



1. Pursuant to order 6 of the 27 May Orders, pending the determination of the Rights Proceeding, the proceeds of the asset sales are to be held on trust by the Liquidators until further order of the Court, after certain deductions, and comprise the Fund.
2. The 27 May Orders give the Growers a right to assert a claim against the Fund. However, those orders do not confer rights on the Represented Growers that they did not already possess at law or in equity in respect of the Fund.
3. The Court required (by order 4 made on 15 June 2010) that the defendants bring any application for costs to be paid out of the Fund by 15 July 2010. On 28 July 2010, the appearing fourth defendants (comprising 53 out of 4064 (1.3%) growers) (the **Applicants**) made an application pursuant to Order 66 rules 1 and 4 of the *Rules of the Supreme Court 1971 (RSC)* that the Liquidators pay from the Fund:
  - (a) the reserved costs in this proceeding (that is, the costs of the hearings on 12 May and 15 June 2010); and
  - (b) the costs of this application,

of the Applicants, on a full indemnity basis, in accordance with “Clarendon Lawyers' standard terms of engagement” from the Fund.

### **Plaintiffs' objections**

4. The plaintiffs object to this application principally because it seeks a special costs order *prior* to the determination of the entitlement of any fourth defendant to the Fund.
5. If, as the plaintiffs' contend, the fourth defendants have no entitlement whatsoever to the Fund, the special costs order will pay the costs of a party with no entitlement. It will thereby effect a confiscation of property belonging to the true owners of that property without any foundation in the principles of the law of costs.
6. The proper time to determine entitlement to costs is at the conclusion of the proceedings, when the merits of the parties competing claims has been determined by the Court. No authority or process of reasoning has been advanced by the fourth defendants to depart from that principle. The authorities cited by the fourth defendants do not support such a departure. Such a departure would be inconsistent with the rationale for costs orders adopted by this Court and by other Australian and English Courts.

### **Grounds for exercise of O 66 r 4 discretion not set out**

7. *First*, O 66 r 4 does not require the court to make an order for costs out of the property. The

word “may” indicates that the award of costs under the rule is an exercise of discretion. It would be a misapplication of the discretion, in the ordinary course, to compensate parties for costs inconsistent with their success or failure at trial: *Corporate Systems Publishing Pty Ltd v Lingard* [2009] WASCA 158 at [71] and [154] (Owen P, McLure and Buss JJA concurring), special leave refused [2010] HCATrans 137.

8. This much is unsurprising. Order 66 rule 4 is a discretionary rule, based on the English rule in respect to costs out of a common fund: O 62 r 28 The Supreme Court Practice 1982 Volume 1 "White Book". Brandon LJ in *Preston v Preston* [1982] 1 Fam 17 at 3, in considering the scope of awarding costs payable out of a common fund, held that

I do not consider that the power to order costs to be taxed on a common fund basis is intended to be *exercised arbitrarily or whimsically*. On the contrary, it appears to me that it is necessary, before the court departs from the general basis of taxation laid down in paragraph (2) [party party costs] and directs taxation on the more generous basis authorised by paragraph (3) [indemnity costs], that *there should be some special or unusual feature* in the case to justify the court in exercising its discretion in that way. (Emphasis added)

9. All the Growers have presently done is to assert an interest in the Fund. No determination has been made as to whether the Growers have any such interest.<sup>1</sup> The bare “assertion of an interest” is not sufficient to warrant an order under Order 66 rule 4: *Swain v Noakes* (BC9201315) (1992) WASC Library No 920173 at [9].
10. Even where a party otherwise has the benefit of a form of presumed costs allowance under O 66 r 9(2) (which is not the case here), the fund will not necessarily be required to indemnify the party. That is for the sound reason that “[t]here can be no justification for the expenditure of the estate's funds in this way, with the consequent penalising of the other innocent beneficiaries”: *Gava & Anor v Grljusich & Anor* (BC9600510, Supreme Court Of Western Australia, Kennedy J, 22 February 1996, Library No 960082); *Miller v Cameron* (1936) 54 CLR 572 at 579 (Latham CJ).
11. More is required. Generally speaking, in order for a party to avail itself of O 66 r 4, (i) the expenditure resulted in a benefit to the common property represented by the fund, and (ii) the expenditure has been reasonably incurred: Dal Pont, G, *The Law of Costs*, 2<sup>nd</sup> Edn,

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<sup>1</sup> The fourth defendants’ claim to the fund was due on 9 August but was only filed on 30 August 2010.

