

LAND COURT OF QUEENSLAND

CITATION: *Cherwell Creek Coal Pty Ltd [ACN 063 763 002] v BHP Queensland Coal Investments Pty Ltd (ACN 098 876 825) & Ors [2009] QLC 0130*

PARTIES: Cherwell Creek Coal Pty Ltd [ACN 063 763 002]
(applicant)

v

BHP Queensland Coal Investments Pty Ltd [ACN 098 876 825], QCT Resources Pty Ltd [ACN 010 808 705], BHP Coal Pty Ltd [ACN 010 595 721], QCT Mining Pty Ltd [ACN 010 487 840], Mitsubishi Development Pty Ltd [ACN 009 779 873], QCT Investment Pty Ltd [ACN 010 487 831] and Umal Consolidated Pty Ltd [ACN 000 767 386]
(respondents)

FILE NO: MRA1332-08

DIVISION: Land Court of Queensland

PROCEEDING: Determination of Quantum of security for costs

DELIVERED ON: 27 August 2009 (Ex Tempore)

DELIVERED AT: Brisbane

MEMBER: Mr PA Smith

ORDER: 1. That the applicant provide security for the respondents' costs in the amount of \$1m. as set out below in a form of a bank guarantee agreed between the parties within seven days or otherwise in a form acceptable to the registrar; namely:

- a. \$250,000 to be provided within 21 days;
- b. the balance to be provided within 21 days of
 - (i) refusal of the respondents' application to have the issue in paragraph 3(b)(ii) of the amended defence separately tried (including any appeal from that refusal);
 - (ii) if the court orders the separate trial of that issue the disposal of the trial of that issue by order (including on any appeal) which does not dismiss the originating application;

and in default the proceedings be stayed;

2. Liberty to apply with respect Order 1.
3. The Court has no power to revisit the pronouncement made on 5 December 2008 that there be no order as to costs.
4. The applicant pay the respondent's costs incurred specifically with respect to security for costs from the date of pronouncement of the Land Appeal Court's decision until 27 August 2009.

CATCHWORDS:

Security for costs – quantum – expert evidence – length of hearing – difficult litigation – uncertainty – liberty to apply –
Costs – no order as to costs – pronouncement – revisiting order – power – costs subsequent to appeal decision.

Uniform Civil Procedure Rules 1999 r.672-677

Mineral Resources Act 1989 Part 18A

Magbury Pty Ltd v Hafele Australia Pty Ltd 2001 2 QdR 187

Bruce Pie v Mainwaring, English and Peldan 1985 1 QR 401

Cooper and Strickland v The Crown 1984 10 QLCR 23

APPEARANCES:

Ms J Chapple of Counsel for the applicant
Mr S Doyle SC and Mr A Pomeranke of Counsel for the respondents
Holding Redlich, solicitors, for the applicant
Allens Arthur Robinson, solicitors, for the respondents

- [1] I have before me a matter which has been remitted back to me by the Land Appeal Court relating to the determination of the quantum of security for costs with respect to this matter. In order to spare the parties any further uncertainty or delay I determine the best course to adopt is to provide brief reasons *ex tempore* today.
- [2] The matter before me is indeed complex and I do not propose to delve further into the facts and circumstances which give rise to the applicant's application but instead to simply rely upon that which I said in my decision of 5 December 2008¹ when I originally dismissed the application for security for costs.
- [3] There are a number of points which are relevant in considering the quantum of the security for costs in this matter. The applicant has proposed that I take into

¹ See 2008 QLC 0216.

account the nature of the legislation which gives rise to this application and the special circumstances that it finds itself in in this regard. That is of course a relevant consideration which I have taken into account. The respondent urges that the basic issue to weigh heavily on my discretion in this matter is the fact that the applicant is a corporation with only very limited funds and that those who stand behind the corporation are indeed wealthy citizens and further that, at least until recently, those persons have not come from behind the cloak of the applicant company by way of any offer of security in any amount.

