SUPREME COURT OF QUEENSLAND

CITATION:	*Aquilina Holdings Pty Ltd v Lynndell Pty Ltd & Anor; Lynndell Pty Ltd & Anor v Capital Finance Australia Limited & Ors* (No.2) [2008] QSC 98
PARTIES:	**LYNNDELL PTY LTD (ACN 102 268 217)** (first applicant) and **OFF THE PLAN PTY LTD (ACN 100 719 926)** (second applicant) **v** **CAPITAL FINANCE AUSTRALIA LIMITED (ACN 069 663 136)** (first respondent) and **ARLANDIS ANUSAITIS, ERNST SELZ, HELEN LAVY and THE ALBATROSS PROPERTY GROUP PTY LTD (ACN 114 397 036)** (second respondent) **AQUILINA HOLDINGS PTY LTD (ACN 103 213 172)** (Applicant) **v** **LYNNDELL PTY LTD (ACN 102 268 217)** (first respondent) (and) **OFF THE PLAN PTY LTD (ACN 100 719 926)** (second respondent)
FILE NOS:	BS 8939 of 2007 BS 8835 of 2007
DIVISION:	Trial Division
PROCEEDING:	Costs determination
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 May 2008
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Daubney J
ORDER:	**1. Leave be granted in BS 8835 of 2007 and BS 8939 of 2007 pursuant to s 471B of the *Corporations Act* 2001 to proceed against Lynndell Pty Ltd (in liquidation);** **2. Aquilina Holdings Pty Ltd and Capital**

Finance Australia Ltd be released from the undertakings which they respectively gave to this Honourable Court on 9 October 2008 ('the Undertakings').

3. **It is declared that, upon payment in full of the debt owing to Capital Finance Australia Ltd from the proceeds of sale from a contract of sale dated 30 May 2007 entered into between Aquilina Holdings Pty Ltd and Off the Plan Pty Ltd (as Vendors) and Shingley Projects Pty Ltd (as Purchaser), Lynndell Pty Ltd did not become entitled to the balance referred to in subparagraph (b)(v) of the Undertakings, by way of subrogation under the securities which Capital Finance Australia Ltd held and holds from Aquilina Holdings Pty Ltd and Off the Plan Pty Ltd, including registered mortgage no. 709588766.**

4. **The proceeding commenced under originating application BS 8939 of 2007 otherwise be dismissed.**

5. **That Lynndell Pty Ltd and Off the Plan Pty Ltd shall pay the costs (including any reserved costs) of the respondents to proceeding BS 8939 of 2007 and the applicant in proceeding BS 8835 of 2007, all such costs to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – TAXATION – ASSESSMENT IN LIEU OF TAXATION – where successful party has applied for an order that the Court fix its costs pursuant to *Uniform Civil Procedure Rules 1999* rule 687(2)(c) – whether the court should depart from the ordinary rule that costs are to be assessed

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – Unnecessary parties and appearances – where it was not in issue that a particular party had priority – whether it was appropriate for that party to be served with the proceedings – whether an order for costs on the indemnity basis should be made in favour of that party

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – PROCEEDINGS BY OR AGAINST THE COMPANY – Leave to proceed – whether leave to proceed is required – where a company is in liquidation – whether leave to proceed is required for the purposes of seeking a costs order against the company –

whether such leave should be granted

Corporations Act 2001 (Cth)
Uniform Civil Procedure Rules 1999 (Qld)

King v Yurisich (2006) 59 ACSR 598

COUNSEL: AJH Morris QC for the first respondent
CA Wilkins for the second respondent

SOLICITORS: Hopgood Ganim for the first respondent
Tucker & Cowen for the second respondent

[1] Since delivering my reasons for judgment in this matter, the parties have provided submissions as to the orders to be made and as to costs.

