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 6)* [2016] QSC 229
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** ABN 54 078 848 745 (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:	Trial – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON: 10 October 2016

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Flanagan J

ORDER:

1. **In SC 12122 of 2013 the respondents pay the applicants' costs of and incidental to the determination of the separate questions.**
2. **In SC 12138 of 2013 the respondents pay the applicant's costs of and incidental to the determination of the separate questions.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIAL SUCCESS – EVENT: WHAT CONSTITUTES – where trial involved determination of separate questions relating to the validity of notices under Coal Supply Agreements – where applicants successful on some separate questions – where respondents successful on some separate questions – where the notices were found to be invalid – whether the finding that the notices were invalid under the Coal Supply Agreements was the relevant "event" for the purposes of r 681 of the *Uniform Civil Procedure Rules 1999* (Qld)

Uniform Civil Procedure Rules 1999 (Qld), r 681

Alborn v Stephens [2010] QCA 58, cited

Callide Power Management Pty Ltd & Ors v Callide Coalfield (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfield (Sales) Pty Ltd & Ors (No 5) [2016] QSC 199, cited

Firebird Global Master Fund II Ltd v Republic of Nauru (No 2) (2015) 90 ALJR 270, considered

McDermott v Robinson Helicopter Company (No 2) [2015] 1 Qd R 295, cited

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S D Doyle QC, with D G Clothier QC, 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 31 August 2016 I delivered Reasons in respect of the determination of separate questions.[1] The questions were answered in the context where the applicants sought declarations that the 12 November 2013 notices delivered by the respondents were not notices in accordance with clause 12.3(b)(ii) of the Coal Supply Agreements. The effect of the answers to the separate questions is that the 12 November 2013 notices were not notices in accordance with clause 12.3(b)(ii) and are therefore invalid.

[2] On this basis the applicants submit that there is no reason why the applicants, having succeeded in establishing their claim for a determination that the notices were invalid, should not have the benefit of a costs order. According to the applicants such an order would reflect the general rule in r 681 of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*) that costs should follow the event.[2] The "event" identified by the applicants is the determination of the invalidity of the notices.[3]

[3] The respondents submit however, that the "event" is not the outcome of a hearing, application or proceeding simpliciter[4]:

> "The term must be read "distributively [to mean] the events or issues, if more than one, arising in the proceedings"[5], so that "events in an action are to be identified by reference to individual issues or questions in the action, and the event is not simply the result or outcome of the action".[6] The applicants' submissions mischaracterise the "event" by confusing it with the final outcome, namely, the declaration and determination of invalidity."[7]

[4] There were approximately 35 questions to be answered in each of SC 12122 of 2013 and SC 12138 of 2013. The respondents submit that while the applicants succeeded on certain questions and on the overall question of invalidity there were at least four significant and distinct issues on which the applicants failed,[8] namely:

(a) whether the compliance with the time requirements were pre-conditions to validity[9];

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1 *Callide Power Management Pty Ltd & Ors v Callide Coalfield (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfield (Sales) Pty Ltd & Ors (No 5)* [2016] QSC 199.

2 Applicants' Submissions on Costs (SC 12122 of 2013), [3]; Applicant's Submissions on Costs (SC 12138 of 2013), [4]–[5].

3 Applicants' Submissions on Costs (SC 12122 of 2013), [2]; Applicant's Submissions on Costs (SC 12138 of 2013), [4].

4 Respondents' Costs Submissions, [3] citing *Alborn v Stephens* [2010] QCA 58 at [8] and *McDermott v Robinson Helicopter Company (No 2)* [2015] 1 Qd R 295 at [30].

5 *Interchase Corporation Limited (In liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at [84].

6 *McDermott v Robinson Helicopter Company (No 2)* [2015] 1 Qd R 295 at [30].

7 Respondents' Costs Submissions, [3].

8 The respondents also note that the applicants failed specifically *inter alia* on Separate Questions (SC 12122 of 2013) 1(a), 1(b), 5(b) and 6(b) and Separate Questions (SC 12138 of 2013) 1(a), 1(b) and 5(b).

9 Separate Questions (SC 12122 of 2013) 16 and 17 and Separate Questions (SC 12138 of 2013) 14 and 15.

(b) whether changes in circumstances relating to geological conditions could constitute a Change Event[10];

(c) whether a Change Event must comprise a single event or more than one event of the same nature[11];

(d) whether matters set out in the notice must, "on the face of the notice", fall within the definition of "Change Event".[12]

The respondents submit that each of the four issues were separate "events" for the purposes of r 681 of the *UCPR.*

[5] In *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)*[13] the High Court considered the question of costs in the context where the appeal raised four issues. The appellant's success on appeal was confined to limited issues which did not affect the outcome of the appeal. The Court observed (citations omitted):[14]

> "In any event, the preferable approach is the one usually taken, that costs should follow the outcome of the appeal. This is not the case where it may be said that the event of success is contestable, by reference to how separate issues have been determined. There are no special circumstances to warrant a departure from the general rule, and good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like. The fact that Firebird retains its registration is immaterial to the overall outcome of this appeal."

