SUPREME COURT OF QUEENSLAND

CITATION:	*Nerang Subdivision Pty Ltd & Ors v Hutson & Anor* [2024] QSC 10
PARTIES:	**NERANG SUBDIVISION PTY LTD** ACN 129 469 254 (first applicant) **KANAYA HOLDINGS PTY LTD** ACN 098 864 905 (second applicant) **PACIFIC VIEW FARM (QUEENSLAND) PTY LTD** ACN 114 561 081 (third applicant) **v** **ROBERT HUTSON IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF NANCY ULLMAN LOESKOW** (first respondent) **FEDERAL COMMISSIONER OF TAXATION** (second respondent)
FILE NO/S:	BS No 1209 of 2023
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 February 2024
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Cooper J
ORDER:	**The first respondent pay the second respondent's costs of and incidental to the proceeding to be assessed on the standard basis if not agreed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – EVENT: WHAT CONSTITUTES – PARTIAL SUCCESS – where first and third applicants succeeded on first issue – where first respondent succeeded on remaining three issues – where the issue which the first and third applicants succeeded on were definable and severable from the remaining contractual construction issues such that the first issue was a separate "unit of litigation" – where the costs involved in litigating the first issue and the remaining issues were broadly equal – where the first and third applicants rejected a *Calderbank*

offer made by the first respondent – where the first and third applicants did not act unreasonably in rejecting the *Calderbank* offer – where the result of the judgment was not less favourable than the terms of the *Calderbank* offer in circumstances where the first and third applicants succeeded on the first issue – whether to make no order as to costs where the comparative success of the parties is broadly equal

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – INTERVENER, RELATOR, AMICUS CURIAE – where the Federal Commissioner of Taxation did not seek to appear on his own initiative or at the suggestion of the court – where the Commissioner was joined as a necessary party because his rights and obligations relating to the assessment of tax against the first respondent were directly affected by the determination of the first issue – where the Commissioner had no interest in the dispute and his appearance was only necessitated because the dispute gave rise to an issue which would, once determined, directly affect his rights and obligations under certain legislation – where the Commissioner took an active, albeit limited, role in the proceedings – whether the Commissioner is required to bear his own costs

Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684

Allianz Australia Insurance Ltd v Swainson [2011] QCA 179, cited
Calderbank v Calderbank [1976] Fam 93, applied
Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 6) [2016] QSC 229, considered
Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd [2016] QCA 130, cited
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
J & D Rigging Pty Ltd v Agripower Australia Ltd [2014] QCA 23, considered
KMB v Legal Practitioners Admissions Board (Qld) [2018] 1 Qd R 500; [2017] QCA 146, considered
Nerang Subdivision Pty Ltd v Hutson [2023] QSC 268, cited
New England Biolabs v F Hoffman-La Roche AG [2004] FCAFC 246, considered
Oshlack v Richmond River Council (1998) 193 CLR 72, considered
Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2) [2009] QCA 239, cited
Speets Investment Pty Ltd v Bencol Pty Ltd (No 2) [2021] QCA 39, cited

Stewart v ATCO Controls Pty Ltd (in liq) (No 2) (2014) 252 CLR 331, considered
Thiess v TCN Channel 9 Pty Limited (No 5) [1994] 1 Qd R 156, cited
Virbac (Aust) Pty Ltd v Merck Patent GmbH (1994) 52 FCR 534; (1994) 29 IPR 548, considered

COUNSEL: H Atkin for the first and third applicants
M O'Meara SC, with B McMillan, for the second respondent

SOLICITORS: Mills Oakley for the first and third applicants
Cooper Grace Ward for the first respondent
Australian Government Solicitor for the second respondent

[1] On 1 December 2023, I gave judgment in this proceeding.[1]

[2] As set out in the Reasons,[2] there were four issues raised for determination:

(a) whether the first respondent (**the Administrator**) is presently required (or, alternatively, will in the future be required) to be registered for GST pursuant to s 23-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (**GST Act**);

(b) whether the amount of the Owner's Return which the Administrator will receive on the sale of each Lot is to be reduced by any GST payable by the Administrator on that sale, regardless of whether the purchaser of the Lot pays GST in relation to the supply under the GST withholding provisions in subdivision 14E of schedule 1 to the *Taxation Administration Act* 1953 (Cth);

(c) whether the Deed or the Development Leases bring about the result that the Developer's Return from the sale of a Lot is to be increased by the amount of the Developer's liability for GST;

(d) whether an adjustment that increases the amount to be paid by a purchaser at settlement of the sale of a Lot by reason of land tax having been paid prior to settlement is an adjustment within the meaning of that term in the definition of Gross Sale Proceeds in the Development Leases.

