

BETWEEN:

FORREST & FORREST PTY LTD
Appellant

and

STEPHEN McKENZIE WILSON
First Respondent

and

YARRI MINING PTY LTD
Second Respondent

and

QUARRY PARK PTY LTD
Third Respondent

and

ONSLow RESOURCES LTD
Fourth Respondent



SECOND TO FOURTH RESPONDENTS' SUBMISSIONS

Part I: Publication of Submissions

1 We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues Arising in the Proceedings

2 On 29 November 2016 the second, third and fourth respondents filed a submitting appearance for these proceedings.

3 By its submissions dated 14 December 2016 the appellant seeks costs orders against the second, third and fourth respondents.

4 On 9 February 2017 His Honour Justice Gageler made orders that the second, third and fourth respondents file and serve written submissions they choose to make as to costs.

5 The second, third and fourth respondents submit that, in the event that the applicant is successful in the proceedings, costs should not follow the cause.

Part III: Notices under section 78B of the *Judiciary Act* 1903 (Cth)

6 The second to fourth respondents have considered whether a notice should be given under section 78B of the *Judiciary Act* 1903 (Cth) and certify that no notice needs to be given.

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Part IV: Material Facts

7 These proceedings arise as a result of the decision of Warden Stephen Wilson SM that:

- (a) applications for mining lease 08/478 and general purpose lease 08/78 by Yarri Mining Pty Ltd;
- (b) applications for mining lease 08/489 and miscellaneous licence 08/70 by Quarry Park Pty Ltd; and
- (c) application for mining lease 08/479 by Onslow Resources Ltd,

be recommended for grant.¹

10 8 Upon the hearing of the appellant's judicial review application on 11 November 2014, His Honour Justice Allanson determined on 28 May 2015 that grounds 8 and 9 of the application as relating to mining lease 08/489, miscellaneous licence 08/70 and general purpose lease 08/78 be upheld and the balance of the application be dismissed.² Costs were subsequently awarded against the second and third respondents on 4 June 2015 in respect of 30% of the appellant's costs.

9 The subsequent appeal by the appellant to the Court of Appeal of the Supreme Court of Western Australia³ involved a determination in relation to the findings of Warden Stephen Wilson SM in respect of mining leases 08/478 and 08/479 only.

Third respondent

20 10 The third respondent, Quarry Park Pty Ltd, has not been involved in the subject matter of the appeals commenced by the appellant since the hearing of the appellant's initial application for judicial review before the Supreme Court of Western Australia on 11 November 2014.

11 The third respondent has filed a submitting appearance for all subsequent appeals by the appellant.

12 There is no basis for the appellant to now seek costs as against the third respondent.

Second and fourth respondents

13 On 16 June 2015 the appellant commenced its appeal proceedings in the Supreme Court of Appeal of Western Australia by filing its appeal notice.

14 On 23 June 2015 the second and fourth respondents lodged their notice of intention in relation to the appeal. The second and fourth respondents gave notice that they intended to

¹ *Yarri & Ors v Forrest & Forrest Pty Ltd* [2014] WAMW 6.

² *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181.

³ *Forrest & Forrest Pty Ltd v Wilson* [2016] WASCA 116.

take part in the appeal. The third respondent gave notice that it did not intend to take part in the appeal and would accept any order made by the Court in the appeal other than as to costs.

15 On 21 July 2015 the appellant lodged its case.

16 On 20 August 2015 the second and fourth respondents (through their then solicitors) lodged their answer, which included written submissions, notice of contention and legal authorities relevant to the submissions.

10 17 By application dated 24 December 2015 supported by an affidavit of the same date, the second and fourth respondents' solicitors (at that time) sought leave of the Court to cease acting in the proceedings due to non-payment of legal fees. On 15 January 2016 those solicitors were granted leave to cease acting.

18 The appeal was heard on 9 February 2016. The second and fourth respondents were unable to obtain appropriate legal representation for the proceedings and therefore were not represented at the hearing.

19 Judgment was delivered on 7 July 2016⁴ by which the Court dismissed the appeal and provided that the respondents had liberty to apply for any costs order by 14 July 2016.

20 On 2 September 2016 the Court ordered the appellant to pay the second and fourth respondents costs of their notice of intention and answers filed in the proceedings⁵.

20 21 On 3 August 2016 the appellant applied for special leave to appeal from the judgment of the Court of Appeal of the Supreme Court of Western Australia.

22 On 12 August 2016 the second to fourth respondents filed a submitting appearance in respect of the special leave application.

23 On 10 November 2016 special leave to appeal was granted to the appellant.

24 On 29 November 2016 the second to fourth respondents filed a submitting appearance for these proceedings.

25 The second to fourth respondents submit that, in all of the circumstances, it is not appropriate that costs follow the cause in this instance.

Part V: Respondent's statement of applicable law

30 26 Rule 50.01 of the *High Court Rules 2004 (High Court Rules)* provides that, relevantly, "*the costs of and incidental to all proceedings in the Court are in the discretion of the Court or a*

⁴ *Forrest & Forrest Pty Ltd v Wilson* [2016] WASCA 116.