[2] It will be recalled that Aquilina Holdings Pty Ltd ('Aquilina') and Off the Plan Pty Ltd ('OTP') were the registered proprietors as tenants in common of certain land at Airlie Beach. The first registered mortgagee of the land was Capital Finance Pty Ltd ('Capital'). This mortgage secured funding which had been advanced to the joint venture vehicle, Aquiplan Management Pty Ltd ('Aquiplan'). It will also be recalled, as set out in paragraphs [12] and following of my reasons for judgment, that just before a sale of the land was scheduled to be settled, Lynndell Pty Ltd ("Lynndell") (one of the guarantors of the loan by Capital to Aquiplan) lodged caveats over the land claiming an equitable interest by way of subrogation, relying in that regard on an amount which Lynndell had paid to Capital in part satisfaction of the debt due by Aquiplan. Aquilina, as a registered proprietor of the land, made application (in BS 8835 of 2007) for removal of the caveats. Lynndell and OTP cross-applied (in BS 8939 of 2007) for declaratory relief in respect of the claim for subrogation.

[3] When the matter came on for hearing, the parties gave undertakings which effectuated Lynndell's release of its caveats, thereby allowing settlement to proceed and Capital, as first registered mortgagee, to be paid out, with the balance proceeds of sale to be held in Capital's solicitors' trust account pending my determination of the question set out in paragraph [15] of my reasons for judgment. As set out in those reasons, my conclusion was that, upon payment in full of the debt owing to Capital from the proceeds of sale of the land, Lynndell did not become entitled to the balance of the purchase price by way of subrogation under Capital's securities.

[4] In short:

(a) Lynndell and OTP were unsuccessful in the proceeding by which they sought declaratory relief to vindicate Lynndell's claimed right of subrogation (BS 8939 of 2007), and

(b) Whilst the caveats lodged by Lynndell were removed in consequence of the cross-undertakings which were given to enable settlement to

proceed, the effect of my decision was that the claimed ground on which the caveats were based was erroneous.

[5] Dealing first with Aquilina, as the applicant in BS 8835 of 2007, and the second mortgagees of the land, who were the second respondents in BS 8939 of 2007, there is no reason why the usual rule of costs following the event should not apply. The second mortgagees have, quite properly, drawn to my attention the fact that, since the hearing, Lynndell has been ordered to be wound up in insolvency, and raise the question as to whether leave is required under s 471B of the *Corporations Act 2001* to proceed against a company in liquidation for the purposes of making a costs order. I think there is merit in the submission that, in the circumstances of this case, the making of a costs order can be seen as something quite distinct from the continuation of a proceeding against a company in liquidation. But, like Weinberg J in *King v Yurisich*[1], I do not consider it necessary for me to express a concluded view on this matter because, having regard to the circumstances, and particularly the terminal stage of these proceedings, any leave required under s 471B would be granted.

[6] The second mortgagees have also applied for an order that the Court fix their costs pursuant to *UCPR* rule 687(2)(c). This rule is particularly useful, and apposite for use, in situations such as the determination of costs on interlocutory applications on procedural matters, in which the quantum of costs is typically modest and there is clearly a cost benefit for the parties in having an immediate fixing of the costs rather than requiring them to expend further, perhaps greater, costs on an assessment. In such a case, which will usually arise when a judge is sitting in the Applications jurisdiction, the avoidance of delay and the achievement of an appropriately just resolution at a minimum of expense to the parties may warrant a judge adopting a robust approach to the fixing of costs. It must be borne in mind, however, that the primary position under the *UCPR* is that costs are to be assessed – rule 687(1). The Court, of course, has a discretion to depart from that primary position, but in my view should only do so in appropriate cases, such as those I have mentioned. In particular, the availability of a discretion to depart from the assessment regime provided for under the rules of court ought not be seen as a licence for judges to be asked to act as costs assessors.

[7] In my view, it would not be appropriate to fix the costs in the present case, not least because the liquidators of Lynndell will have an interest on behalf of the creditors of that company in seeing an assessment of the costs properly recoverable.

[8] As to Capital, which was the first respondent to BS 8939 of 2007, it should also have its costs against Lynndell and OTP. Capital contends, however, that it should have its costs on an indemnity basis. In this respect it submits that:

(a) There was no basis for joining it as a party; it is submitted that Lynndell and OTP had no arguable cause of action or claim to restrain Capital's enforcement of its prior security or the receipt by it of the proceeds of realising that security;

---

1 (2006) 59 ACSR 598.

