LAND COURT OF QUEENSLAND

CITATION:	*Hail Creek Coal Holding Pty Limited & Ors v Michelmore (No 2)* [2021] QLC 23
PARTIES:	**Hail Creek Coal Holding Pty Limited, Marubeni Coal Pty Ltd, Nippon Steel Australia Pty Limited, Sumisho Coal Development Queensland Pty Ltd** (applicants) v **Ian Ferguson Michelmore** (respondent)
FILE NO:	MRA119-20
PROCEEDING:	Application for costs
DELIVERED ON:	19 July 2021
DELIVERED AT:	Brisbane
HEARD ON:	Submissions closed 9 July 2021
HEARD AT:	Heard on the papers
MEMBER:	PG Stilgoe OAM
ORDERS:	**I order Ian Ferguson Michelmore pay to Hail Creek Coal Holding Pty Limited, as agreed or assessed on the standard basis, its costs:** **1. of the proceedings;** **2. of and incidental to:** **(a) the hearing on 4 December 2020;** **(b) the hearing on 11 December 2020; and** **(c) the application brought 1 March 2021; and** **3. thrown away by the adjournment of the hearing on 14 December 2020.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – where the respondent sought costs on a standard basis up until the date of the *Calderbank* offer and costs on an indemnity basis thereafter

– where the respondent submitted there was no basis upon which the respondent should be ordered to pay the costs of the proceeding prior to the date of the *Calderbank* offer – where the respondent sought costs to be assessed on a standard basis – where the Court ordered the respondent pay the costs of the proceedings on a standard basis – where the Court ordered the respondent pay the costs of the hearings and application on a standard basis – where the Court ordered the respondent pay the costs thrown away by the adjournment of the hearing on a standard basis

Land Court Act 2000 s 27A
Mineral Resources Act 1989 s 281

Banno v Commonwealth of Australia (1993) 81 LGERA 34, cited
Hail Creek Coal Holding Pty Limited & Ors v Michelmore [2021] QLC 19, cited
Lonergan & Anor v Friese [2020] QLAC 3, cited
Lonergan & Anor v Friese (No 2) [2020] QLAC 4, applied
Mentech Resources Pty Ltd v MCG Resources Pty Ltd (In Liq) & Ors (No 2) [2012] QLAC 2, not followed
Pastrello v Roads and Traffic Authority of New South Wales (2000) 110 LGERA 223, cited

APPEARANCES: Not applicable

[1] As I addressed in my decision of 27 May 2021, Ian Ferguson Michelmore and Hail Creek Holding Pty Limited could not agree on the compensation that Hail Creek should pay Mr Michelmore for a 138 ha mining lease ("the ML").

[2] Mr Michelmore originally sought compensation in excess of $14,850,000. By the time of the hearing, his claim was a more modest $8,140,000. I awarded $530,530.

[3] Hail Creek seeks an order that Mr Michelmore pay its costs of and incidental to the proceedings:

1. on a standard basis until 30 November 2020; and

2. on an indemnity basis from 1 December 2020, being the date on which Hail Creek made a *Calderbank* offer that was significantly more than my award.

[4] Mr Michelmore submits that Hail Creek should pay his costs of the proceedings.

[5] Section 281(7) of the *Mineral Resources Act 1989* ("MRA") states that I may make such order as to costs as I think fit. Section 27A(1) of the *Land Court Act 2000* ("LCA") similarly gives me an unfettered discretion as to costs.

[6] Hail Creek submits the rule that costs follow the event is a factor to be considered when exercising my discretion and referred me to the Land Appeal Court decision in *Mentech Resources Pty Ltd v MCG Resources Pty Ltd (In Liq) & Ors (No 2)* ("*Mentech*"):[1]

> "The discretion to award costs is unfettered. However the rule often followed, and the rule incorporated in r 689 [now 681] of the *Uniform Civil Procedure Rules 1999*, is that costs follow the event. That rule, while it does not govern the exercise of the discretion here, nonetheless informs it, as there is justice in that approach."

[7] That extract from *Mentech* is incomplete. McMeekin J continued: "It protects those put to unnecessary and substantial expense at the behest of others".[2] It is also unhelpful, as the case related only to the costs on appeal, not the costs of the original hearing.

