

# LAND APPEAL COURT OF QUEENSLAND

CITATION: *BHP Queensland Coal Investments Pty Ltd & Ors v Cherwell Creek Coal Pty Ltd* [2009] QLAC 0005

PARTIES: BHP Queensland Coal Investments Pty Ltd  
(ACN 098 876 825)  
- and -  
QCT Resources Pty Ltd  
(ACN 010 808 705)  
- and -  
BHP Coal Pty Ltd  
(ACN 0101 595 721)  
- and -  
QCT Mining Pty Ltd  
(ACN 010 487 840)  
- and -  
Mitsubishi Development Pty Ltd  
(ACN 009 779 873)  
- and -  
QCT Investment Pty Ltd  
(ACN 010 487 831)  
- and -  
Umal Consolidated Pty Ltd  
(ACN 000 767 386)  
(appellants)

v.

Cherwell Creek Coal Pty Ltd  
(ACN 063 763 002)  
(respondent)

FILE NO: LAC2008/1110

DIVISION: Land Appeal Court of Queensland

PROCEEDING: Appeal

ORIGINATING COURT: Land Court of Queensland

DELIVERED ON: 12 June 2009

DELIVERED AT: Brisbane

THE COURT: White J  
Mrs CAC MacDonald, President of the Land Court  
Mr RP Scott, Member of the Land Court

ORDERS:

1. **The appeal is allowed.**
2. **Remit the proceedings to the Member to determine the quantum of the security to be provided.**
3. **The respondent to pay the appellants' costs of and incidental to the appeal unless the respondent contends that some other order ought be made in which case:**
  - (i) **the respondent file and serve its submissions within 21 days;**
  - (ii) **the appellants file and serve their submissions within 14 days of receipt of the respondent's submissions;**
  - (iii) **the respondent file and serve its reply, if any, within seven days of receipt of the appellants' submissions;**
  - (iv) **the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.**

CATCHWORDS:

Procedure – Costs – Security for costs – other matters – where the appellants initiated proceedings against the respondent for compensation pursuant to s.722G of the *Mineral Resources Act 1989* (Qld) – where the appellants sought an order in the Land Court that the respondent provide security for its costs in the event that the respondent's claim against the appellants is successfully defended – where the learned Member declined to order security – whether the learned Member erred in finding it was far from certain that an order for costs would be made in favour of the appellants – whether the general rule that costs follow the event applies

Procedure – Costs – Security for costs – other matters – where the appellants initiated proceedings against the respondent for compensation pursuant to s.722G of the *Mineral Resources Act 1989* (Qld) – where the appellants sought an order in the Land Court that the respondent provide security for its costs in the event that the respondent's claim against the appellants is successfully defended – where the learned Member declined to order security – whether the learned Member erred in characterising the respondent as in the position of a defendant on the basis that the respondent was forced into litigation to protect its rights and entitlements

*Central Queensland Coal Associates Agreement Act 1968* (Qld)

*Land Court Act 2000* (Qld), s.34, 55

*Land Court Rules 2000* (Qld), r.4

*Mineral Resources Act 1989* (Qld), s.722F, s.722G

*Mineral Resources (Peak Downs Mines) Amendment Act 2008* (Qld)

*Uniform Civil Procedure Rules 1999* (Qld), r.671, r.681

*Barns v Director-General, Department of Transport* (1997) 18 QLCR 133, applied  
*Banno v The Commonwealth* (1993) 45 FCR 32, distinguished  
*Haber v Department of Main Roads* [2004] QLAC 0102, applied  
*House v The King* (1936) 55 CLR 499, applied  
*Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621, applied  
*LGM Enterprises Pty Ltd v Brisbane City Council* [2008] QLAC 0231, applied  
*Maatschappij Voor Fondsenbezit v Shell Transport and Trading Co* [1923] KB 166, cited  
*Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11, cited  
*Sykes v Minister for Mines and Energy* [2008] QLC 0116, cited  
*Sykes v Minister for Mines and Energy* [2009] QLAC 0001, cited  
*Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No 2)* [1953] 1 WLR 1481, cited  
*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, applied  
*Willey v Synan* (1935) 54 CLR 174, cited

