

SUPREME COURT OF QUEENSLAND

CITATION: *Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall & Ors*
[2014] QCA 203

PARTIES: **THIESS PTY LTD**
ABN 87 010 221 486
(appellant)
v
INDUSTRIAL MAGISTRATE ELIZABETH HALL
(first respondent)
THE PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND, PRESIDENT D R HALL
(second respondent)
ADAM JOHN LOW
(third respondent)

FILE NO/S: Appeal No 5811 of 2013
SC No 11568 of 2012

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 August 2014

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P and Holmes and Morrison JJA
Judgment of the Court

ORDER: **No order as to the costs of the appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant was unsuccessful in its appeal from the Trial Division – where the appeal was the last step in a long process of appeals and applications for review emanating from proceedings against the appellant in the Industrial Magistrates Court – where both parties sought their costs of the appeal – where neither side’s arguments, as originally put, were meritorious – where the appellant litigated unsuccessfully and on an erroneous basis – where the respondent’s submissions through the course of the litigation were counter-productive – whether any costs order should be made

COUNSEL: No appearance for the appellant, the appellant's submissions were heard on the papers
 No appearance for the first and second respondents
 No appearance for the third respondent, the third respondent's submissions were heard on the papers

SOLICITORS: Ashurst for the appellant
 No appearance for the first and second respondents
 Department of Justice and the Attorney-General, Workplace Health & Safety Queensland for the third respondents

- [1] **THE COURT:** This Court has previously dismissed an appeal from the Trial Division in what was the last step in a long process of appeals and applications for review emanating from proceedings against the appellant in the Industrial Magistrates Court. The Court's conclusion was that the Industrial Magistrate was correct in ruling that, objection having been taken to the joinder of two matters described as alternatives in a complaint, the proper course was to require the complainant (the third respondent) to elect on which matter he would proceed, pursuant to s 43(3)(a) of the *Justices Act*.
- [2] In the appellant's appeal from the magistrate to the Industrial Court and on its application to a judge of the Trial Division for review of the Industrial Court's decision, both parties had proceeded on the basis that the magistrate was wrong in concluding that there was an express power to require the prosecutor to elect under that provision. The third respondent maintained that there was instead an implied power, while the appellant argued that there was no power at all, and the complaint should have been struck out. The judge at first instance accepted the third respondent's contention as to the implication of a power. Only at this Court's request were submissions made as to whether there was an express power; the power which the Court ultimately found to exist.
- [3] Both parties seek their costs of the appeal. The appellant contends that its appeal was attributable to the third respondent's failing to appeal an earlier decision and consistently conceding that no express power existed; and, it argues, it was successful in having the reasoning of the primary judge as to the existence of an implied power rejected. The third respondent, on the other hand, points out that he has consistently maintained that he should be asked to elect between charges and that the appellant has been unsuccessful in a series of applications and appeals.
- [4] This is an unusual situation. Neither side's argument, as initially put, was meritorious. The focus of both was (wrongly, as this Court has found) on the existence or otherwise of an implied power. The appellant has litigated unsuccessfully and on an erroneous basis, and by no means deserves to recover its costs. On the other hand, the respondent's contribution to the argument on its path to this Court has been counter-productive. The proper course, in our view, is to make no order as to the costs of the appeal.