[3] The outcome was that the first and third applicants (**the Developers**) succeeded on the first issue (**the GST registration issue**). A declaration was made that the Administrator is required to be registered for GST. The Administrator succeeded on the remaining issues (**the contractual construction issues**). The balance of the Developers' application was dismissed with the result that the declarations they had sought in relation to the contractual construction issues were not made.

[4] The second respondent (**the Commissioner**) is not a party to the contractual arrangements between the Administrator and the Developers. The Commissioner was a necessary party to the proceeding because, as the person responsible for the

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1 *Nerang Subdivision Pty Ltd v Hutson* [2023] QSC 268 (**Reasons**).
2 Reasons, [8].

administration of the GST Act, his rights and obligations relating to the assessment of tax against the Administrator are directly affected by the declaration made following determination of the GST registration issue. In the proceeding, the Commissioner did not advance a concluded position for or against the question of GST registration but made submissions on the proper construction of the relevant provisions of the GST Act and the application of principles derived from relevant authorities to assist the Court to determine whether to make the declarations sought in respect of that issue. The Commissioner also made submissions directed to ensuring that such declarations as might be made would not inhibit the discharge of his statutory duties in connection with the administration of the GST Act.[3]

[5] The parties have now filed submissions as to the costs of the proceeding.

[6] The position taken by the Developers is that:

(a) in circumstances where both they and the Administrator have enjoyed mixed success in respect of discrete issues which involved broadly equal time and cost in the proceeding, the Court should make no order as to costs between those partis such that the parties are left to bear their own costs;

(b) the Administrator should be ordered to pay the Commissioner's costs of the proceeding.

[7] The Administrator submits:

(a) as between himself and the Developers, he was the successful party to the proceeding such that:

(i) the Developers should pay his costs and those costs should be assessed on the indemnity basis after 1 September 2023 by reason of the Developers' rejection of a *Calderbank* offer;[4]

(ii) alternatively, if the Court determines that the Developers' success on the GST registration issue makes it appropriate to apportion costs between the parties, the Administrator should pay 1/3 of the Developers' costs of the proceeding and the Developers should pay 2/3 of his costs of the proceeding with his costs after 1 September 2023 being assessed on the indemnity basis;

(b) as to the costs of the Commissioner:

(i) the Commissioner should bear those costs himself on the basis that, in substance, he appeared as *amicus curiae*;

(ii) alternatively, if the Court determines that the Commissioner is entitled to his costs, those costs should be paid by the Developers.

[8] The Commissioner submits that he should not have to bear his costs of the proceeding which arose from the commercial dispute between the Developers and the Administrator in which the Commissioner has no interest and where his

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3 Reasons, [10].

4 *Calderbank v Calderbank* [1976] Fam 93 (***Calderbank***).

presence as a party was only made necessary because that commercial dispute gave rise to the GST registration issue. The Commissioner's primary position is that his costs should be paid by the Administrator as the unsuccessful party on the GST registration issue. Alternatively, the Commissioner submits it would be open to the Court to order that the Developers pay his costs or that the Developers and the Administrator bear an equal share of his costs.

Costs as between the Developers and the Administrator

[9] The general rule is that costs of a proceeding are in the discretion of the Court but follow the event unless the Court orders otherwise.[5]

[10] The rationale for that general rule was explained by McHugh J in *Oshlack v Richmond River Council*:[6]

> "The expression 'the usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. 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.
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> As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."

[11] Although the word "event" is not defined in the UCPR or any other relevant statutory provision, it has been the subject of considerable authority. Those authorities establish that the word is to be approached distributively with the consequence that it refers to the event of an issue or of each separate issue, if there is more than one, in the proceeding.[7] Consistently with this, UCPR r 684(1) expressly provides that the court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.

[12] *In Speets Investment Pty Ltd v Bencol Pty Ltd (No 2)*,[8] Bond J (as his Honour then was) summarised the position:

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5 *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), r 681.

6 (1998) 193 CLR 72, 97 [67]–[68].

7 *Thiess v TCN Channel 9 Pty Limited (No 5)* [1994] 1 Qd R 156, 207–8; *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26, 60–1 [82]–[84]; *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)* [2009] QCA 239, [3]–[7]; *Allianz Australia Insurance Ltd v Swainson* [2011] QCA 179, [4]–[5]; *Speets Investment Pty Ltd v Bencol Pty Ltd (No 2)* [2021] QCA 39 (***Speets***), [13].