[4] In view of the very strange circumstances that give rise to this litigation and the fact that indeed a separate part² of the *Mineral Resources Act 1989* has been brought into existence which will only apply with respect to these parties, this is a matter without precedent, although of course the general rules will still apply. I consider the likelihood is that the costs to be incurred by both parties in arriving at a final disposition of this matter is to likely be very large indeed. Those costs are likely to be large even if the matter is able to be dealt with by way of the disposition of an agreed question of law as is currently under consideration as between the parties.

[5] There are a number of estimates as to costs that have been provided and in this regard I have been provided with a very useful summary table of those costs. The affidavit of Mr Pappalardo shows an estimate of costs in taking this matter to hearing, including the hearing which he has estimated as a seven-week hearing, in the sum of \$1,629,444. The basis upon which Mr Pappalardo has drawn up this amount is challenged by the applicant on several grounds. The table that I have before, being the schedule of estimate of costs, has conveniently gone through Mr Pappalardo's costs taking into account comments made by Mr Garrett for the applicant and has arrived at sums between \$1,262,495 and \$1,279,995 as a likely estimate of the respondents' costs.

[6] There are a number of things I need to say generally regarding the quantification of the costs in this matter. The respondents have included significant costs relating to experts. The applicant has countered by saying that joint expert reports can be prepared in a number of respects or that not all of those expert reports are necessary. At the end of the day the way in which the respondents choose to run their case is a matter for them and it is appropriate that the reasonable costs of having the appropriate expert witnesses available

² Part 18A.

should be taken into account in determining the security for costs. The uniqueness of this litigation makes it, I believe, very difficult for any of the witnesses who have provided affidavit evidence relating to the quantification of the security to be definitive in any real way as to the witnesses that will be required, the scope of expertise necessary and the likely time required for each witness. On the basis of Mr Pappalardo's evidence one could imagine the trial being perhaps conceivably quite longer than seven weeks were all of those witnesses to be called with very detailed technical evidence and all subject to evidence of an opposing nature from the applicant with obviously long and detailed cross-examination following.

[7] There is also the issue that was referred to by Justice White in the case of *Maggbury Pty Ltd v. Hafele Australia Pty Ltd*³. In *Maggbury* Justice White noted⁴ that it is not unusual to allow security up to and including the first day of a trial and thereafter to leave the question of security to the trial judge on an application made by the defendant, and that is the course that she adopted in that matter. I have not strictly adopted that course in this matter but have generally taken her comments into account in arriving at the quantum of security for costs that I have. The quantum that I determine is the sum of \$1m. I have arrived at that sum by discounting to some degree, though difficult to quantify, the number of experts that may be required and the degree to which there may be some commonality between expertise but also in considering the length of hearing that may be required for this matter, given that I am not convinced that the seven weeks referred to will, in all likelihood, be correct. It may be much shorter or it may indeed be much, much longer.

[8] The costs of the hearing in accordance with Mr Pappalardo's calculation amount to some \$522,700, whilst in Mr Garrett's calculations, as set out in the table, the cost would be approximately \$386,950. Rounding those figures up and down it means there's somewhere in the order of \$400,000 to \$500,000 being viewed as the likely cost of the hearing of this matter. Given the range of figures that the parties have come up with (including the hearing) of approximately \$1.2m. to \$1.6m. and effectively taking away the amounts that have been set out for the trial and making some slight allowance for the number of experts that may or may not be required, I have come to the conclusion that an appropriate figure at

³ 2001 2 Qd. R 187.

⁴ At p. 195, paragraph 39.

this stage of the litigation with all of the uncertainties that are no doubt involved in preparing a matter for hearing, \$1m. is an appropriate figure. However, I do see that such figure may indeed blow out quite significantly or time may show that such figure is perhaps excessive should the matter come down to a very narrow determination even if it proceeds after a determination of the question of law that is perhaps going to occur. I consider then that the best course to adopt is to allow the parties liberty to apply generally with respect to the quantum of the security for costs at any time.

