

SUPREME COURT OF QUEENSLAND

CITATION: *Althaus & Anor v Australia Meat Holdings P/L & Anor*
[2006] QCA 499

PARTIES: **JOHN EDMOND ALTHAUS**
(first plaintiff/first respondent)
REDMEAT PTY LTD ACN 064 838 982
(second plaintiff/second respondent)
v
AUSTRALIA MEAT HOLDINGS PTY LIMITED
ACN 011 062 338
(first defendant/appellant)
CONAGRA INC
(second defendant/cross-appellant)

FILE NO/S: Appeal No 3316 of 2006
SC No 7975 of 2004

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal - Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered 20 October 2006
Further Order delivered 1 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2006

JUDGES: McMurdo P, Keane and Holmes JJA
Further Order of the Court

FURTHER ORDER: **1. Conagra's application to vary Order No 4 of 20 October 2006 is refused**
2. The application by Mr Althaus and Redmeat Pty Ltd is refused
3. No order is made in relation to the costs of these applications

CATCHWORDS: PROCEDURE - COSTS - RECOVERY OF COSTS - where this Court allowed cross-appellant company's appeal in part in the substantive judgment but did not award costs in favour of cross-appellant - where cross-appellant seeks to vary costs orders so as to receive its costs on the basis that although it and appellant company were related entities at the time of the relevant events, the two companies are now separate entities - whether the two companies were related entities - whether they had common commercial interests - whether at the appeal hearing the cross-appellant company's arguments

should have been presented on its behalf by the appellant company's counsel - whether a separate costs order should be made in cross-appellant's favour

Althaus & Anor v Australia Meat Holdings P/L & Anor [2006] QCA 412; Appeal No 3316 of 2006, 20 October 2006, cited

COUNSEL: D J S Jackson QC, with A M Pomerence, for the appellant
S L Doyle SC, with S D Anderson, for the cross-appellant
W Sofronoff QC, with J T Stevens, for the respondents

SOLICITORS: Allens Arthur Robinson for the appellant
Clayton Utz for the cross-appellant
Barwick Stevens for the respondents

- [1] **THE COURT:** On 20 October 2006, the Court gave judgment in which, inter alia, Conagra's appeal was allowed in part. The Court made no order as to costs in favour of Conagra in respect of the issues on which it was successful on the basis that, as stated in the reasons of Keane JA:¹
- "... Conagra's interests and arguments on the appeal were in no way inconsistent with those advanced by AMH [Australia Meat Holdings Pty Ltd]. While Conagra is an entity separate from AMH, and so entitled to separate representation in the action, the two entities are associated and there was no reason why the arguments presented on appeal on behalf of AMH and Conagra could not have been presented by one set of legal representatives."
- [2] Conagra now seeks a variation of the order in relation to costs on the footing that, although AMH and Conagra were related entities at the time of the events of which Mr Althaus complains, the two companies were not related at the time of the hearing as a result of transactions which occurred in September 2002. Further, because the issues agitated by Conagra on the appeal, as to the adequacy of the plaintiffs' pleading of their case of breach of confidentiality, had not been raised in AMH's notice of appeal, those issues could not have been addressed by counsel for AMH.
- [3] Mr Althaus and Redmeat, in submissions in response to Conagra's application, point to evidence in an affidavit dated 16 March 2005 by Conagra's former solicitor which showed that, at that time at least, Conagra still retained a 46 per cent interest in AMH. On this evidence, it appeared that there remained a substantial common commercial interest between the two companies at the time the appeal was heard.
- [4] Upon receiving the submission by Mr Althaus and Redmeat, Conagra filed a further affidavit which deposed in detail to the circumstances of the divestiture of Conagra's interest in AMH. The effect of this evidence is that, by September 2004, Conagra no longer retained any equity in AMH, and that the statement to the contrary by Conagra's former solicitor in the affidavit of 16 March 2005 was mistaken.
- [5] In the light of this further affidavit, it must be accepted that, at the time the appeal was heard, Conagra and AMH were no longer associated. Nevertheless, it remains

¹ *Althaus & Anor v Australia Meat Holdings P/L & Anor* [2006] QCA 412 at [56].

true to say that there was no good reason why the arguments presented on appeal by AMH and Conagra could not have been presented by AMH's legal representatives. Conagra's point that it was not open to AMH to agitate complaints about the insufficiency of the plaintiffs' pleading of their case of breach of confidentiality is not sufficient to require a different conclusion.

- [6] There was no inconsistency between the positions taken on the appeal by AMH and Conagra. Indeed, on the appeal, they had a community of interest as against Mr Althaus and Redmeat. The arguments which were advanced on their behalf related to the insufficiency of the case pleaded by the plaintiffs. These arguments did not require any disclosure of information between AMH and Conagra which might have prejudiced the position of either of them in the litigation or otherwise. Conagra's argument could easily have been presented by the very able and experienced counsel who appeared for AMH. In these circumstances, the course which was adopted smacks of luxury. Mr Althaus and Redmeat should not be mulct in costs because Conagra chose not to authorise AMH's counsel to present Conagra's arguments on appeal on its behalf.
- [7] It appears that Mr Althaus and Redmeat now seek orders "for leave to include representative claims pursuant to claim 110 particulars N, 1 and 2 of the amended statement of claim". It is not clear what is meant by this application. In any event, the Court is not disposed to entertain the application which, if it is to be made, should not be made to this Court in the first instance, but to a judge of the Trial Division.

Conclusion and order

- [8] Conagra's application for the variation of Order No 4 of 20 October 2006 is refused. The application by Mr Althaus and Redmeat is refused. There will be no order as to the costs of these applications.