APPEARANCES: Mr S L Doyle SC, with Mr A M Pomerence, for the appellants  
Mr B O'Donnell QC, with Ms J Chapple, for the respondent

SOLICITORS: Allens Arthur Robinson for the appellants  
Holding Redlich Lawyers for the respondent

## Background

[1] The appellants sought an order in the Land Court that the respondent, Cherwell Creek, provide security for their costs in respect of proceedings against them in that court in the event that they successfully defended Cherwell Creek's claim for compensation. The learned Member declined to order security. Cherwell Creek's proceedings in the Land Court were initiated pursuant to the provisions of s.722G of the *Mineral Resources Act* 1989 (Qld) ("the Act"). Part 18A of that Act had been inserted by the *Mineral Resources (Peak Downs Mines) Amendment Act* 2008 (Qld) ("the Amending Act") which came into effect on 9 May 2008. Section 722G provides:

- “(1) Cherwell Creek may apply to the Land Court for an order for the payment of compensation for the loss of its opportunity, because of the enactment of this part, to commercialise the MDLA364 coal resource.
- (2) An application may only be made within 3 months after the commencement day.”

- [2] The appellants are participants in the Central Queensland Coal Associates Joint Venture (“CQCAJV”). The CQCAJV owns the Peak Downs Coal Mine. It is managed by the appellants described below by the learned Member as the BHP Group. The members of CQCAJV in their respective interests are the holders of Mining Lease No. 1775 (“ML1775”) and Special Lease No. 12/42239 (“SL12/42239”). ML1775 was granted in 1984 under the *Central Queensland Coal Associates Agreement Act 1968 (Qld)* on which the Peak Downs Mine is located. SL 12/42239 is partly within and partly outside ML1775. The part which is outside is the location for infrastructure critical to the Peak Downs Mine. This includes spoil piles, environmental and tailings dams, haul roads and ramps, mechanical workshops, warehouses, power reticulation structures and a large coal reject stock pile.
- [3] In 1994 Cherwell Creek was granted Exploration Permit for Coal No. 545 (“EPC545”). Part of EPC545 overlapped a part of SL12/42239 on which the appellants’ mining infrastructure is located. On 22 August 2003 the Minister renewed the permit for a further nine years from August 1996 to August 2005. The appellants disputed the validity of the original grant and filed an application for a statutory order of review of the 2003 decision in the Supreme Court in November 2003. In 2005 and 2007 Cherwell Creek applied for and was granted further renewals, each of which was disputed by the appellants. In 2006 Cherwell Creek applied for Mineral Development Licences 364 and 366 (“MDL364”, “MDL366”) based on EPC545. Those licences related to the northern and southern regions of EPC545 respectively and in part overlapped SL12/42239.
- [4] According to the Explanatory Notes to the Amending Act the dispute between Cherwell Creek and the appellants has arisen because of the historical split between the mining tenure (for the mining operations) and the land tenure (for the infrastructure) for the Peak Downs Mine, all of which pre-dated the tenure regime under the Act. When the Act was enacted in 1989 it included transitional provisions that expressly covered mining leases granted under the *Central Queensland Coal Associates Agreement Act*. Any special leases granted under the then *Land Act* pursuant to the authority for that within the *Central Queensland Coal Associates Agreement* were similarly transitioned over when the *Land Act 1994 (Qld)* was enacted. The Explanatory Note continues:

“Unfortunately, the special leases were never protected to ensure that tenure could not be granted under the *Mineral Resources Act 1989* over them. It is not known whether this was deliberate or an oversight. However, this lack of protection has certainly proved to be a costly mistake in the current situation, as it has resulted in uncertainty and lengthy delay in the resolution of the dispute between [the appellants] and Cherwell Creek.”