8 *Speets*, [14]–[17].

"[14] It is important to recognise, however, that it does not follow from the foregoing that the application of the general rule should usually lead to costs orders which reflect different results on separate events or issues. The Court is given a broad discretion and is specifically empowered to determine that some other order is more appropriate.

[15] In practice, courts often take the approach of identifying heads of controversy or 'units of litigation' (rather than what might technically be regarded as issues on the pleadings) regarding success or failure on the head of controversy or unit of litigation as the criterion for awarding costs: see *Thiess v TCN Channel 9 Pty Limited (No 5)* at 207-8 and *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd* [2015] QCA 168 at [1].

[16] The general approach is that there must be special or exceptional circumstances to warrant depriving a successful party of its costs and the mere fact that the successful party has been unsuccessful on some issues will ordinarily not be sufficient to do so: *Courtney v Chalfen* [2021] QCA 25 at [5]. On an appeal, for example, where a party has succeeded on one of two ways to the same outcome, the Court of Appeal might well regard the costs of the second way on which that party failed as not so distinct conceptually or practically as to warrant making a costs order which reflected that party's failure: *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd* at [1]. On the other hand, one circumstance in which it might be appropriate to award costs of a particular question or part of a proceeding is where that matter is definable and severable and has occupied a significant part of the proceeding: see *Courtney v Chalfen*, in which the Court of Appeal referred with approval to the decision of McMurdo J (as his Honour then was) in *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [8].

[17] Of course, it does not follow that an issues-based costs order should always be made in circumstances analogous to those described by McMurdo J in *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)*. Where there are multiple issues which are determined in different directions as between the parties, a court might form an overall impression having regard to the significance of the issues, the way they were determined, and the amount of time and cost spent on them, and order one party to pay a proportion of another party's costs as a way to reflect fairly the parties' comparative success or failure in the outcome which was obtained. Courts often prefer to avoid the complicated form of costs assessment that would follow if different issues are determined in different directions as between the parties and costs were to be awarded in respect of issues. In this regard, in *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (No 2)* [2019] NSWCA 173, the New South Wales Court of Appeal observed at

> [9] where taking such an approach might result in a protracted assessment process:
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> > '… It is more efficient, and fairer, for the court simply to net-off [orders for issues in different directions as between the parties], which it is entitled to do (see *Day v Humphrey* [2018] QCA 321 at [13] per the court). Such an assessment will, undoubtedly be 'rough and ready' (*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 at [5]), and that is entirely permissible.'"

[13] The Administrator submits that "event" for the purposes of awarding costs of the proceeding was the determination of the parties' respective entitlements to the proceeds of sale flowing from the sale of Lots in the Development. From there he argues that, notwithstanding the determination of the GST registration issue in the Developers' favour, he was wholly successful in respect of the event in the proceeding. That is because the making of the declaration that he is required to be registered for GST and the refusal to grant the declaratory relief that the Developers sought in relation to the contractual construction has had a detrimental impact on the amount of funds which the Developers are entitled to receive from the sale of the Lots. In this way, the Administrator seeks to frame the "event" by reference to the financial consequences for the parties of the declarations made, and not made, by the court.

[14] In support of that position, the Administrator cited paragraphs from the judgment of Flanagan J (as his Honour then was) in *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 6)*[9] as authority for the general proposition that attention must be paid to the substance of the litigation when considering a party's success in the proceeding. While that proposition can be accepted at a general level, I do not consider that it assists the Administrator in the particular circumstances of this case which are different to those considered in *Callide*.

[15] *Callide* concerned the award of costs after the determination of approximately 35 separate questions in a proceeding where the applicants sought declarations that notices purportedly delivered pursuant to a coal supply agreement were not valid. The applicants succeeded on certain questions and on the overall question of the invalidity of the notices. Nevertheless, the respondents argued that the answers to other questions meant that the applicants had failed on four significant and distinct issues and that each of those four issues was a separate "event" for the purposes of r 681 of the UCPR. That argument was rejected in circumstances where the respondents' success in having some questions answered in their favour did not alter the fact that the respondents had been wholly successful in establishing that the notices were invalid. In that case, the validity of the notices was the ultimate issue which arose for determination in the proceeding and, consequently, the "event" for the purposes of r 681.

