LAND COURT OF QUEENSLAND

CITATION:	*Riverstone Resources Pty Ltd v Thorcran Grazing Pty Ltd as Tte* [2019] QLC 33
PARTIES:	**Riverstone Resources Pty Ltd** ACN 140 911 922 (applicant) v **Thorcran Grazing Pty Ltd as Tte** ACN 628 632 566 (objector)
FILE NO:	MRA415-18
DIVISION:	General Division
PROCEEDING:	Application for costs
DELIVERED ON:	19 July 2019 [ex tempore]
DELIVERED AT:	Brisbane
HEARD ON:	19 July 2019
HEARD AT:	Brisbane
PRESIDENT:	FY Kingham
ORDER:	**The applicant must pay the respondent's costs of this hearing, fixed in the following way:** **a) the sum of $2750 for legal advice;** **b) the sum of $1720 for company searches; and** **c) the reasonable costs of experts engaged by the respondent to advise the respondent on the preparation of the joint brief to experts, as invoiced, but capped at the sum of $2640 including GST.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the respondent objected to the applicant's application for a mining lease – where the applicant subsequently abandoned its application for a mining lease – where the applicant did not explain why

it abandoned the application – where it was open to the Court to draw an inference that the applicant was concerned about its ability to meet the grounds of objection – where the Court awarded fixed costs in favour of the respondent

Mineral Resources Act 1989 s 268(8)
Land Court Act 2000 s 34(1)

Moreton Bay Regional Council v Mekpine Pty Ltd & Anor (No 2) (2014) 35 QLCR 273; [2014] QLAC 5, applied
Anson Holdings Pty Ltd v Wallace & Anor (2010) 31 QLCR 130; [2010] QLAC 4, applied

APPEARANCES: P Joyce (solicitor), Lander & Rogers, for the applicant
G Thorne, a director of the respondent

[1] This Court does have power to award costs in the circumstances in this matter under s 268(8) of the *Mineral Resources Act 1989*. There is a specific power conferred on the Court to award costs in favour of an objector against an applicant who abandons the application.

[2] There is also a provision in the *Land Court Act*, s 34(1), which confers a broad discretionary power to award costs. That section is subject to another Act to the contrary. I do not regard s 268(8) as a provision to the contrary. I think it works in a complimentary fashion with s 34(1). Both provisions I have referred to are expressed in broad discretionary terms.

[3] I should note, although it has not been raised as an issue, that this is an administrative jurisdiction. Section 34(1) refers to a proceeding, and that has been interpreted by the Supreme Court not to include a hearing of this nature. However, there is a section in the *Land Court Act*, s 52B, which applies s 34 to hearings of this nature. So there is no doubt that the Court has power to award costs in favour of Thorcran Grazing in this matter.

[4] There is no usual order as to costs made by this Court, although the Land Appeal Court has observed on many occasions that there is often justice in the approach that costs should follow the event – for example, *Moreton Bay Regional Council v Mekpine Pty Ltd & Anor (No 2)*.[1]

[1] (2014) 35 QLCR 273.

[5] So in *Moreton Bay Regional Council v Mekpine Pty Ltd & Anor (No 2)*, the Land Appeal Court said, and I quote:

> "It has been held on many occasions that the discretion to award costs granted by s 34 is unfettered but that the discretion is to be exercised judicially, that is for reasons that may be explained and substantiated. However it has also been recognized by the Land Appeal Court that although the discretion to award costs is unfettered, the rule that costs follow the event may inform the exercise of the discretion granted under s 34(1), 'as there is justice in that approach. It protects those put to unnecessary and substantial expense at the behest of others.'"[2] (citations omitted)

[6] Neither s 268(8) nor s 34(1) require the respondent to prove exceptional circumstances, and the Land Appeal Court has confirmed that that is not necessary in a mining objection hearing. And here I would like to quote from the Land Appeal Court in the case of *Anson Holdings Pty Ltd v Wallace & Anor*:

> "We do not consider therefore that this Court should recognize that there is a settled rule that easy access be available to the Land Court in mining lease applications by way of costs not being awarded against either party other than in special cases. Rather each case should be considered on its merits.
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> When exercising the discretion under s 34(1) with respect to mining lease applications, it is legitimate for the Court to take into account the fact that the landholder who objects to the grant of a mining lease is exercising a statutory right to object, in circumstances where the grant of a mining lease could lead to an unwelcome intrusion on to the landowner's property. Clearly, landholders who face having their way of life and operations on their land changed, sometimes dramatically, through mining activities in many respects beyond their control, should not be discouraged from pursuing proper concerns in an appropriate manner before both this Court and the Land Court. Similarly the conduct of the miner in the objection and appeal process is relevant.
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> The respondent's success in the appeal proceedings is to be balanced against those factors. While the rule that costs follow the event is not automatically applied in this jurisdiction, that rule is one which is deeply embedded in our law and that is a factor to be taken into account when exercising our discretion under s 34(1)."[3] (citations omitted)

[7] So the question is, then, what – whether it is appropriate to award costs and, if so, what costs. The applicant complained in its written submissions that the respondent is seeking compensation or reimbursement rather than costs. That is an unusual submission given the purpose of cost is compensatory. Ordinarily they are not awarded to punish unsuccessful parties, they are intended to compensate a successful party against the expense which he or she has incurred by reason of the legal proceedings.

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[2] Ibid [12].
[3] (2010) 31 QLCR 130 [8]-[10].

[8] The respondent submits the likely result of the hearing proceeding would have been a recommendation against the grant of the mining lease for reasons raised by them. The applicant says an application for costs is not the correct forum for ventilating substantial issues. I agree. The Court could not make a determination about the outcome of the application without hearing the evidence. Nevertheless, for the purpose of the costs application the respondent is asking the Court to draw an inference about the applicant's ability to mine the resource in the way in which Riverstone described in its application, or its ability to meet other grounds of objection that were raised by the respondent.

[9] Shortly after seeking a preliminary hearing on the issue of how the resource would be mined and recovered by – shortly after an application seeking a preliminary hearing on that point by the respondent, the applicant, Riverstone, withdrew the application. No explanation has been given to the Court for the reason for withdrawing the application. And in the absence of any other explanation it is open to the Court to draw an inference that the applicant was concerned about its ability to meet the objection on that ground at least.

[10] The respondent has used some strong words to describe the applicant's conduct, both in its application to the department and in the way in which it has conducted itself in this objection hearing. And the applicant says it has approached the case in good faith. I do accept that the applicant has cooperated in some respects with the Court by responding to a request for information in circumstances where the Court did not have the power to make the order sought, and also in withdrawing a nomination of an expert to whom the respondent objected. And those two features do go in the applicant's favour.

[11] The respondent argued the application was misleading and it is not appropriate to make a finding of that nature on the basis of a submission for a costs order. However, the respondent has made a case that the applicant has failed to comply with directions about the pre-hearing steps in this matter on a number of occasions and they are recorded in the respondent's submissions on this application. The applicant did not respond to that argument in its material. I am aware that the applicant has failed to comply with the Court's directions both before and after it was represented. And that is a relevant consideration on an application for costs. And it is worth noting that the

respondent has paid very close attention to the Court's procedural requirements and has also always sought to clarify what was expected and to respond within the time required, and that is a relevant factor on an application for costs, which is identified in the practice direction for mining objection hearings. In summary, the applicant has withdrawn its application for a mining lease without explanation to the Court and in circumstances that give rise to a reasonable inference that the applicant may not be able to satisfactorily meet the respondent's argument on the merits of the application. Further, it has failed to comply with case management directions both before and after it was represented, delaying the efficient conduct of the case.

[12] The question, then, is what costs should be awarded. I should say, in those circumstances, I consider it is appropriate to make an order as to costs in favour of the respondent. The question is, what costs should they be. The Court's power is to award costs as it considers appropriate. The Court could either fix an amount as to costs or provide that the costs are to be assessed against a specified scale of fees, if not agreed. I see little prospect of the parties agreeing on an amount as to costs and do not want the parties to incur extra time and expense in trying to reach agreement. Assessing costs against a scale of fees would also involve the parties in additional expense and, I think, some uncertainty, as a scale of fees is designed around a different type of litigation process to the one involved in this administrative hearing. For that reason, I think it is appropriate for the Court to fix an amount for costs rather than to require costs to be assessed.