[5] The Explanatory Note identified the Peak Downs Mine as a premium coking coal mine with a large workforce of employees and contractors. Its continuing viable operation was of considerable benefit to the local economy and to the State, generating many millions of dollars in royalties. The government therefore regarded as unacceptable the tenure dispute with Cherwell Creek. It noted that the appellants and their associates were proposing a major expansion of the Peak Downs Mine and investigating the feasibility of developing and constructing a new Greenfield mine in the northern part of ML1775 to be known as the Caval Ridge Mine. The Explanatory Note continued:

“The Government accepts that the land currently held by Cherwell Creek under [EPC545] and its application for [MDL364] is the optimal location for the infrastructure needed for the Caval Ridge Mine.”

It was undesirable for the appellants and their associates to be required to place the infrastructure on top of reserves of premium hard coking coal within ML1775.

[6] By provisions in Part 18A of the Act, Cherwell Creek’s application for EPC545 was renewed to 9 May 2008, the date the Amending Act commenced, and was ended on that day. Cherwell Creek’s applications for MDL364 and MDL366 were rejected from 9 May 2008. The area covered by Cherwell Creek’s application for MDL364 was made available to the appellants and their associates as holders of ML1775 for an application for mining leases to be lodged within two years. The land comprising SL12/42239 which was not within a mining tenement or covered by an application for a mining tenement was made available to the holders of ML1775 for an application for a mining lease to be lodged within one year.

[7] By s.722F no compensation is payable by the State to Cherwell Creek (or any other person) for or in connection with the enactment or operation of Part 18A or anything done to carry out or give effect to that Part. By s.722G, which empowers Cherwell Creek to apply for an order for the payment of compensation for the loss of its opportunity to commercialise the MDL364 coal resource, the holders of ML1775 are parties to the proceeding on the application. By subsection (4):

“On an application under this section, the Land Court must –

- (a) decide whether any compensation should be payable; and
- (b) if it decides compensation should be payable –
  - (i) decide the amount of the compensation; and
  - (ii) make an order for payment of the amount by the [holders of ML1775] to Cherwell Creek.”

In making a decision under s.722G(4), the Land Court must have regard:

“...to the likelihood that, had this part not been enacted, Cherwell Creek, alone or in conjunction with another person, would have been able to commercialise the MDLA364 coal resource...”

The Land Court is required to have regard to a number of matters in reaching that decision including the extent and quality of the coal resource, its likely mineability, the market for any coal mined and the likely life of the mine, coal revenue generated, the costs generated,

“...the likelihood of a mining lease, appropriate for Cherwell Creek to commercialise the MDLA364 coal resource, being granted under this Act”

and any other relevant matter.

### **Cherwell Creek**

[8] Cherwell Creek, as found by the learned Member and not challenged, has a paid up capital of \$2; pays all its debts as and when they fall due; has as a director and, ultimately, sole shareholder, Mr Christopher Wallin, who is estimated to have personal wealth of \$550,000,000.<sup>1</sup> Neither Mr Wallin nor any asset rich corporation which he controls have made an offer to be responsible for any costs for which Cherwell Creek may become liable arising out of this litigation.

### **Quantum of costs**

[9] Although Cherwell Creek contends that the appellants’ estimate of their likely costs in the proceeding for which they seek an order of \$1,629,440 is excessive, there was no dispute that very considerable costs would be incurred because, at the least, by virtue of s.722G(5) of the Act the Land Court must have regard to:

- “(a) the likely extent and quality of the MDLA364 coal resource;
- (b) the likely mineability of the MDLA364 coal resource;
- (c) the likely market for any coal mined from the MDLA364 coal resource;
- (d) the likely life of a mine for the MDLA364 coal resource;
- (e) the likely coal revenue generated from the MDLA364 coal resource;
- (f) the likely coal revenue generation costs;
- (g) the likelihood of a mining lease, appropriate for Cherwell Creek to commercialise the MDLA364 coal resource, being granted under this Act;
- (h) any other relevant matter”

in considering if Cherwell Creek would have been able to commercialise the MDL364 coal resource.

[10] The learned Member did not make any assessment of costs in the event that his refusal to grant security was overturned on appeal.