[16] In this proceeding, while the grant of the declaration in relation to the GST registration issue and the refusal to grant declarations relating to the contractual construction issues has affected the amount which the parties are entitled to receive from the proceeds of sale of Lots, I cannot accept that the "event" should be

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9 [2016] QSC 229 (***Callide***), [7]–[8].

characterised in the manner proposed by the Administrator. As the Developers submit, there was no claim in this proceeding for any relief quantifying the parties' respective entitlement to funds from the proceeds of sale. That was not an issue which arose for determination in the proceeding. Instead, as noted at [2] above, there were four issues litigated including the GST registration issue.

[17] The Developers applied for declarations consequent upon the determination of the GST registration issue. This was clearly an appropriate course where their dispute with the Administrator over the question of GST registration had become intractable and the determination of that dispute was necessary to inform the performance of the third applicant's obligation to distribute funds from the proceeds of sale of a Lot under cl 5.3 of the various Development Leases. Although the Administrator now submits that the declaration concerning GST registration does not benefit the Developers, as it concerns the rights and obligations between the Administrator and the Commissioner and cannot be enforced by the Developers, he never sought to strike out the GST registration issue from the proceeding. Instead, he defended the claim for the declarations as to his obligation to register for GST but was unsuccessful. In circumstances where the determination of the GST registration issue resulted in the making of the declaration, I cannot see how it could be sensibly argued that the Developers' success on that issue did not affect the overall outcome of the proceeding.

[18] In my view, the GST registration issue was an issue that was definable and severable from the contractual construction issues (whether considered individually or together) and which occupied a significant part of the proceeding. Using the language referred to in *Speets*, the GST registration issue and the contractual construction issues were separate "units of litigation". I am satisfied that those were separate events for the purposes of r 681 of the UCPR and that, in the circumstances of this case, the exercise of the discretion to order costs should reflect the parties' mixed success in respect of those different events.

[19] The Developers filed evidence which suggests that the costs involved in litigating the GST registration issue and the contractual construction issues were broadly equal. That evidence is consistent with the broad impression I formed having heard and determined the application. On that basis, the Developers submit that their entitlement to be awarded 50% of their costs (reflecting their success on the GST registration issue) and the Administrator's entitlement to be awarded 50% of his costs (reflecting his success on the contractual construction issues) should be netted off with the result that no order for costs should be made and both they and the Administrator should bear their own costs.

[20] The Administrator does not challenge the evidence as to the apportionment of the costs incurred in litigating the different issues. Nevertheless, the Administrator submits that the Developers should receive only 1/3 of their costs and he should receive 2/3 of his costs. The matters he relies on in support of that submission are:

(a) the time and costs incurred in agitating the GST registration issue outweighed the net benefit obtained by the Developers from the making of the declaration following the determination of that issue. That was said to be so in circumstances where the Court's findings on the contractual construction issues meant that the outcome of the GST registration issue had a detrimental

impact on the amount of funds the Developers are entitled to receive from the sale of the Lots. Consequently, agitating the GST registration issue had limited or no impact on the "event" for the purposes of r 681, being the parties' respective entitlement to the proceeds of sale;

(b) at the hearing of the application, the Developers abandoned their claim to the second declaration sought concerning GST registration (in the alternative to the declaration made following the determination of the GST registration issue) and abandoned what the Administrator describes as a misconceived position set out in a sample settlement statement provided to him by the Developers on 14 November 2022.

[21] For the reasons given in [13] to [18] above, I do not accept that the financial consequences for the Developers of the making of the declaration relating to GST registration warrants depriving the Developers of part of their costs, or requiring that they pay part of the Administrator's costs, incurred in litigating the GST registration issue. Nor am I satisfied that the Developer's claim in the alternative for a different form of declaration relating to the GST registration or the fact that its submissions at the hearing did not accord with the sample settlement statement – which was provided before the commencement of the proceeding and was not referred to in the Developers' statement of claim or their written submissions – added to the length or cost of the proceeding to such a degree as to warrant the apportionment of costs proposed by the Administrator.

[22] Subject to considering the effect of the Developers' rejection of a *Calderbank* offer, my view is that the comparative success of the Developers and the Administrator in the proceeding is broadly equal.