[13] There are three categories of costs that are claimed. The first is legal fees. During the hearing, I made it clear that I – that this was not a claim by a litigant in person for the cost of their time in participating in this process; it is by way of a disbursement for legal advice in the way that other disbursements are often awarded. Against that, had the respondent been represented in these proceedings and been successful in securing an award of costs, they would not have received full indemnity for the legal costs but somewhere between 40 to 60 per cent of their costs, on my understanding, by way of party-and-party costs.

[14] I am satisfied that there is sufficient connection between the items that are recorded in the invoices and this hearing, given the nature of the issues raised in the objection and the way in which the respondent has conducted the case, to satisfy me that there

is a connection. I note the fees were incurred after the application had been referred to the Court. I take into account that the respondent negotiated a cap on the fees of $5500. I do note also that there were three lawyers involved, and perhaps the two things cancel themselves out somewhat. I consider the areas of advice are reasonably connected. I would award an amount of 50 per cent of the costs invoiced to reflect the approach that would have been taken had the respondent been represented by Ashurst during the proceedings.

[15] The search costs were a matter of considerable debate. In terms of disbursements for searches, it is a large figure, although, as Mr Thorne argued, overall it is a – not a large sum of money. It is a sum of $1720. I am going to allow that in full. I am satisfied that Mr Thorne today has demonstrated that they are sufficiently connected to the issues that were raised by the objection and that the respondent was agitating during the hearing as to be recoverable. They go to the financial capacity of the applicant company and the only – the shareholder, Coonabula Resources Group Pty Ltd. They also go to the past performance and association of individuals and applicants who are associated to the applicant company, and they also go to the connections to the corporation that has proposed the technology that was at the heart of the dispute about the applicant's ability to mine in the way described in the application. In those circumstances, I will allow the sum of $1720.

[16] As to the expert witnesses' disbursements, the respondent is not seeking any sum beyond what they will actually be invoiced to pay the expert witnesses. The invoices are not yet before the Court. The information that Mr Thorne was able to provide me shows that, including GST, at most the invoices will amount to $2640. I consider it is appropriate to allow the reasonable costs of the expert witnesses advising the respondent about the materials that should be included in the joint brief to the experts, that is, in the joint brief not just to the experts engaged by the respondent, but the experts engaged by the applicant.

[17] Although it was not a requirement of the Court, in that the parties were not directed to do that, the clear invitation – and, I would say, recommendation – that comes through from the email on behalf of the judicial registrar is that the Court would expect parties to communicate with their expert witnesses about what material should be included in the joint brief to the expert witnesses. Joint briefing of expert witnesses

for their meeting process is an essential part of a process designed to ensure that both experts in a particular field have all information they consider to be relevant to the issues they are asked to advise upon and that both experts are well prepared and able to address the same questions. And I note that this relates to costs incurred only after the CMEE process had commenced at my direction.

[18] So the order will be a little bit complicated, but I will order the applicant to pay the respondent's costs of this hearing, fixed in the following way: (a) a sum of $2750 for legal advice, (b) sum of $1720 for company searches and those disbursements, and (c) the reasonable costs of experts engaged by the respondent to the extent of advising the respondent on the preparation of the joint brief to experts, capped at the sum of $2640, including GST. I do not know that it is necessary for me to make this as an order, but I observe that until those invoices are produced, the actual amount that the respondent will receive will not be known, but it will be no more than $2640.

[19] All right. With that, I will – as I said, I will have those orders provided to the parties, and I will publish the reasons in due course, and this matter is now at an end, on the assumption that the Department provides confirmation of withdrawal of the application if it has not already done so. Thank you, gentlemen, and we will adjourn the Court.

Order

The applicant must pay the respondent's costs of this hearing, fixed in the following way:

a) the sum of $2750 for legal advice;

b) the sum of $1720 for company searches; and

c) the reasonable costs of experts engaged by the respondent to advise the respondent on the preparation of the joint brief to experts, as invoiced, but capped at the sum of $2640 including GST.

FY KINGHAM
PRESIDENT OF THE LAND COURT