### **Jurisdiction**

[11] It is not disputed that the Land Court has jurisdiction to award security for costs. Rule 4 of the *Land Court Rules 2000 (Qld)* provides that if the *Land Court Rules* do not provide for a matter in relation to a proceeding in the Court and the *Uniform Civil Procedure Rules 1999 (Qld)* would provide for the matter, “the uniform rules apply in relation to the matter

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<sup>1</sup> Mr Wallin may hold some property as trustee.

with necessary changes”. Since the *Land Court Rules* do not provide for an application for security for costs, Chapter 17 of the *Uniform Civil Procedure Rules*<sup>2</sup> may be utilised. By r 671(a) if the plaintiff is a corporation and “there is reason to believe the plaintiff will not be able to pay the defendant’s costs if ordered to pay them” the jurisdiction to order security for costs is enlivened. Cherwell Creek did not contend that the jurisdiction was not enlivened.

[12] In deciding whether to order security a court may have regard, relevantly, to any of the following matters:

- “(a) the means of those standing behind the proceeding;
- (b) the prospects of success or merits of the proceeding;
- (c) the genuineness of the proceeding;
- (d) for rule 671(a) – the impecuniosity of a corporation;
- (e) whether the plaintiff’s impecuniosity is attributable to the defendant’s conduct;
- (f) whether the plaintiff is effectively in the position of a defendant;
- (g) whether an order for security for costs would be oppressive;
- (h) whether an order for security for costs would stifle the proceeding;
- ...
- (m) the costs of the proceeding.”<sup>3</sup>

### **The decision below**

[13] Although the learned Member regarded the outcome of the application for security for costs “as finely balanced”,<sup>4</sup> he concluded that security should not be ordered. He said:<sup>5</sup>

“My reason for so ordering is primarily based on my conclusion that, at this stage of the proceedings, and in light of the provisions of s.34 of the *Land Court Act*, it is far from certain that, even if Cherwell Creek ultimately fails to establish that the BHP Group [the appellants] is liable to pay it any compensation pursuant to s.722G of the MRA [*Mineral Resources Act*], it would necessarily follow that an award of costs in favour of the BHP Group would be made. Additionally, it is my view that, in light of the provisions of the MRA as contained within Part 18A, although Cherwell Creek is by name the applicant in the proceedings, it has commenced its proceedings as the only recourse left available to it in order to recover what is [sic] sees as proper compensation for the loss of the opportunity to extract coal from mining tenements that it held or had an expectation that it would be granted, and therefore its actions can be viewed as responsive to the circumstances thrust upon it by Part 18A.”

The appellants have labelled these as “the certainty error” and “the really a defendant error” and those two grounds were the focus of the appeal.

### **The Certainty Error**

[14] The learned Member was much influenced by his approach to costs in the matter of *Sykes v Minister for Mines and Energy & Anor*<sup>6</sup> to which he was referred by both parties. He also noted the practice of the Land Court to make no order as to costs in many proceedings

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<sup>2</sup> Security for Costs.

<sup>3</sup> *Uniform Civil Procedure Rules*, r 672.

<sup>4</sup> Reasons [36].

<sup>5</sup> Reasons [36].

<sup>6</sup> [2008] QLC 0116.

within its jurisdiction. The power of the Land Court to award costs is contained in s.34 of the *Land Court Act 2000* (Qld) which relevantly provides:

- “(1) Subject to the provision of this or another Act to the contrary, the Land Court may order costs for a proceeding in the court as it considers appropriate.
- (2) If the court does not make an order under subsection (1), each party to the proceeding must bear the party’s own costs for the proceeding.”

[15] There is no provision in the Act which is applicable nor any other Act to the contrary.<sup>7</sup> Accordingly, the Land Court is left with a discretion unconfined except insofar as “the subject matter and the scope and purpose”<sup>8</sup> of the legislation does so. It must be exercised judicially and in accordance with established principles and factors relevant to the litigation.<sup>9</sup> As is well recognised, a significant factor influencing the exercise of the discretion to award costs is the outcome of the litigation.