(b) This position was demonstrated when the matter first came before the Court on 9 October 2007, when the parties consented to orders allowing the sale to proceed with the balance proceeds of sale to be held in trust pending the determination of the priority dispute between the parties other than Capital;

(c) Lynndell and OTP were alerted to these considerations by correspondence from Capital's solicitors on 3 October 2007.

[9] The relief sought by Lynndell and OTP in BS 8939 of 2007 was as follows:

> '1. A declaration that the first Applicant is subrogated to the First Respondent in respect of Mortgage No. 709588766, being the first mortgage over the land described as Lot 95 Crown Plan HR 1223 in the County of Herbert, Parish of Conway, being the whole of the land contained in Title Reference 21191156, and the land described as Lot 268 Crown Plan HR 1060 in the County of Herbert, parish of Conway, being the whole of the land contained in Title Reference 21149096 ("the security property");
>
> 2. A declaration that the right of subrogation is an interest in the security property and that Caveats Nos 711-3-800 and 711036194 are validly registered to protect that interest in the security property;
>
> 3. An order that, upon payment to the First Respondent as first mortgagee of the amount outstanding to it, the First Respondent transfer Mortgage No. 709588766 to the First Applicant;
>
> 4. An order, including an interlocutory order, that the First Respondent be restrained from executing or providing a discharge of Mortgage No. 709588766;
>
> 5. An order that the Second Respondents as second registered mortgagees execute a Release of Mortgage in registrable form in respect of Mortgage No. 709941701 and deliver it up to the solicitors for the Applicants by 12 pm on the day preceding the settlement date of the sale as notified by Gadens to the Second Respondents;'

[10] Notwithstanding that, in the hearing before me, it was never in issue that Capital enjoyed priority as first registered mortgagee, it seems to me, on balance, that, having regard to the relief sought, it was appropriate for Capital, as an interested party, to be served with the proceedings. As a consequence of the undertakings given to effectuate settlement, Capital was spared any further involvement in the matter. In those circumstances, I am disinclined to make an order for Capital's costs on the indemnity basis. Further, for the reasons expressed above, I would not be inclined to exercise a discretion to depart from the primary position that there should be an assessment of the costs recoverable by Capital in this proceeding.

[11] Disbursement of the balance of the sale proceeds held in Capital's solicitor's trust account will be in accordance with the secured interests of the first and second

mortgagees, and the terms of their respective mortgages, and I do not propose making any further order in that regard.

[12] Accordingly, I make the following orders:

1. Leave be granted in BS 8835 of 2007 and BS 8939 of 2007 pursuant to s 471B of the *Corporations Act* 2001 to proceed against Lynndell Pty Ltd (in liquidation);

2. Aquilina Holdings Pty Ltd and Capital Finance Australia Ltd be released from the undertakings which they respectively gave to this Honourable Court on 9 October 2008 ('the Undertakings').

3. It is declared that, upon payment in full of the debt owing to Capital Finance Australia Ltd from the proceeds of sale from a contract of sale dated 30 May 2007 entered into between Aquilina Holdings Pty Ltd and Off the Plan Pty Ltd (as Vendors) and Shingley Projects Pty Ltd (as Purchaser), Lynndell Pty Ltd did not become entitled to the balance referred to in subparagraph (b)(v) of the Undertakings, by way of subrogation under the securities which Capital Finance Australia Ltd held and holds from Aquilina Holdings Pty Ltd and Off the Plan Pty Ltd, including registered mortgage no. 709588766.

4. The proceeding commenced under originating application BS 8939 of 2007 otherwise be dismissed.

5. Lynndell Pty Ltd and Off the Plan Pty Ltd shall pay the costs (including any reserved costs) of the respondents to proceeding BS 8939 of 2007 and the applicant in proceeding BS 8835 of 2007, all such costs to be assessed on the standard basis.