[6] The respondents seek to distinguish *Firebird* on the basis that the High Court Rules as to costs are in a different form to the *UCPR* and importantly do not contain the reference to costs following "the event".[15] I do not accept that *Firebird* should be distinguished on this basis. As submitted by the applicants the difference in the wording of the rules is not a valid point of distinction because each embodies the same underlying principle. The applicants submit as follows:[16]

> "In *John Urquhart t/as Hart Renovations v Partington & Anor* [2016] QCA 199, the Court of Appeal comprising Margaret McMurdo P, Morrison JA and Henry J:
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> (a) (at [8]) held that, despite a similar difference in wording, each of r766(1)(d) and r681(1) embodied the same principle;

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10 Separate Questions (SC 12122 of 2013) 6(b), 20 and 21 and Separate Questions (SC 12138 of 2013) 18 and 19.

11 Separate Questions (SC 12122 of 2013) 6(a)(i), 6(a)(ii)(A) and 6(a)(ii)(B)(1) and Separate Questions (SC 12138 of 2013) 7(a)(i) and 7(a)(ii)B.

12 Respondents' Costs Submissions, [4]; Separate Questions (SC 12122 of 2013) 5(a) and 7(a) and Separate Question (SC 12138 of 2013) 5(a).

13 (2005) 90 ALJR 270.

14 (2005) 90 ALJR 270, 271 at [6].

15 Respondents' Costs Submissions, [8]; *High Court Rules 2004* (Cth) r 50.01.

16 Applicant's Submissions in Reply on Costs (SC 12138 of 2013), [16].

(b) (at [9]) adopted McHugh J's explanation of the rationale of the principle in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 (underlining added):

> *The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant … The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.*

(c) (at [10]) held that:

> *… where a party has been successful in the outcome of the appeal the fact that it did not succeed on every issue or ground advanced will not usually warrant a departure from the general rule that costs should follow the outcome of the appeal.*

(d) (also at [10]), expressly invoked the reasoning of the High Court in *Firebird* in support of this conclusion."

[7] The separate questions raised for consideration the proper construction of the Coal Supply Agreements.[17] These agreements have a potential period of operation of 30 years. Given that the Coal Supply Agreements are long term agreements, the respondents submit that the determination of a number of the separate questions in favour of the respondents will "inform and regulate the parties' future conduct".[18] It is correct, however, as submitted by the applicants, that a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs.[19] The applicants further submit that the respondents' approach focuses incorrectly upon *arguments* rather than substantive issues or events. According to the applicants the characterisation urged by the respondents pays insufficient attention to the substance of the litigation and seeks instead to unduly fragment the litigation on a micro scale.[20] The applicants also submit that the four issues identified by the respondents are not clearly definable and severable and did not in and of themselves occupy a significant part of the trial so as to warrant separate treatment on the question of costs.

[8] Although the answers to specific separate questions in favour of the respondents may inform the future conduct of the parties in the context of long term agreements, it remains the case that the applicants have been wholly successful in establishing that the 12

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17 *Callide Power Management Pty Ltd & Ors v Callide Coalfield (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfield (Sales) Pty Ltd & Ors (No 5)* [2016] QSC 199 at [3].

18 Respondents' Costs Submissions, [6].

19 Applicant's Submissions in Reply on Costs (SC 12138 of 2013), [2] citing Muir JA (with whom Holmes JA and Daubney J agreed) in *Alborn v Stephens* [2010] QCA 58 at [8], cited with approval by Morrison JA (with whom Boddice J agreed) in *Murdoch v Lake* [2014] QCA 269 at [20].

20 Applicant's Submissions in Reply on Costs (SC 12138 of 2013), [20].

November 2013 notices were invalid. The respondents' success, in having some questions answered in their favour, does not affect this outcome. There should therefore be cost orders in favour of the applicants.

Disposition

[9] I make the following orders:

1. In SC 12122 of 2013 the respondents pay the applicants' costs of and incidental to the determination of the separate questions.

2. In SC 12138 of 2013 the respondents pay the applicant's costs of and incidental to the determination of the separate questions.