<sup>2</sup> Those gravamen of those allegations was that the Court should not accept “the propriety of the conduct of the liquidators” because they had engaged in a “very strange manufacture of a basis for getting rid of the tenure underlying the growers' rights” which was “very much contrived so that the proceeds of this property, which has been paid for indirectly by the contributions of growers, will end up in the hands of banks” and the growers were “keen to start the cross-examination of Mr Saker”

2009 Butterworths at [10.1]; *Permanent Trustee Co v Redman* (1917) 17 SR (NSW) 353 at 360 per Harvey J.

12. No such special or unusual features have been identified (nor are any apparent) to justify the exercise of the discretion under O 66 r 4.

### **Application Premature**

13. *Second*, even where O 66 r 4 may be properly invoked and the Court may exercise its discretion in favour of an applicant, the question of sequence is fundamental.
14. Whether or not the fourth defendants succeed at trial is a critical factor in considering their entitlement (if any) to costs. Whether they succeed or fail (and in what degree) is presently unknown. To grant the relief sought would require the displacement of the general rule that costs follow the outcome *without any regard whatsoever* to that outcome. Indeed, it would be to grant the fourth defendants their costs, on an indemnity basis, even if they are found to have made baseless and ill-founded claims.
15. Such an approach is not consistent with the general rule. The general rule is a just rule because, ordinarily the party who turns out to have unjustifiably either brought another party before the court, or given another party cause to have recourse to the court to obtain his rights, should be required to recompense that other party in costs: *Gray v Sirtex Medical Ltd formerly known as Paragon Medical Ltd* [2009] WASC 126; BC200903883 at [62]. In each case, the Court should in the first instance consider whether, on the whole, the plaintiff has succeeded: *Falkingham v Harbison* (1899) 5 ALR 254 at 257.
16. The Court assesses each application against a common fund upon its merits, having regard to the general rule. Where:

[i]n substance, this litigation involved a contest between the plaintiffs, on the one hand, and the beneficiary defendants, on the other. The central issues related to the existence, enforceability, conditionality, construction and effect of the January 2002 Agreement. In my judgment, the beneficiary defendants have been substantially successful in the contest. A beneficiary whose claim [...] fails [...] should not necessarily expect that the costs of the action will be paid by the trustee [...] an order that the costs of the action be paid by the trustee defendants would, in substance, have the result that two-thirds of those costs would be borne by the [successful] beneficiary defendants. To my mind, that would not be a just exercise of the costs discretion in this case. Rather, the plaintiffs should pay the beneficiary defendants' costs of the action.

*Corporate Systems Publishing Pty Ltd v Lingard [No 4]* [2008] WASC 21 (supplementary reasons at BC200801955) at [48] (Beech J).

17. Further, in the absence of a determination of the substantive merits, there is not a best or

adequate foundation to judicially exercise the discretion with respect to costs in favour of any party, as is required: *Naidoo v Williamson* [2008] WASCA 179; BC200807578 at [39], [42].

18. A just decision will be one where the law is applied to the facts found on the relevant evidence brought before the Court by the parties: *Commonwealth of Australia v Albany Port Authority* [2006] WASCA 185 at [81]. Where specific evidence is available, it is to be preferred over general evidence because the cornerstone of all evidence is the rule that the evidence should be “the best that the nature of the case will allow”: *Omychund v Barker* (1744) 1 Atk 21 at 49; 26 ER 15 at 33, recently approved in *Golden Eagle International Trading Pty Ltd & Anor v Zhang & Anor* (2007) 234 ALR 131 at 132; [2007] HCA 15 (per Gummow, Callinan and Crennan JJ):

Despite criticism of it, the “best evidence rule” has not fallen completely into desuetude. Subject to the exigencies of litigation, the circumstances of the parties and the other settled and statutory rules of evidence, it has vitality. An aspect of the rule is that courts should act upon the least speculative and most current admissible evidence available.