[16] It is appropriate to recall the source of the broad discretion to award costs which was discussed by McHugh J in *Oshlack v Richmond River Council*:<sup>10</sup>

“At common law, courts had no jurisdiction to award costs. The jurisdiction is statutory and has evolved gradually. It was regarded as necessary in order to avoid injustice. In modern times, the statutory language typically confers on the court a broad discretion to award costs, rather than declares that costs automatically follow the event. The origin of this broad statutory discretion is O 55 of the Rules of Court in the First Schedule to the *Supreme Court of Judicature Act 1875* (UK) which commenced with the words: ‘Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court.’  
... The statutory provision at issue in the present case is s 69(2) of the *Land and Environment Court Act* which similarly provides that costs are in the discretion of the Court ...”

His Honour noted the observation of Devlin J in *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No 2)*<sup>11</sup> referring to an arbitration, that to deprive a successful party of his costs or to require him to pay part of the costs of the other side “is an exceptional measure”. His Honour noted that the principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. To be deprived of all or part of his costs, a successful party must have been guilty of some sort of misconduct relating to the litigation.<sup>12</sup>

[17] The learned Member, after discussing his approach in *Sykes*, said:<sup>13</sup>

“Accordingly, applying the reasoning that I set out in *Sykes* [relating to the practice of the Land Court], at this stage I am unable to say with any certainty at all that, at the end of the day, if Cherwell Creek fails in its application for compensation, that it would necessarily follow that an award for costs would be made in favour of the BHP Group. Of course, in

<sup>7</sup> For example, the *Acquisition of Land Act 1967* (Qld) in s 27 and the *Valuation of Land Act 1944* (Qld) in s 70 are provisions about costs to the contrary.

<sup>8</sup> *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

<sup>9</sup> *LGM Enterprises Pty Ltd v Brisbane City Council* [2008] QLAC 0231 at [9].

<sup>10</sup> (1998) 193 CLR 72 at [63]–[70]. Although dissenting with Brennan CJ, his Honour’s analysis of the jurisdiction to award costs is regularly cited as offering guidance. See *McIntosh & Anor as Trustees of the Estate of Camm (A Bankrupt) v Linke Nominees Pty Ltd & Anor* [2008] QCA 410 at [14].

<sup>11</sup> [1953] 1 WLR 1481 at 1484.

<sup>12</sup> (1998) 193 CLR 72 at [69]; *Oldfield & Ors v Gold Coast City Council* [2009] QCA 124 at [71]–[72].

<sup>13</sup> Reasons [35].

exercising my discretion, an award for costs *may* be made in those circumstances, but the issue is far from certain.”

[18] There are two things to say about this. In the first place the learned Member in *Sykes* was required to consider whether s 50 of the *Land and Resources Tribunal Act* 1999 (Qld) or s.34 of the *Land Court Act* applied to the question of costs. Section 50 provided that “special circumstances” had to be found to make an award of costs and the usual position was that each party “must” pay its own costs in that Tribunal. Whilst the learned Member concluded that s.34 did apply, he found “special circumstances” in Mr Sykes’ conduct in prolonging the litigation. On appeal,<sup>14</sup> the Land Appeal Court found that s.50 governed the question of costs but did not interfere with the learned Member’s application to the facts.<sup>15</sup> There is no present likelihood of misconduct, as the learned Member found, in the conduct of this litigation.

[19] The second matter concerns the learned Member’s approach to an application for security for costs insofar as he considered that the practice of the Land Court suggested a different approach than one where a successful party can expect an order for costs of the proceedings to be made in its favour. This is the basis for his conclusion that it is not “certain” that any orders would be made.