[9] In noting that the respondents propose that there be determined a separate question of law, I consider it appropriate to stage the payment or the making of the security for costs. That staging would be to order the sum of \$250,000 out of the \$1m. to be made within 21 days of today and the balance to take effect at the conclusion of either the refusal of the respondents' application for the determination of a preliminary question or the determination that the matter should continue. The exact wording of this has been provided to me jointly by counsel in anticipation of the orders that I am making as follows:

1. That the applicant provide security for the respondents' costs in the amount of \$1m. as set out below in a form of a bank guarantee agreed between the parties within seven days or otherwise in a form acceptable to the registrar; namely:
 - a. \$250,000 to be provided within 21 days;
 - b. the balance to be provided within 21 days of
 - (i) refusal of the respondents' application to have the issue in paragraph 3(b)(ii) of the amended defence separately tried (including any appeal from that refusal);
 - (ii) if the court orders the separate trial of that issue the disposal of the trial of that issue by order (including on any appeal) which does not dismiss the originating application;and in default the proceedings be stayed;
2. Liberty to apply with respect to Order 1.

[10] For completeness I should refer to the case of *Bruce Pie v. Mainwaring, English and Peldan*⁵ and the decision of Justice McPherson where his honour said at p.404:

“In a recent decision in England it has been said that a practice of requiring only two thirds of the total estimated costs to be secured no longer prevail: *Procon (Great Britain) Ltd v Provincial Building Co. Ltd* [1984] 1 W.L.R. 557, 568. The decision confirms that the quantum of the security to be provided is a matter for discretion. Among the considerations relevant to the

⁵ [1985] 1 QR 401.

exercise of that discretion are the apparent prospects of success, or absence of them, if discernible; and that the order for security should not be the means of effectively denying the plaintiff his right to pursue his claim. That consideration must necessarily carry less weight where the plaintiff is not an individual but an insolvent corporation, and where, as here, no offer has been made by those (whether they be secured creditors or the shareholders) who are evidently providing the plaintiff with sinews of war to meet any costs that may be awarded against the plaintiff. It follows that, without provision of adequate security, the defendants cannot hope to recover anything, not even so much as a dividend from the assets of that company, in satisfaction of any costs order that they may obtain.”

[11] Accordingly, taking all factors into account in this matter and in particular the unique nature of the litigation, and not being completely satisfied on the basis of the best efforts by the witnesses for both parties to arrive at a quantification of the security for costs, and I wish to stress there is no criticism intended to any of the witnesses in that regard as it was simply almost an impossible task that they were faced with, I have come to the conclusion that the security for costs should be in the sum of \$1m. staged in the manner that I have indicated and that the parties be granted liberty to apply with respect to these orders.

[12] There is one further matter that I need to deal with and that relates to costs relating to the application for security for costs. It is necessary to deal with this aspect in two stages. First is the costs of the application for security for costs as heard by me on 5 December 2008. When one has reference to my decision delivered on 5 December 2008, order 2 from that decision indicated that I would hear from the parties with respect to costs. I did subsequently on 5 December hear from the parties. There was no application for costs made by the applicant at that point; neither was there any application made by the respondent, nor any detailed submission whatsoever regarding costs which in the circumstances was not surprising.

[13] Unfortunately a transcript of what occurred on 5 December is not currently available and I am not overly confident that one will be found. I will direct the Registrar to make all attempts to see if the electronic version of the transcript can be found and transcribed and provided to the parties.

[14] My notes from 5th December 2008 and my recollection from that date are both consistent, that is that there was no application for costs specifically made by the applicant and that after Mr Pappalardo for the respondents indicated that it was simply a normal application and there was no need for an order for costs, I subsequently ordered that there be no order made as to costs. My recollection is that there was an order that there be no order and my first point of call in

checking for what occurred on that date, apart from my notes and absent a transcript, was to check the order that was made only to discover that there was no order taken out by the registry in those circumstances.