[8] The Land Appeal Court considered the issue of costs in compensation cases more closely in *Lonergan & Anor v Friese (No 2)* ("*Lonergan (No 2)*").[3] The Court identified these factors as relevant in exercising a discretion to order costs:

1. The default position under the LCA is that, in the absence of an offer, each party bears its own costs;[4]

2. In accordance with orthodox principle, costs orders ought not be made unless the party seeking costs demonstrates that it has been "successful" so as to engage the ordinary rule that costs follow the event;

3. Where a matter is referred to the Court by the Chief Executive, neither party occupies the position of plaintiff or defendant;

4. In the absence of offers to settle, it cannot be concluded whether either party was "successful";[5] and

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1 [2012] QLAC 2 [4].
2 Ibid.
3 [2020] QLAC 4.
4 Ibid [27].
5 Ibid.

5. One factor that may be taken into account is the reasonableness, or lack thereof, in attempting to reach agreement.[6]

[9] I therefore start with the default position that each party should bear its own costs. This matter was referred to the Court by the Chief Executive so there was no plaintiff or defendant as is ordinarily understood.

Who was the "successful" party?

[10] Mr Michelmore submits that he was "successful" because he was entitled to, and successfully recovered, compensation for the ML.

[11] Mr Michelmore's submission as to "success" is based on a number of factors. Firstly, that he had no choice whether or not to make a claim and that the proceedings were compulsorily referred. That is not quite true; although the Chief Executive referred the proceeding, Mr Michelmore could have applied to the Court to determine the amount.[7]

[12] Secondly, Mr Michelmore submits that the hearing was in the nature of a determination of compensation under compulsory acquisition. That is true in the sense that the MRA requires an additional amount to reflect the compulsory nature of the action taken,[8] but the Land Appeal Court has stated that the principles that apply to compulsory acquisition cases "are not completely pertinent".[9] It does not mean, in my view, that a landowner is always successful simply because a court has determined the compensation payable. That something more is required is implicit in the statements in *Lonergan (No 2).*

[13] Thirdly, Mr Michelmore submits that, because this is in the nature of a compulsory acquisition case, he should be allowed access to the Court without being deterred by the prospect of a costs order if his case proves unpersuasive.[10] That is true, but it is also true that this proposition is premised on him presenting an arguable and well organised case. That phrase speaks to the last of the factors in *Lonergan (No 2)*; whether there was an element of unreasonableness in the claim.

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6 Ibid.
7 MRA s 281(1).
8 Ibid s 281(4)(e).
9 *Lonergan & Anor v Friese (No 2)* [2020] QLAC 4 [29].
10 *Banno v The Commonwealth* (1993) 81 LGERA 34.

[14] On 1 December 2020, Hail Creek offered to settle for $2,200,000 with each party bearing its own costs.[11] On any view, this offer clearly shows that Hail Creek was "successful".[12] I do not accept that Mr Michelmore was the successful party.

Was there a reasonable attempt to reach agreement?

[15] The parties had been attempting to negotiate a settlement before the proceedings came to Court. Mr Michelmore tendered evidence that he had received an offer from Hail Creek's previous owners to buy the land for $7,000,000.[13] That offer was dated 14 November 2017.

[16] The parties were required to file compensation statements early in the proceedings. Mr Michelmore's compensation statement claimed in excess of $14,850,000; Hail Creek stated that compensation should be $208,725 if the highest and best use of the land was rural or $461,037.50 if the highest and best use of the land was as an accommodation village.

[17] Both statements were, of course, aspirational. Mr Michelmore could not expect that Hail Creek would more than double the offer made by its predecessors. Hail Creek could not expect Mr Michelmore to accept a token sum.

[18] The valuers filed their first joint expert report on 20 November 2020.[14] They agreed that if the highest and best use of the land was rural, its value was $208,725. Mr Cavanagh, engaged by Hail Creek, assessed the value of the land at $530,530. He used the direct comparison method, applying a premium for the fact that the highest and best use was an accommodation village, not rural. Mr Caleo, engaged by Mr Michelmore, valued the land at $11,242,300, using the net present value method.