[20] Cherwell Creek in support of the learned Member’s approach contends that within the structure of the *Land Court Act* there is a presumption against an order for costs which would, in turn, militate against the likelihood of an order being made. This is said to be because the ‘fall back’ position in s.34(2) provides that in the absence of an order each party will pay its own costs. This, so the argument goes, is to be contrasted with r.681 of the *Uniform Civil Procedure Rules* where, although costs are in the discretion of the court, they will follow the event unless otherwise ordered. However, s.34(2) of the *Land Court Act* does not detract from the unconfined discretion in s.34(1) so as to make less likely that an order for costs will be made. In *Haber v Department of Main Roads*<sup>16</sup> the Land Appeal Court accepted the approach of the Land Appeal Court in *Barns v Director-General, Department of Transport*:<sup>17</sup>

“The general rule that costs will usually follow the event is one which is deeply embedded in our law.”

[21] This litigation is between significant commercial interests who have retained large firms of specialist solicitors who in turn have briefed leading counsel. It is highly unlikely that the

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<sup>14</sup> *Sykes v Minister for Mines and Energy & Anor* [2009] QLAC 0001.

<sup>15</sup> The Court of Appeal in *Sykes v Queensland Gas Company & Anor* [2009] QCA 163 at [72]-[83] concluded that s.34 did apply to the exercise of the discretion as the issue of costs was procedural and the amending legislation applied.

<sup>16</sup> [2004] QLAC 0102.

<sup>17</sup> (1997) 18 QLCR 133 at 134.

considerations which are present when a self-represented litigant (or modestly represented litigant) appears against an agency of government in the Land Court and which guide the exercise of the discretion will be present here.<sup>18</sup> The observations by Wilcox J in *Banno v The Commonwealth*<sup>19</sup> and relied upon by Cherwell Creek are not, therefore, apt. This litigation is not akin to the land resumption cases of which *Banno* was one.<sup>20</sup> Furthermore, there is an important difference from the acquisition of land cases here in that, contrary to those cases, Cherwell Creek does not start as the land owner. One factor which may be determinative of whether an order for costs would be made in the subject litigation may depend on the success of the appellants' argument that the original grant to Cherwell Creek was void which would be an aspect of the likelihood of a mining lease being granted as provided for in s.722G(5)(g). It is accepted by both parties that that is an issue which cannot be profitably ventilated on this application or appeal.

[22] When the learned Member said that it was far from certain that an order for costs would be made in favour of the appellants he pronounced the wrong test and thereby fell into appellable error.

### **Really a Defendant Error**

[23] The learned Member concluded<sup>21</sup> that Cherwell Creek was forced into the litigation by the Amending Act and was, in truth, a defendant. The learned Member referred to and relied on the propositions enunciated by Scrutton LJ in *Maatschappij Voor Fondsenbezit v Shell Transport and Trading Co*:<sup>22</sup>

“...Where the person against whom security is sought is really defending himself against attack, even if he be nominally plaintiff, but really defending himself against defendants' previous actions against him,”

security will not be ordered.

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<sup>18</sup> Those considerations were mentioned by the Land Appeal Court in *Bowden v The Valuer-General* (1980) 7 QLCR 138 at 144–148 when it spoke of “the ease of access” to the Land Court particularly in cases between “the citizen” and a “government instrumentality”.

<sup>19</sup> (1993) 45 FCR 32 at 51.

<sup>20</sup> In *Haber* the Land Appeal Court noted that the general rule should be applied flexibly in land compensation cases at first instance because it “is the only way in which a dispossessed owner can obtain an independent determination of the value of the land taken”.

<sup>21</sup> Reasons [36].

<sup>22</sup> [1923] KB 166 at 177.