- [15] I have considered the submissions made by Mr Doyle and Ms Chapple regarding the unusual circumstances that we find ourselves in with respect to this aspect of the matter and I have also considered the decision of the Land Appeal Court in *Cooper and Strickland v. The Crown*⁶. That case related to the question as to whether or not the Land Appeal Court could consider costs of the original matter before a single member when the appeal was not specifically against any costs orders made by the single member but was only against a substantive matter. Similar considerations apply in this matter. The court made useful observations regarding what a decision of the Land Court means when they said at p.26:

"The word 'decision' does not appear to be a technical term and according to its popular meaning (Shorter Oxford English Dictionary 3rd Edition) it means 'the action of deciding; settlement, determination; a conclusion, judgment, especially one formally pronounced in a Court of law'. The word is clearly capable of wide and separable meaning. In its widest connotation we think a 'decision' embraces the published reasons and various individual findings and rulings of a Member below on any particular matter referred to him for determination. These reasonings etc. are comprised in one document and collectively constitute a 'decision' or judgment in its complete or total form."

- [16] Whatever the status of the order made on 5th December 2008 may be, either as a semantic form or otherwise, I am satisfied that a pronouncement was made by myself on that day to the extent that there should be no order as to costs with respect to the application for security for costs. In my view, therefore, it is appropriate that any amendment of that order should be the matter of an appeal before the Land Appeal Court. It is not a matter which can be referred back to me. I am not satisfied that Rule 675 UCPR is sufficiently wide to allow me to revisit it, nor are Rules 667 or 668 of the UCPR appropriate. In the event that I am wrong on this issue and the matter goes on appeal on this particular point, then I will indicate that the ruling that I would make, had I felt I had power and it was appropriate for me to make that order, would be that the costs of the application be costs in the cause.

- [17] I now turn to the final aspect of costs to be determined and that relates to the costs incurred subsequent to the decision of the Land Appeal Court and leading up until the decision I have made today as to the quantification of the security

⁶ 1984 10 QLCR 23 at pp.26 and 27.

for costs. Mr Doyle for the respondents has made it clear from when this matter first came back before me after the Land Appeal Court decision that he was content for the matter to be determined on the basis of all material that was already before the court. Ms Chapple for her part, and I'm not being critical in any way, required the making of further submissions to the court and those submissions were seeking a quantification of security significantly less than what I have ordered today. Given the totality of those circumstances I consider it appropriate to order that the applicant pay the respondents' costs incurred specifically with respect to security for costs from the date of pronouncement of the Land Appeal Court's decision up until today.

[18] *[Mr Doyle then sought leave, although noting that it was probably not necessary having regard to the Land Court Rules, with respect to the Court's refusal of his application for costs in respect to the first stage, on the basis that it raises an important question as to the scope of the UCPR. The Court granted leave.]*

Orders

1. That the applicant provide security for the respondents' costs in the amount of \$1m. as set out below in a form of a bank guarantee agreed between the parties within seven days or otherwise in a form acceptable to the registrar; namely:
 - a. \$250,000 to be provided within 21 days;
 - b. the balance to be provided within 21 days of
 - (i) refusal of the respondents' application to have the issue in paragraph 3(b)(ii) of the amended defence separately tried (including any appeal from that refusal);
 - (ii) if the court orders the separate trial of that issue the disposal of the trial of that issue by order including on any appeal) which does not dismiss the originating application
- and in default the proceedings be stayed;
2. Liberty to apply with respect Order 1.
3. The Court has no power to revisit the pronouncement made on 5 December 2008 that there be no order as to costs.

4. The applicant pay the respondents costs incurred specifically with respect to security for costs from the date of pronouncement of the Land Appeal Court's decision until 27 August 2009.

PA SMITH
MEMBER OF THE LAND COURT