[23] The principles which govern the exercise of the costs discretion where a *Calderbank* offer has been made were summarised in *J & D Rigging Pty Ltd v Agripower Australia Ltd*,[10] as follows:

> "[5] The failure to accept a *Calderbank* offer is a matter to which a court should have regard when considering whether to order indemnity costs. The refusal of an offer to compromise does not warrant the exercise of the discretion to award indemnity costs. The critical question is whether the rejection of the offer was unreasonable in the circumstances. The party seeking costs on an indemnity basis must show that the party acted 'unreasonably or imprudently' in not accepting the *Calderbank* offer.
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> [6] In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*, the Victorian Court of Appeal stated that a court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard to at least the following matters:
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> (a) the stage of the proceeding at which the offer was received;
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> (b) the time allowed to the offeree to consider the offer;
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> (c) the extent of the compromise offered;

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10 [2014] QCA 23, [5]–[6] (citations omitted).

(d) the offeree's prospects of success, assessed as at the date of the offer;

(e) the clarity with which the terms of the offer were expressed;

(f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it."

[24] The High Court addressed the effect of a refusal to accept a *Calderbank* offer in *Stewart v ATCO Controls Pty Ltd (No 2)*,[11] as follows:

> "This Court has a general discretion as to costs. The non-acceptance of a *Calderbank* offer is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs. The respondent submits that its rejection of the offer was not unreasonable. If that be the test, it would appear to require at the least that the respondent point to a reason for not accepting the offer beyond the usual prospects of being successful in litigation."

[25] In *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd*,[12] the Queensland Court of Appeal accepted that passage as setting out the law with regards to costs when a *Calderbank* offer has been made.

[26] The Administrator made the *Calderbank* offer on 1 September 2023. It was made at a point where the proceeding was well-advanced and I am satisfied that it was open for acceptance for a reasonable period. The Developers rejected the offer on 6 September 2023.

[27] The terms of the offer were clear. They were as follows:

> "We are also instructed to offer to settle the proceeding in the following terms:
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> (a) The application, insofar as it seeks relief against the [Administrator], is dismissed.
>
> (b) The [Developers] bear their own costs of the application insofar as it seeks relief against the [Administrator].
>
> (c) The [Administrator] bear his own costs of the application."

[28] The Administrator submits that, having regard to the financial detriment to the Developers resulting from the making of the declaration concerning GST registration and the rejection of their case on the contractual construction issues, the result of the judgment was less favourable than the terms of the *Calderbank* offer. I cannot accept that submission in circumstances where the Developers succeeded in obtaining a declaration that the Administrator is required to be registered for GST, and that declaration was necessary to resolve the dispute between the parties concerning GST registration and thereby to inform the performance of the third applicant's obligation to distribute funds from the proceeds of sale of a Lot under cl 5.3 of the various Development Leases.

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11 (2014) 252 CLR 331, 334 [4].

12 [2016] QCA 130 (***Comgroup Supplies***), [2]

[29] Those are matters beyond the usual prospects of being successful in litigation which, in my view, mean that the Developers did not act unreasonably in rejecting the *Calderbank* offer. Accordingly, the rejection of that offer has no bearing on the exercise of the costs discretion.

[30] Having concluded that the comparative success of the Developers and the Administrator in the proceeding is broadly equal I am satisfied that, to avoid the cost of an assessment of the parties' respective costs, the appropriate exercise of the costs discretion as between those parties is to set-off their respective entitlement to be paid 50% of their costs with the result that no order is made for costs as between those parties and they are each left to bear their own costs.

Costs of the Commissioner

[31] The Administrator cites three authorities in support of his submission that, in substance, the Commissioner appeared as *amicus curiae*: *KMB v Legal Practitioners Admissions Board (Qld)*;[13] *Virbac (Australia) Pty Ltd v Merck Patent GmbH*;[14] and *New England Biolabs v F Hoffman-La Roche AG*.[15]

[32] In *KMB*, the appellant was successful in appealing the Board's refusal to make a declaration concerning the appellant's application for admission. The appellant then applied for an order that the Board pay his costs of the appeal. In refusing to order costs, the Court held that the appellant's application to the Board for a declaration did not create a dispute *inter partes*. Likewise, the appeal from the Board's refusal to make the declaration did not involve a determination of existing rights in a dispute between two parties but is, instead, an inquiry by the Court itself into a particular issue that the Court must determine in the course of controlling entry into the legal profession by reference to standards of character.[16] In that context, the Court referred to the special position of the Board as a statutory adjunct of the Court which performs the function of determining, among other things, whether an applicant is a fit and proper person to be admitted and the statutory right which the Board has been given to appear before the Court and to be heard by the Court by way of assistance. On that basis, the Court described the Board as "a genuine *amicus curiae*".[17] The court concluded as follows:[18]

> "The statutory status of the Board as decision-maker and contradictor does not transform it into a party in the ordinary sense. Its function remains, even when appearing before the court, 'to help the Supreme Court by making a recommendation about each application for admission' in terms of s 39(1) of the Act. There is, therefore, no 'event' upon the occurrence of which the Court should make its 'usual order'. The Board neither wins nor loses an appeal such as this. Nor does the appellant."

