SUPREME COURT OF QUEENSLAND

CITATION:	*Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 4)* [2015] QSC 337
PARTIES:	**CALLIDE POWER MANAGEMENT PTY LTD** ACN 082 468 700 (first applicant) **CALLIDE ENERGY PTY LIMITED** ACN 082 468 746 (second applicant) **IG POWER CALLIDE LTD (FORMERLY SHELL COAL POWER CALLIDE LTD)** ACN 082 413 885 (third applicant) **v** **CALLIDE COALFIELDS (SALES) PTY LTD** ACN 082 543 986 (first respondent) **ANGLO COAL (CALLIDE) PTY LTD** ACN 081 022 228 (second respondent) **ANGLO COAL (CALLIDE) NO. 2 PTY LTD** ACN 004 784 454 (third respondent) **CS ENERGY LIMITED** ACN 078 848 745 (applicant) **v** **CALLIDE COALFIELDS (SALES) PTY LTD** ACN 082 543 986 (first respondent) **ANGLO COAL (CALLIDE) PTY LTD** ACN 081 022 228 (second respondent) **ANGLO COAL (CALLIDE) NO. 2 PTY LTD** ACN 004 784 454 (third respondent)
FILE NO/S:	SC No 12122 of 2013 SC No 12138 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON: 2 December 2015

DELIVERED AT: Brisbane

HEARING DATE: On the papers
Respondents' submissions received 9 November 2015
Applicants' submissions in SC No 12122/13 received 16 November 2015
Applicant's submissions in SC No 12138/13 received 16 November 2015
Respondents' reply submissions received 18 November 2015

JUDGE: Flanagan J

ORDER: **In SC No 12122/13:**

1. **As to the applicants' strike-out application filed 13 March 2015, there be no order as to costs.**
2. **The applicants pay the respondents' costs of and incidental to the respondents' particulars application filed 7 April 2015.**
3. **The applicants pay the respondents' costs of and incidental to the mention on 5 May 2015.**
4. **The applicants pay the respondents' costs of and incidental to the mention on 15 July 2015.**
5. **The applicants pay the respondents' costs thrown away by the amendments made in the applicants' further amended statement of claim filed 15 June 2015 including the costs of the respondents' reasonable recipient allegations and particulars.**
6. **The applicants pay the respondents' costs thrown away by the amendments made in the applicants' amended application filed 21 August 2015.**
7. **Save as set out in (6), the costs of the applicants' applications filed 15 August 2014, 13 March 2015 and the applicants' amended application filed 21 August 2015, in relation to separate questions, be each party's costs in the proceeding.**

In SC No 12138/13:

1. **As to the applicant's strike-out application filed 13 March 2015 (and amended 10 April 2015), there be no order as to costs.**
2. **The applicant pay the respondents' costs of and incidental to the respondents' particulars application filed 7 April 2015.**
3. **The applicant pay the respondents' costs of and incidental to the mention on 5 May 2015.**
4. **The applicant pay the respondents' costs of and incidental to the mention on 15 July 2015.**

5. **The applicant pay the respondents' costs thrown away by the amendments made in the applicant's further amended statement of claim filed 15 June 2015 including the costs of the respondents' reasonable recipient allegations and particulars.**
6. **The applicant pay the respondents' costs thrown away by the amendments made in the applicant's amended application filed 14 August 2015.**
7. **Save as set out in (6), the costs of the applicant's applications filed 6 August 2014, 13 March 2015 and the applicant's amended application filed 14 August 2015, in relation to separate questions, be each party's costs in the proceeding.**

CATCHWORDS: PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – COSTS IN THE CAUSE – where the applicants applied for the hearing and determination of separate questions – where the applicants' application was originally not granted as such an application was premature – where the applicants subsequently amended the statement of claim and applied again for the hearing and determination of separate questions – where the applicants were successful in an order for the hearing and determination of separate questions – where there had been a number of further mentions of the matter prior to the ordering of separate questions – where there had been a number of applications for strike-out and/or requests for further particulars by both the applicants and the respondents – what are the appropriate costs orders to be made in relation to the applications for separate questions, strike-outs, further particulars and the mentions of the matters

PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – ADJOURNMENT AND AMENDMENT – where the applicants applied for the hearing and determination of separate questions – where the applicants' application was originally not granted as such an application was premature – where the applicants subsequently amended the statement of claim and applied again for the hearing and determination of separate questions – where the applicants were successful in an order for the hearing and determination of separate questions – where there had been a number of further mentions of the matter prior to the ordering of separate questions – where there had been a number of applications for strike-out and/or requests for further particulars by both the applicants and the respondents – what are the appropriate costs orders to be made in relation to the applications for separate questions, strike-outs, further particulars and the mentions of the matters

