent. He did not elaborate on them but emphasised only matters which he felt had been inadequately dealt with in the twenty-sixth respondent's submissions. I do not accept that the argument based on separate representation being unnecessary has any crucial application in the particular circumstances of the case with regard to him. However, it is unreal to suggest that he did not rely on, or at least acquiesce in, the same propositions for the same purposes as were pressed by the twenty-sixth respondent.

[15] Having regard to the clear legislative policy of giving a beneficial interpretation to the provisions of s 664F, I consider that I should not make no order as to costs. However, it is in my view a case where it was unreasonable to rely on a number of the propositions referred to above for the reasons explained. It is a matter of impression what costs order ought to be made. Having regard to my impression of the course the matter took, I order the applicant pay to each of the first and twenty-sixth respondent 1/3 of the costs of the application to be assessed on the standard basis.

[16] There is one other aspect of the matter. There was an application for a stay of proceedings for a sufficient time to allow the respondents to consider the terms of the reasons for judgment with a view to deciding whether an appeal should be lodged. That application was refused. In my view that application falls outside the description in s 664F of "legal proceedings in relation to the application". The

application was made *instanter* upon the delivery of the judgment. The application was dealt with immediately and refused. In the particular circumstances, it may be doubted whether any significant additional costs could be justified. I consider that the appropriate order is that there be no order as to costs of that application.

[17] The formal orders are the following:

1. I order the applicant to pay to each of the first and twenty-sixth respondents 1/3 of their costs of and incidental to the application to be assessed on a standard basis;
2. I make no order as to costs of the application for a stay of proceedings.