- [24] It is unnecessary to elaborate greatly on the facts of that decision<sup>23</sup> save that the then English rules required a foreign plaintiff (as was the plaintiff) with no assets within the jurisdiction to give security for costs, but not a defendant. The Court of Appeal in *Maatschappij* characterised the proceedings as essentially interpleader proceedings where the court will look at the substance rather than the form of the dispute and order security if appropriate and might have ordered security but for the fact that the moving party was not prepared to do so.
- [25] The learned Member also referred to and was assisted by *Willey v Synan*<sup>24</sup> in reaching his conclusion that Cherwell Creek was, effectively, a party defending its proprietary rights and forced into litigation by the Amending Act. Briefly, in *Willey* the plaintiff was a member of the crew of a ship travelling from New Zealand to Australia and not ordinarily resident within Australia. He allegedly found on board the ship English silver coins. On arrival, officials of the Customs Department took possession of the coins. The plaintiff made a claim for the coins under s 207 of the *Customs Act* 1901–1934. The Collector of Customs thereupon gave notice to the plaintiff requiring him to commence an action for the recovery of the coins and in default the coins would be condemned without further proceedings. It appears from the judgments that both the ship owners and the New Zealand government claimed the coins. The plaintiff commenced an action against the Collector of Customs for the recovery of the coins and the Collector of Customs applied for security for costs pursuant to Order XXVIII, r 9 of the *High Court Rules* in that he was not ordinarily resident in the jurisdiction. The court by reason of the defendant’s notice requiring him to commence proceedings and the statutory forfeiture which would have resulted from his failure to do so, held that the plaintiff was, in substance, in the position of a defendant and security for costs should not be ordered.
- [26] The approach in *Willey* has been mentioned in many subsequent cases. In *Interwest Ltd v Tricontinental Corporation Ltd*<sup>25</sup> Ormiston J reviewed the authorities in relation to

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<sup>23</sup> It is plain that Banks and Scrutton LJ were unsympathetic to the plaintiff company (seeking security from the joined defendant) as this summary by Scrutton LJ at 178 reveals:

“In this case, considering that a Dutch company is bringing the question of the effect of a Dutch assignment and a Dutch attachment to English Courts to decide, though its claim is against a Dutch principal debtor, and the dispute had much better be settled in Dutch Courts, I think this Court should use its discretion by declining to order security from a Dutch company in whose favour the Dutch attachment has been issued, and who reasonably comes to England to protect itself against the proceedings which the other Dutch company has started in England, to which this Court has joined it as defendant.”

<sup>24</sup> (1935) 54 CLR 175.

<sup>25</sup> (1991) 5 ACSR 621.

counterclaims and cross-claims in the context of an application for security and concluded:<sup>26</sup>

“Perhaps it may be said that the authorities support the proposition that security will only ordinarily be ordered against a party who is in substance the plaintiff, and that an order ought not to be made against parties who are defending themselves and thus forced to litigate: cf *Accidental & Marine Insurance Co v Mercati* (1866) 3 Eq 200. That would appear to be an overstatement, but the fact that a plaintiff, or counterclaimant, has instituted essentially defensive proceedings, must be a significant factor in the exercise of the court’s discretion.”

And

“Principally it would appear necessary to characterise the proceedings in respect of which security is sought. If they are ‘defensive’ proceedings, either directly resisting proceedings already brought or seeking to ‘halt self-help procedures’, it would seem that to require security would be oppressive, or at least would provide serious grounds for refusing to make an order. At the least, it is a factor to be considered in the exercise of the discretion.”

[27] It is, therefore, necessary to look more closely at the facts. The appellants dispute the validity of the original grant of EPC545 and subsequent renewals. Cherwell Creek applied for MDL364 and MDL366 in respect of EPC545. By operation of Part 18A of the Act, Cherwell Creek’s applications for mining tenements were, relevantly, rejected.<sup>27</sup> Only the appellants were entitled to apply for and be granted a mining lease of the land the subject of MDL364 and EPC545. The appellants applied for a mining lease of that land on 16 October 2008, well after Cherwell Creek commenced these proceedings for compensation on 8 August 2008, so it could not be said, if relevant, which is doubtful, that the appellants’ application prompted Cherwell Creek’s proceedings in the Land Court.

