

# SUPREME COURT OF QUEENSLAND

CITATION: *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors (No 2)*  
[2015] QSC 248

PARTIES: **BHP BILLITON MITSUI COAL PTY LTD**  
ACN 009 713 875  
(applicant)  
v  
**WILLIAM ANGUS ISDALE, MEMBER OF THE LAND  
COURT OF QUEENSLAND**  
(first respondent)  
**RAYMOND JOHN BAULCH and MARJORIE BERYL  
BAULCH**  
(second respondents)  
**CHIEF EXECUTIVE, DEPARTMENT OF  
ENVIRONMENT AND HERITAGE PROTECTION**  
(third respondent)

FILE NO/S: SC No 12316 of 2014

DIVISION: Trial Division

PROCEEDING: Application for Costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 26 August 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Philip McMurdo J

ORDER: **The second respondents pay to the applicant its costs of the proceeding.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – application for costs of a proceeding in which a statutory order of review was made under the *Judicial Review Act 1991* (Qld) – whether an order for costs should be made under s 49 of the *Judicial Review Act 1991* (Qld) – s 49 requires identification of “the relevant applicant” – where the application was not one made by the applicants under s 49, though the respondents’ submissions suggested the applicant was the “relevant applicant” for the purpose of s 49 – where, if the respondents were the “relevant applicant” for the purpose of s 49, no order should be made under s 49, having regard to the considerations set out in s 49(2)

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – whether costs should follow the event – where a statutory order of review was made in the proceeding and a declaration granted in favour of the applicant – where the second respondents argued that each side should bear its own costs – whether an order for costs should be made under s 49 of the *Judicial Review Act 1991 (Qld)* – where the applicant should have its costs paid by the unsuccessful parties  
*Judicial Review Act 1991 (Qld)*, s 49

*Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454, applied  
*BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107, cited

COUNSEL: A Skoien, with M Batty for the second respondents  
 No appearance for the first and third respondents

SOLICITORS: Ashurst for the applicant  
 SB Wright & Wright and Condie for the second respondents  
 No appearance for the first or third respondents

- [1] This judgment deals with the costs of a proceeding in which I made a statutory order of review under the *Judicial Review Act 1991 (Qld)*.<sup>1</sup> The contest was between the applicant, BHP, and the second respondents, Mr and Mrs Baulch, who were adversaries in the Land Court which was hearing the objections by Mr and Mrs Baulch to an application for additional surface area of mining leases.
- [2] In the Land Court, Mr and Mrs Baulch sought and were granted an order for general disclosure of documents according to what was said to be the applicant’s duty of disclosure under r 211 of the *Uniform Civil Procedure Rules 1999 (Qld)*. The question in this court was whether the Land Court erred in law in holding that the duty under r 211 applied to a case of that kind in the Land Court. BHP’s argument prevailed and I granted a declaration in its favour.
- [3] BHP seeks its costs of this proceeding, upon the basis that they should follow the event. Mr and Mrs Baulch argue that each side should bear its own costs.
- [4] The argument for Mr and Mrs Baulch refers to s 49 of the *Judicial Review Act* and addresses some but not all of the considerations set out in s 49(2). Section 49 relevantly provides as follows:

“49 Costs - review application

- (1) If an application (the *costs application*) is made to the court by a person (the *relevant applicant*) who -
- (a) has made a review application; or

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<sup>1</sup> *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107.

- (b) has been made a party to a review application under section 28; or
- (c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;

the court may make an order -

- (d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
  - (e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.
- (2) In considering the costs application, the court is to have regard to -
- (a) the financial resources of -
    - (i) the relevant applicant; or
    - (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
  - (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
  - (c) if the relevant applicant is a person mentioned in subsection (1)(a) - whether the proceeding discloses a reasonable basis for the review application; and
  - (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c) - whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

...

- (4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application.

...

- (6) In this section -

*review application* means -

- (a) an application for a statutory order of review under section 20, 21 or 22 ...”