⁵ *Forrest & Forrest Pty Ltd v Wilson & Ors* [2016] WASCA 116.

*Justice.*⁶ The appellant seeks that the Court exercises its discretion to order costs in respect of the proceedings against the second, third and fourth respondents.

27 Rule 50.01 of the High Court Rules confers on the Court a broad discretion to award costs, and does not imply that costs automatically follow the cause.⁷

28 The second to fourth respondents submit that the usual order of costs to follow the cause is not appropriate for the reasons set out in Part VI.

Part VI: Response in opposition to costs

10 29 The Court has the power to order whatever costs it sees fit, however, costs are to be determined by the exercise of discretion based on the whole of the circumstances which the Court has before it.⁸

30 There is not an absolute rule that the appellant, if successful, is to be compensated by the unsuccessful respondent party with respect to the Court's power.⁹

31 Costs are compensatory and not punitive in nature.¹⁰ The costs discretion must be exercised judicially and not arbitrarily, capriciously or so as to frustrate the legislative intent.¹¹

32 It does not necessarily follow that a successful party will have a favourable exercise of judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues.¹²

20 33 The discretion to order costs depends on the true extent of a party's actual responsibility for the costs incurred in the proceedings.¹³ In circumstances where a party did not play any substantive role or contribute significantly to the overall costs of the proceedings, costs should not be awarded against that party.¹⁴

34 It is implicit that a submitting party is generally to be regarded as immune from liability and will not ordinarily be liable to a costs order in respect of any costs incurred in the proceedings subsequent to the filing of the submitting appearance.¹⁵

35 The usual position that costs follow the event is capable of operating unfairly, and the Court must exercise its power fairly and do substantial justice among the parties.¹⁶

⁶ *High Court Rules 2004* (Cth) r 50.01.

⁷ *Oshlack v Richmond River Council* [1998] HCA 0011 at [63].

⁸ *Bardsley-Smith v Penrith City Council (No. 2)* [2015] NSWLEC 94 at [120].

⁹ *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; *Oshlack v Richmond River Council* [1998] HCA 0011 at [40] per Gaudron and Gummow JJ (and cited in *Probiotec Ltd v The University of Melbourne* [2008] FCAFC 5).

¹⁰ *Latoudis v Casey* [1990] HCA 59; 170 CLR 534 at 543.

¹¹ *Oshlack v Richmond River Council* [1998] HCA 0011 at [22].

¹² *Cretazzo v Lambardi* (1975) 13 SASR 4 at [16].

¹³ *Douglas v James (No. 2)* [2015] NSWSC 969 at [52].

¹⁴ *Probiotec Ltd v The University of Melbourne* [2008] FCAFC 5 at [71]-[78].

¹⁵ *Develtor Property Group Pty Ltd v Newcastle City Council Pty Ltd v Newcastle City Council* [2001] NSWLEC 47 at [42]. See *China Shipping (Australia) Agency Co Pty Ltd v Kelly Pty Ltd (No 2)* [2010] NSWSC 1557 at [8] where His Honour His Honour Justice Rein noted that "a defendant who files a submitting appearance except as to costs is prima facie only liable for costs up to the time of service of the submitting appearance and not thereafter".

36 The Court should exercise its discretion and decline to award costs against the second, third and fourth respondents in these circumstances for the following reasons.

37 First, the second to fourth respondents will not play a substantive role in these proceedings or contribute significantly to the overall costs of these proceedings.¹⁷ The third respondent has not been an active protagonist in these or the preceding appeals since 11 November 2014, and the second and fourth respondents since 24 December 2015. The usual position that a submitting party is to be regarded as immune from liability and not liable to a costs order should be followed.

10 38 Secondly, these proceedings relate solely to the issue of the statutory construction of sections 74(a)(ca)(ii), 74A(1), 75(4) and 75(5) of the *Mining Act* 1978. Any costs incurred by the appellant in these proceedings have not been caused by the conduct of the second to fourth respondents and the second to fourth respondents are not responsible for the costs incurred by the appellant in the proceedings.

39 Finally, in these circumstances, an award of costs against the second to third respondents would be punitive and result in substantial injustice.

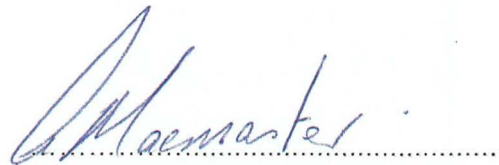
Part VII: Statement of the Respondent's argument

Not applicable.

Part VIII: Estimate of time for oral presentation

20 Not applicable.

Dated 1 March 2017



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Fourth Respondents

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¹⁶ *Friends of King Edward Park Inc v Newcastle City Council (No. 3)* [2016] NSWLEC 74 at [63].

¹⁷ *Probiotec Ltd v The University of Melbourne* [2008] FCAFC 5.