Uniform Civil Procedure Rules 1999 (Qld), r 386, r 692

Body v Mount Isa Mines [2014] QCA 214, cited

Callide Power Management Pty Ltd & Ors v Callide Coalfield (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors [2014] QSC 216, related
Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 2)* [2015] QSC 142, related
Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 3)* [2015] QSC 295, related
Di Carlo v Dubois [2002] QCA 225, cited
Fletcher v Fortress Credit Corp (Australia) II Pty Ltd [2015] QSC 51, cited
Queensland Bulk Handling Pty Ltd v Peabody (Wilkie Creek) Pty Ltd (No 2) [2015] QSC 106, cited
Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6, considered

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J C Bell QC, with A Pomerenke QC, and J O'Regan, for the applicant in SC No 12138 of 2013

D G Clothier QC, with S R R Cooper, and S J Webster, for the respondents in SC No 12122 of 2013 and SC No 12138 of 2013

SOLICITORS: Johnson Winter Slattery for the applicants in SC No 12122 of 2013

Corrs Chambers Westgarth for the applicant in SC No 12138 of 2013

Gilbert + Tobin Lawyers for the respondents in SC No 12122 of 2013 and SC No 12138 of 2013

[1] On 28 October 2015 I gave reasons as to why these are appropriate cases for the ordering of the hearing and determination of separate questions.[1]

[2] The parties were directed to file and deliver submissions as to costs. The submissions filed address draft costs orders proposed by the respondents in each action.

[3] The relevant procedural history is set out in paragraphs [13] to [35] of my Reasons delivered on 28 October 2015.

[4] The respondents in each proceeding seek an order that the applicants pay the costs sought in paragraphs 1(a) to 1(g) of the draft order on an indemnity basis. The respondents in effect seek that the costs associated with and thrown away by the applicants' changes to

[1] *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors*; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 3)* [2015] QSC 295.

their case be ordered to be paid on the indemnity basis. The respondents identify the relevant conduct of the applicants in paragraphs [8] to [21] of their written submissions. The basis for seeking indemnity costs is articulated in paragraph [22]:[2]

> "Whilst it may be accepted that a contest about particulars or an abandonment of allegations would not of itself attract an order for indemnity costs, the features of the applicants' conduct referred to above are highly unusual. They constituted an entirely irresponsible and unreasonable approach to the conduct of the proceedings and included a breach of the Court's directions about supplying amended particulars of an existing case in favour of the unauthorised introduction of a new case. They involved a case which, upon full and final reflection, was abandoned in circumstances where the time for that reflection was well in advance of the applicants filing any applications in the proceedings." (citations omitted)

[5] Alternatively, the respondents seek indemnity costs in respect of the mention on 5 May 2015 and the respondents' strike-out applications filed 6 May 2015.[3]

[6] The applicants submit that there is no basis for any indemnity costs order in that there was nothing "highly unusual" or "entirely irresponsible and unreasonable" in the applicants' conduct as contended. The applicants refer to the principles relevant to the exercise of the discretion to award costs on the indemnity basis discussed by White J (with whom Williams JA and Wilson J agreed) in *Di Carlo v Dubois*.[4]

[7] The applicants' conduct, when viewed in the context of the history of this litigation, does not, in my view, warrant costs to be awarded on an indemnity basis. I accept that the correct interpretation of the Coal Supply Agreements and the requirements for a valid notice under the Agreements are complex matters. Whilst the amendments to the applicants' statements of claim went beyond the directions made by me on 29 May 2015 for the delivery of amended particulars to specific paragraphs of the pleadings, I accept that by the amendments the applicants sought to confine their cases in the context of seeking to achieve a narrowing of the issues so as to enable the proceedings to be managed in a way that furthered the interests of justice. I also note that the respondents' applications to strike-out certain paragraphs of the statements of claim were refused. As I observed at [31] of the Reasons:[5]

> "The respondents' analysis of the clauses of the Coal Supply Agreement does not, in my view, provide a sufficient basis for striking out the relevant pleaded paragraphs … Even if one considers the tests propounded by the applicant to be vague, the applicant is otherwise able to support their construction of the Coal Supply Agreement, and thus their pleaded grounds of invalidity of the Change Event Notice, by reference to the actual terms of the Agreement."

[8] I also observed at in [36]:

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2 Respondents' submissions dated 9 November 2015, [22].

3 Respondents' submissions dated 9 November 2015, [23].

4 [2002] QCA 225, [32]-[40]; applicants' submissions undated (BS12122/13), [17]-[18]; applicants' submissions dated 16 November 2015 (BS12138/13), [27].

5 *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors*; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 2)* [2015] QSC 142.

> "Senior Counsel for CS Energy Limited, in the course of oral submissions, helpfully offered to refine the applicant's case if I was to find that the particulars were in effect vague."