[19] With this evidence in mind, Mr Michelmore made an open offer on 27 November 2020 of $6,000,000 with each party bearing its own costs.[15] Hail Creek's offer came shortly after. Mr Michelmore's decision to reject the offer may seem unwise in

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11 Email from Allens to Emanate Legal dated 1 December 2020. This document is appended to Affidavit of Todd Daniel Rankin, 10 June 2021.

12 In contrast to the position in *Lonergan & Anor v Friese (No 2)* [2020] QLAC 4 [23] where no party "beat its own offer".

13 Ex 2.

14 Ex 1, tab 10.

15 Ex 1, tab 18.

hindsight, but he was entitled to rely on the professional advice he had received, even if that advice was poor.

[20] Both valuers filed supplementary reports in February 2021.[16] Although both reports purported to be in response to new evidence about the cost of relocating the camp, in fact, the reports gave the valuers an opportunity to revisit their primary assumptions and review the work of their counterpart.

[21] Mr Cavanagh's view of the value on the direct comparison method did not change but he conceded that the highest and best use was, in fact, as an accommodation village. He flagged the considerable difficulties in using the net present value approach to valuation but used it to assess value under that method at $2,323,750.

[22] Mr Caleo criticised Mr Cavanagh's use of the direct comparison method and did not produce a valuation on this basis, despite the requirements of Practice Direction 6 of 2020.[17] He maintained his preference for the net present value approach but reduced his assessment to $8,140,000.

[23] In the second joint expert report filed 6 April 2021,[18] Mr Cavanagh remained of the view that the value of the land using the direct comparison approach was $530,530. Mr Caleo's assessment on that basis was $7,700,000. Mr Cavanagh assessed the value of the land using the net present value method at $2,403,933. Mr Caleo revised his opinion up to $8,144,700.

[24] Mr Michelmore submits that his refusal of Hail Creek's offer was not unreasonable because the valuation evidence was incomplete at the time. That may be true, and it may also be true that Mr Michelmore was entitled to await the outcome of the additional reports, but it is at this point that Mr Michelmore's arguments start to wear thin.

[25] He had been provided with a clear basis for Hail Creek's offer. He already had notice of the significant difficulties in Mr Caleo's use of the net present value approach. He did not attempt any further negotiations; instead, on 27 February 2021, he "doubled down" by having his lawyers attempt to file evidence supporting an additional claim of $582,955.32.

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16 Ex 1, tabs 14, 15.
17 Practice Direction 6 of 2020, [21(a)].
18 Ex 1, tab 21.

[26] As Hail Creek points out,[19] Mr Michelmore gave no reasons why this evidence was not filed earlier. He gave no reason why he was claiming valuation costs as far back as 2009, when Hail Creek did not apply for the ML until 2018. Most importantly, the bulk of these costs could not properly be considered as a loss or expense that arose as a consequence of the grant of the mining lease;[20] some were costs of the litigation, some were costs of negotiation which are not recoverable,[21] and some, particularly the very early costs, could not be referrable to an ML for which Hail Creek had not yet applied. The only explanation for Mr Michelmore's late attempt to increase his claim was that, if I preferred Mr Cavanagh's assessment using the net present value method, Hail Creek's offer would still fall short.

[27] It is no answer for Mr Michelmore to submit that Hail Creek should have renewed its offer;[22] both parties had the ability to reopen negotiations. It is also no answer to submit that the offer was conditional on each party bearing its own costs. It was not, as Mr Michelmore submits, an offer inclusive of costs – it was an offer whereby costs would lie where they fell, similar to the default position in the Land Court. Further, Mr Michelmore could have known what his costs were at that point, particularly as his lawyers filed an affidavit to that effect shortly after.

[28] Mr Michelmore's initial claim in excess of $14,000,000 was clearly unreasonable as none of Mr Caleo's evidence supported that view. Mr Michelmore's failure to engage in any settlement negotiations after receiving the valuers' supplementary joint expert report was also unreasonable. On balance, Mr Michelmore did act unreasonably.

[29] Hail Creek should have its costs of the proceedings, but from what date and on what scale?

[30] The Land Appeal Court in *Lonergan (No 2)* does not specify what course the Court should take if an offer to settle reveals that one party has been successful. However, I apprehend that its intent was that the default position is displaced, and the ordinary rules of civil litigation apply; that is, the successful party is entitled to its costs of the proceedings.