[33] *Virbac* concerned an appeal of the decision of the Commissioner of Patents to grant an extension of a patent relating to a pharmaceutical substance. The appeal raised a question of the construction of the provisions of the *Patents Act* 1990 (Cth) dealing

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13 [2018] 1 Qd R 500 (***KMB***).
14 (1994) 52 FCR 534 (***Virbac***).
15 [2004] FCAFC 246 (***New England Biolabs***).
16 *KMB*, 511 [47].
17 *KMB*, 511 [46].
18 *KMB*, 513 [60].

with the extension of such a patent. The novelty of the questions raised, and their implications for the administration of the statutory provisions, led the Court to suggest at an early stage of the proceeding that the Commissioner of Patents appear at the hearing of the appeal. In considering whether the unsuccessful party to the appeal should be ordered to pay the costs of the Commissioner for Patents, in addition to the costs of the successful party, the Court referred to the special interest of the Commissioner of Patents in the proper construction of the provisions which he must administer as a consideration tending to sway the court against imposing the costs of the Commissioner of Patents costs upon a party. The appearance of the Commissioner of Patents was described by the court as "akin to that of an *amicus curiae*".[19] On that basis, the Court made no order as to the costs of the Commissioner of Patents.

[34] In *New England Biolabs*, the Commissioner of Patents exercised her statutory right to intervene in an appeal. The Full Court of the Federal Court declined to order that the costs of the Commissioner of Patents be paid by the unsuccessful appellant, applying the approach adopted in *Virbac*.[20]

[35] The present proceeding is somewhat different. Here, the Commissioner did not seek to appear on his own initiative or at the suggestion of the Court. Although he had no interest in the commercial dispute, as previously noted at [4] above, the Commissioner was joined as a necessary party because his rights and obligations relating to the assessment of tax against the Administrator are directly affected by the declaration made following determination of the GST registration issue. Although the role of the Commissioner was limited,[21] I do not accept the Administrator's submission that, in substance, the Commissioner appeared as *amicus curiae*.

[36] It is correct, as the Administrator submits, that there is no "event" as between the Commissioner and either the Developers or the Administrator. Nevertheless, I accept that the Commissioner should not have to bear his costs of the proceeding which arose from a commercial dispute in which he had no interest and where his appearance was only necessitated because that commercial dispute gave rise to an issue concerning the application of the GST Act which would, once determined, directly affect his rights and obligations under that legislation.

[37] The Administrator also relies upon correspondence prior to the hearing of the application in which the Commissioner stated that he was considering making an application to be removed as a party to the proceeding and sought an undertaking from the Developers and the Administrator that they would not seek costs against him. In response, the Administrator stated that:

(a) if the Commissioner remained a party to the proceeding but did not take an active role and simply abided the order of the Court then he agreed not to seek costs against the Commissioner; but

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19 *Virbac*, 541.
20 *New England Biolabs*, [2].
21 Reasons, [10].

(b) if the Commissioner remained a party and took an active role in the proceeding, the question of costs should be determined at the end of the proceeding in the usual way.

In the events which transpired, the Commissioner took an active (albeit limited) role in the proceeding.

[38] I do not accept the Administrator's submission that the Commissioner's actions in seeking to protect himself from adverse costs orders means that it would be against the ordinary principles of fairness for him to now seek to have his costs paid by the unsuccessful party. In addition to the matters already referred in [35] and [36] above, I accept the Commissioner's submission that he had an obligation and an interest, both as a party to the proceeding and as a model litigant to assist the Court on the issue upon which he had been joined. In those circumstances I do not consider that it would be unfair for the Commissioner to seek his costs. To the contrary, I consider it appropriate for him to be paid his costs. Further, I consider that, as between the Developers and the Administrator, fairness dictates that it should be the Administrator, as the unsuccessful party on the GST registration issue upon which the Commissioner was joined, to bear the Commissioner's costs.

Conclusion

[39] I will make no order as to costs between the Developers and the Administrator.

[40] As to the costs of the Commissioner, I will order that the Administrator pay the Commissioner's costs of and incidental to the proceeding to be assessed on the standard basis if not agreed.