[9] Although the amendments on 15 June 2015 went beyond what was contemplated by the Court, I am satisfied that it was not done with any other motivation but to both refine and confine the relevant issues so as to assist in the determination of the preliminary questions applications.

[10] Whilst the respondents accept that a party should not ordinarily be penalised simply for confining its case, the respondents submit that the applicants' conduct has caused significant waste of the Court's and the respondents' time. This is because the applicants embarked on a course of conduct over a significant period of time to move the Court to order separate questions without first ensuring that their own cases were in final form.

[11] I accept that a party moving a Court for the determination of preliminary questions must accept, on the authorities referred to [45] and [46] of my Reasons of 28 October 2015,[6] that the application must be determined on concrete facts. This requires that an applicant for a preliminary determination should first ascertain whether any ambiguity exists as to the case it seeks to advance. Such lack of certainty in a complex case does not in itself necessarily result in the making of a costs order on an indemnity basis.

[12] The applicants accept that they should be ordered to pay the costs of and incidental to the respondents' particulars application filed 7 April 2015 and the mentions held on 5 May 2015 and 15 July 2015. These costs should be ordered on the standard basis.

[13] As to the costs of and incidental to the applicants' strike-out applications filed 13 March (and amended 10 April 2015[7]), these applications were not determined by the Court. The applications initially sought to strike-out certain paragraphs of the respondents' defence, namely those dealing with:

(a) substantial compliance; and

(b) the knowledge of a reasonable recipient of the Change Event Notice in the position of the applicants.

[14] As noted in [48] of my Reasons of 29 May 2015,[8] as to the paragraphs dealing with substantial compliance, these were amended by the respondents prior to the hearing of the application on 13 April 2015.

[15] Given the amendments to the applicants' statements of claim, the defence concerning the "reasonable recipient" is no longer pressed by the respondents. Such a result was

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6 *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors*; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 3)* [2015] QSC 295.

7 An amended application filed 10 April 2015 was only filed in SC No 12138/13.

8 *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors*; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 2)* [2015] QSC 142.

foreshadowed in [56] of my Reasons of 29 May 2015.[9] I am of the view that this defence would not have been raised had the applicants not initially pleaded that upon the proper constructions of the Coal Supply Agreement a "Change Event" within the meaning of the Agreement must be an occurrence, comprised of a single event or circumstance or closely related set of events or circumstances.

[16] The Court has, however, not determined the applicants' strike-out applications of the "reasonable recipient" defence on their merits. The applicants submit that, as there has been no determination on the merits, the correct approach is that identified by McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin*:[10]

> "If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings."

[17] The applicants therefore submit that the strike-out applications were reasonably commenced. It was reasonably open to the applicants to object to particulars that:[11]

(a) did not identify any particular word or phrase in the notice and explain how the meaning of that word or phrase was materially informed by the extensive extrinsic facts particularised; and

(b) asserted, for example, that a reasonable person would have had access to accountants and technical consultants: paragraph 22(l).

[18] The applicants further submit that their conduct in later amending the statements of claim so as to delete the "closely related" contention does not render the applicants' earlier conduct in respect of this application unreasonable. This submission should be accepted with the proviso, however, that had the "closely related" contention never been pleaded there would have been no necessity for the respondents to plead a "reasonable recipient" defence.

[19] There have no doubt been costs thrown away because of the amendments to the statements of claim which rendered the "reasonable recipient" defence unnecessary. The respondents should have the costs thrown away because of these amendments. Without in any way deciding the merits of the applicants' strike-out applications filed 13 March 2015 (and amended on 10 April 2015) it was reasonable for the respondents to initially defend on the basis of the "reasonable recipient" defence, notwithstanding that this defence may not ultimately have withstood scrutiny.

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9 *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors*; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 2)* [2015] QSC 142.

10 (1997) 186 CLR 622, 625.

11 Applicants' submissions dated 16 November 2015 (BS12138/13), [13].

[20] The appropriate order as to the costs of and incidental to the applicants' strike-out applications filed 13 March 2015 (and amended on 10 April 2015) is that there be no order as to costs.

[21] Whilst it is true that the costs thrown away by the applicants' amendments to their pleadings and applications filed 14 August 2015 are covered by the operation of r 386 and r 692 respectively of the *Uniform Civil Procedure Rules* 1999 (Qld), it is appropriate to make specific orders to cover the costs thrown away. As submitted by the respondents in their reply submissions:[12]

> "While rr 386 and 692 provide generically for costs thrown away to be paid by the amending party (on the standard basis), it is '*entirely unremarkable*' for the Court to make an express order to this effect.[13]
>
> …
>
> Further, even if the costs thrown away are to be awarded on the standard basis there is utility in the Court making an order identifying those categories of costs in the terms sought by the respondent (including the mentions and the reasonable recipient particulars):
>
> (a) This is not a simple case of an amendment to a statement of claim resulting in a corresponding amendment to a defence, which are identified in the normal course by a costs assessor, but a case which has involved a series of applications, mentions and amendments which are tied up together. Where the costs thrown away by an amendment include the costs of mentions or directions hearings, it is normal and appropriate for the Court to make an express order that those costs be paid by the amending party."[14] (emphasis in original)

[22] I accept that, the Court being familiar with the history of these proceedings, it is appropriate that the costs orders made in relation to costs thrown away because of the amendments to the applicants' pleadings be specifically identified.