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19 Applicants' Submissions on Costs, 10 June 2021, [59].
20 MRA s 281(3).
21 *Lonergan & Anor v Friese* [2020] QLAC 3 [56].
22 Respondent's Submissions on Costs, 2 July 2021, [30].

[31] If I take that approach, Hail Creek is entitled to its costs from the commencement of the proceedings. It also means, though, that the punitive aspect of a *Calderbank* offer is achieved by the escalation of costs from nothing to standard costs. To escalate it even further, to order indemnity costs from the date of the offer, would be an unreasonable exercise of my discretion unless I was satisfied that Mr Michelmore was acting vexatiously or dishonestly. Despite my comments about the veracity of Mr Caleo,[23] there is no evidence that Mr Michelmore himself acted inappropriately.

[32] Mr Michelmore has one final submission against an order for costs. He submits that, because this is a compensation jurisdiction, an order for costs should not erode the benefit of the compensation determined.[24] That submission assumes that these compensation proceedings are just like a determination of compensation for a compulsory acquisition. As I have already noted, the Land Appeal Court has stated that the comparison is "not completely pertinent".[25] The one factor that can be taken into account, as I have noted and already discussed, is the reasonableness of the parties. As Hail Creek observes, the Court will allow just compensation to be eroded by a costs order if a party pursues a vexatious, dishonest or grossly exaggerated claim.[26] Mr Michelmore's conduct of the case is not of that order but nor is he deserving the protection of the Court in a matter which was closer to a commercial contest between parties with similar negotiating power than of an unsophisticated landowner overborne by a financial behemoth.

[33] Hail Creek also claims the costs of review hearings on 4 and 11 December 2020 and the costs thrown away by the adjournment of the hearing on 14 December 2020.

[34] The review on 4 December 2020 was a hearing review to see if the parties were ready for the hearing. At that review, Mr Michelmore's lawyers advised that they were seeking additional expert evidence. Previous orders required the nomination of expert witnesses by 21 August 2020 and all expert evidence to be filed by 6 November 2020.

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23 *Hail Creek Coal Holding Pty Limited & Ors v Michelmore* [2021] QLC 19 [27]–[36].
24 *Pastrello v Roads and Traffic Authority of New South Wales* (2000) 110 LGERA 223, 225.
25 *Lonergan & Anor v Friese (No 2)* [2020] QLAC 4 [29].
26 *Banno v The Commonwealth* (1993) 81 LGERA 34, 53. See Applicants' Reply to the Respondent's Submissions on Costs, 9 July 2021, [23].

[35] Having no notice of this development, Hail Creek's lawyers had no instructions. The hearing review was adjourned to 11 December 2020 for that purpose.

[36] At the hearing review on 11 December 2020, I adjourned the hearing that was due to start on 14 December 2020.

[37] These events were precipitated solely by the actions of Mr Michelmore's lawyers and in breach of Court orders. Hail Creek should have its costs of those events.

[38] As I have already mentioned, on the first day of the hearing, Mr Michelmore sought to file and read evidence about the professional costs he had incurred. The application was withdrawn later that day, but Hail Creek submits that it incurred costs in preparing to oppose the application. Once again, these events were precipitated solely by the actions of Mr Michelmore's lawyers and in breach of Court orders. Hail Creek should have its costs of the application.

Conclusion

[39] I can understand why Mr Michelmore might be feeling aggrieved by the result of these proceedings. I can understand that my decision on costs may be rubbing salt into his wounds. But this decision is a salutary lesson to all involved. Landowners should be careful not to be taken in by overenthusiastic advice from which it is difficult to depart with dignity. Miners should not be stingy in their early negotiations for compensation. Lawyers for parties should give appropriately considered advice. A 20-year mining lease is a long time to reflect on missed opportunities.

Orders:

I order Ian Ferguson Michelmore pay to Hail Creek Coal Holding Pty Limited, as agreed or assessed on the standard basis, its costs:

1. **of the proceedings;**
2. **of and incidental to:**
   - **(a) the hearing on 4 December 2020;**
   - **(b) the hearing on 11 December 2020; and**
   - **(c) the application brought 1 March 2021; and**
3. **thrown away by the adjournment of the hearing on 14 December 2020.**