[28] Although, as the Explanatory Notes and the Minister’s Second Reading Speech made clear, the State has a real interest in the exploitation of the coal reserves in the subject lands and it would not be liable for compensation to Cherwell Creek for extinguishing any entitlement which it might have and any loss which it might have sustained as a consequence of the extinguishment. Instead, presumably because they will benefit from the successful exploitation of any mineral resource found, the appellants are to be liable if Cherwell Creek can establish and quantify the loss of its opportunity to commercialise the coal resource. Once Cherwell Creek determined to proceed in the Land Court pursuant to s 722G of the Act, by operation of the provisions of the Act the appellants were the opposite party. If Cherwell Creek proves successful in its claim then the appellants will be liable for whatever amount the court quantifies as its loss. There is no previous action against Cherwell Creek by the appellants of the kind discussed in the cases which has forced Cherwell Creek to commence these proceedings.

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<sup>26</sup> (1991) 5 ACSR 621 at 626–627.

<sup>27</sup> Section 722C of the Act.

[29] As Ormiston J observed, whether a party against whom security is sought is to be characterised as an aggressor or as a defender of its rights and entitlements is but one factor to be weighed in deciding whether to order security. It may, in some cases, be decisive, but here the learned Member accorded that factor greater weight than, on a close analysis of the facts, it can bear.

### **Review of the discretion**

[30] The appellant has contended that s.55(b) of the *Land Court Act*, which requires the Court to:

“... act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts”,

precludes the restraint which appellate courts exercise when the appeal is from a discretionary decision on matters of practice and procedure.<sup>28</sup> There is, however, good reason for following that guidance and it is in keeping with the spirit of s.55(b) to do so and not expose litigants to the threat of re-litigating the merits of a discretionary judgment. In *House* the plurality said:<sup>29</sup>

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.”

[31] The learned Member misdirected himself about the proper approach to an application for security for costs when he said that it was “far from certain” that an order for costs would be made in favour of the appellants, if successful, because of s.34 and proceeded on a wrong understanding of the ambit of that provision.

[32] The learned Member equated the appellants with those whose conduct had forced a party into litigation to protect its rights or entitlements when the situation was rather more complex. Having failed to recognise that complexity, the learned Member characterised Cherwell Creek as a defendant and then gave that factor too much weight. It needed to be balanced against the extensive and expensive nature of the proceedings in the Land Court<sup>30</sup> and that Cherwell Creek had no assets of value against which an order for costs could be executed, with a very wealthy individual standing behind the corporation unwilling to be exposed to any costs order. That the appellants are substantial corporations with significant financial resources is not here a relevant consideration because Cherwell Creek’s litigation will not be stifled by an order for security.

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<sup>28</sup> *House v The King* (1936) 55 CLR 499 at 505.

<sup>29</sup> (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

<sup>30</sup> The quantum of costs sought by the appellants, if nothing else, demonstrated this.

[33] Accordingly, the learned Member's decision was outside the exercise of a sound discretionary judgment and security ought to have been ordered.

### **Quantum**

[34] The learned Member did not assess the quantum of the appellants' costs. It is not appropriate that this Court should attempt to do so and, if the parties cannot agree on a suitable sum and method for securing it, the application should be remitted to the learned Member for his determination.

### **Costs**

[35] Unless there are submissions to the contrary, the respondent should pay the appellants' costs of and incidental to the appeal to be assessed on the standard basis. If the respondent contends that some other order ought be made then:

- (i) the respondent file and serve its submissions within 21 days;
- (ii) the appellants file and serve their submissions within 14 days of receipt of the respondent's submissions;
- (iii) the respondent file and serve its reply, if any, within seven days of receipt of the appellants' submissions;
- (v) the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.

### **Orders**

1. The appeal is allowed.
2. Remit the proceedings to the Member to determine the quantum of the security to be provided.
3. The respondent to pay the appellants' costs of and incidental to the appeal unless the respondent contends that some other order ought be made in which case:
  - (i) the respondent file and serve its submissions within 21 days;
  - (ii) the appellants file and serve their submissions within 14 days of receipt of the respondent's submissions;
  - (iii) the respondent file and serve its reply, if any, within seven days of receipt of the appellants' submissions;
  - (iv) the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.

**WHITE J**

**CAC MacDONALD  
PRESIDENT OF THE LAND COURT**

**RP SCOTT  
MEMBER OF THE LAND COURT**