- [5] The submissions for Mr and Mrs Baulch, with respect, are not entirely clear as to the way in which s 49 is said to be engaged in the present case. One of their submissions is that: “consistent with section 49(2)(a) of the JR Act, consideration ought to be given to the financial position of the Applicant [which] as a large public company, seeking to expand its existing commercial mining operations”. Another is that: “as sections 49(2)(c) and 49(2)(d) focus attention upon the reasonableness of the Applicant’s conduct, similar considerations in respect of the Second Respondents’ conduct favour the making of no order as to costs. There was a clearly arguable basis for the Second Respondents to seek disclosure and to maintain the existence of a general duty of disclosure ...”.<sup>2</sup>
- [6] Any consideration of the operation of s 49 requires the identification of “the relevant applicant”. This will be a person who has made an application to the court for an order of the kind described in s 49(1)(d) or s 49(1)(e). In the present case, there is an application by BHP for an order for costs. But BHP’s application is not made under s 49 because the order which is sought is not of a kind which the court may make under s 49(1). It is not within s 49(1)(d), at least because all of the relevant costs were incurred by the time this costs application was made.
- [7] The passages which I have set out from the written submissions for Mr and Mrs Baulch suggest that s 49 should be applied as if BHP was the “relevant applicant”. As s 49 cannot be so applied, the only relevance of s 49 could come from treating Mr and Mrs Baulch as “the relevant applicant”, in that by submitting that each party should bear its own costs of the proceeding, they have applied for such an order to be made under s 49(1)(e).
- [8] Upon the premise that they are the “relevant applicant”, the court must have regard to each of the considerations set out in s 49(2). The first of them is the matter of the financial resources of the relevant applicant: s 49(2)(a)(i). However, Mr and Mrs Baulch have provided no evidence as to that matter. In particular, they have provided no evidence which suggests that they would be unable to meet an order for the payment of BHP’s costs.
- [9] The second necessary consideration is whether the proceeding in this court involved an issue that affects, or may affect, the public interest, in addition to any personal right or interest of Mr and Mrs Baulch: s 49(2)(b). The question of law upon which this case turned is one of general application so that it could be said that its determination was in the public interest. However, as McPherson JA said in *Anghel v Minister for Transport (No 2)*:<sup>3</sup>
- “Section 49(2)(b) appears to be directed to proceedings in which it is the public interest rather than any private right of the applicant that is sought to be vindicated by the application.”
- The contest in the Land Court is one in which Mr and Mrs Baulch are pursuing their private interests as land owners, just as BHP is pursuing its own interest as a miner. I doubt that the wider relevance of the determination of this question of law affects the public interest in a way which is relevant under s 49(2)(b).
- [10] As for s 49(2)(d), I accept that the case for Mr and Mrs Baulch was reasonably arguable. But having regard to the absence of any evidence as to the financial resources of Mr and

<sup>2</sup> Second respondents’ written submissions, paras 11 and 13.

<sup>3</sup> [1995] 2 Qd R 454, 460.

Mrs Baulch and to the fact that they contested the present proceeding in order to protect their own interests rather than to vindicate some public interest, I am not persuaded that there should be an order under s 49(2)(e), if that is what Mr and Mrs Baulch are seeking by their argument.

- [11] Their submissions referred to other considerations. It was argued that the potential of BHP's proposed expansion of the mine has the potential to disrupt their pastoral activities, giving them a proper basis to seek disclosure of documents as they did in the Land Court. I am not in a position to assess whether such a general disclosure of documents is necessary for the proper disposition of the Land Court case. But upon the premise that it is reasonably necessary, it does not follow that this fact has any relevance for a decision as to who should pay the costs of the proceeding in this court.
- [12] This proceeding resulted from a stance taken by Mr and Mrs Baulch in the Land Court which resulted in the Land Court making a reviewable error of law. The case for Mr and Mrs Baulch was reasonably arguable. But this proceeding had to be brought by BHP which, in my view, should have its costs paid by the unsuccessful parties.
- [13] It will be ordered that the second respondents pay to the applicant its costs of the proceeding.