[23] It is therefore appropriate that the Court orders the applicants pay the costs thrown away by the amendments made in the applicants' further amended statements of claim filed 15 June 2015 (including the costs of the respondents' reasonable recipient allegations and particulars) as well as the costs thrown away by the amendments made in the applicants' amended applications for separate questions filed 14 August 2015 and 21 August 2015 respectively.

[24] As to the costs of and incidental to the respondents' strike-out applications filed 6 May 2015, I have already ordered on 29 May 2015 that the applicants pay these costs to be assessed or otherwise agreed.

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[12] Respondents' reply submissions dated 18 November 2015, [10], [12].

[13] Citing *Body v Mount Isa Mines* [2014] QCA 214, [46]; *Fletcher v Fortress Credit Corp (Australia) II Pty Ltd* [2015] QSC 51, [7].

[14] Citing *Queensland Bulk Handling Pty Ltd v Peabody (Wilkie Creek) Pty Ltd (No 2)* [2015] QSC 106, [7], [10].

[25] As to the applicants' applications for the determination of separate questions, these commenced with applications filed 6 August 2014 and 15 August 2014 which were heard by Jackson J. The respondents seek the costs of the applications determined by Jackson J primarily on the basis that the applications were premature. The applicants submit that there should be no order as to costs.

[26] The question of costs in respect of the applications before Jackson J should be viewed in the wider context of the applicants' desire to have preliminary questions determined. These attempts were ultimately successful. The respondents opposed any order being made for separate questions. Such opposition continued after the applicants had clarified their case and previous factual issues had been resolved. The applicants therefore submit that apart from the applications dealt with by Jackson J (where the applicants submit that there should be no order as to costs), costs should follow the event.

[27] In my Reasons of 28 October 2015[15] I concluded that these are appropriate cases for the separate determination of questions prior to the hearing of the balance of the case primarily due to considerations of utility and economy, case management and the interests of justice. The appropriate order therefore in relation to the applications for separate questions is that the costs be each party's costs in the proceedings save to the extent the applicants are required to pay the respondents' costs thrown away by the applicants' amendments made to their amended applications filed 14 August 2015 and 21 August 2015 respectively.

Disposition

[28] I make the following costs orders in SC No 12122 of 2013:

(1) As to the applicants' strike-out application filed 13 March 2015, there be no order as to costs.

(2) The applicants pay the respondents' costs of and incidental to the respondents' particulars application filed 7 April 2015.

(3) The applicants pay the respondents' costs of and incidental to the mention on 5 May 2015.

(4) The applicants pay the respondents' costs of and incidental to the mention on 15 July 2015.

(5) The applicants pay the respondents' costs thrown away by the amendments made in the applicants' further amended statement of claim filed 15 June 2015 including the costs of the respondents' reasonable recipient allegations and particulars.

(6) The applicants pay the respondents' costs thrown away by the amendments made in the applicants' amended application filed 21 August 2015.

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[15] *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors*; *CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 3)* [2015] QSC 295.

(7) Save as set out in (6), the costs of the applicants' applications filed 15 August 2014, 13 March 2015 and the applicants' amended application filed 21 August 2015, in relation to separate questions, be each party's costs in the proceeding.

[29] I make the following costs orders in SC No 12138 of 2013:

(1) As to the applicants' strike-out application filed 13 March 2015 (and amended 10 April 2015), there be no order as to costs.

(2) The applicants pay the respondents' costs of and incidental to the respondents' particulars application filed 7 April 2015.

(3) The applicants pay the respondents' costs of and incidental to the mention on 5 May 2015.

(4) The applicants pay the respondents' costs of and incidental to the mention on 15 July 2015.

(5) The applicants pay the respondents' costs thrown away by the amendments made in the applicants' further amended statement of claim filed 15 June 2015 including the costs of the respondents' reasonable recipient allegations and particulars.

(6) The applicants pay the respondents' costs thrown away by the amendments made in the applicants' amended application filed 14 August 2015.

(7) Save as set out in (6), the costs of the applicants' applications filed 6 August 2014, 13 March 2015 and the applicants' amended application filed 14 August 2015, in relation to separate questions, be each party's costs in the proceeding.