19. Consequently, before the court departs from the usual position in respect to costs it will require to consider the best evidence comprising the determined merits of the parties’ claims, and how the parties have acted in the proceedings.
20. Although the applicants have now lodged a defence, they have still not condescended to particulars as to the basis for the very grave allegations of impropriety made against the Liquidators.<sup>2</sup>
21. If at trial these allegations are found to be without foundation, that would be a factor bearing upon the manner of conduct of the proceedings and, therefore, upon the exercise of the Court’s discretion with respect to costs: *Crown Lands, Minister for v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201 at 203-4; *Banque Commerciale SA (In Liq) v Akhill Holdings Ltd* (1990) 169 CLR 279 at 285 (Mason CJ and Gaudron J).
22. If the allegations of impropriety then made were not established (or, indeed, if they were established), no reason is apparent from the submissions why the truly entitled claimants to

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<sup>2</sup> Those gravamen of those allegations was that the Court should not accept “the propriety of the conduct of the liquidators” because they had engaged in a “very strange manufacture of a basis for getting rid of the tenure underlying the growers’ rights” which was “very much contrived so that the proceeds of this property, which has been paid for indirectly by the contributions of growers, will end up in the hands of banks” and the growers were “keen to start the cross-examination of Mr Saker” and “keen to start” the trial: Tr. 12 May 2010 at pp. 94, 100.

the fund should bear the sought costs. That, however, would be the result of the sought orders being made now.

23. Whatever costs orders are ultimately and properly made, the present application is premature, because it necessarily requires the neglect of the most relevant evidence relevant to the awarding of costs: who succeeded and whether the conduct of the proceedings was efficient, proportionate and proper.
24. None of the authorities referred to by the Grower's state or imply a principle that an award of costs may be made prospectively or in circumstances prior to a decision being made in respect to the parties' entitlement to having an indemnity out of the fund.

<i>Castlereagh Securities Ltd and The Companies Act</i> [1973]	Orders made <i>following</i> substantive hearing regarding proposed merger.
<i>Re Ampol Ltd</i> (1989)	Orders made <i>following</i> substantive hearing regarding capital reduction.
<i>Quatro Ltd v Agro Investments Ltd</i> (1999)	Orders made <i>following</i> substantive hearing regarding capital reduction.
<i>ASIC v GDK Financial Solutions Pty Ltd (in liq) (No.3)</i> (2008)	This decision referred to English authorities, which all made costs orders <i>following</i> the determination of the substantive hearing.
<i>Coad v Wellness Pursuit Pty Ltd</i> (2009)	Orders made <i>following</i> substantive hearing regarding administrator's right of indemnity for remuneration, costs and expenses.
<i>Re Arrowfield Group Ltd</i> (1995)	Orders made <i>following</i> substantive hearing regarding capital reduction.
<i>Re Matine Ltd &amp; Ors</i> (1998)	Orders made <i>following</i> substantive hearing regarding scheme of arrangement.
<i>Carruth v Imperial Chemical Industries Ltd</i> [1937]	Orders made <i>following</i> substantive hearing regarding capital reduction.
<i>Re NRMA Ltd &amp; Anor</i> (2000)	Orders made <i>following</i> substantive hearing regarding scheme of arrangement.
<i>HIH Casualty and General Insurance Ltd &amp; Ors</i> [2006]	Orders made <i>following</i> substantive hearing regarding scheme of arrangement.
<i>Re National Safety Council of Australia (Vic Div) (No 2)</i> [1992]	Orders made <i>following</i> substantive hearing regarding directions obtained by liquidator in respect to priorities.
<i>Re Timbercorp Securities Ltd (in liq) and Or</i> (2009) 74 ACSR 626	Prospective orders made in respect to the future conduct of proceedings (see comment below)

25. These proceedings are fundamentally different to the Timbercorp proceedings. In those proceedings, the growers by virtue of the terms of their subleases had a specific entitlement to occupy the land upon termination of the head leases: *Re Timbercorp Securities Ltd (in liq) and Or* (2009) 74 ACSR 626 [57(h)]. The liquidators conceded, and Robson J ruled,

that this right had a value and that the Grower's had an entitlement to the fund (*Re Timbercorp Securities Ltd (in liq) and Or* (2009) 74 ACSR 626 at [17] – [22], [35] – [36] and [62]). No such concession, right or ruling exists in respect of the Olive Properties or these proceedings.

### **Construction of O 66 misconceived**

26. *Third*, to the extent, if any, that O 66 r 4 is applicable, it is not a device to confiscate the property of the truly entitled parties to a fund in favour of those who merely assert such claims. On the proper construction of O 66 r 4, it is a rule that affords interested parties the payment of their reasonable legal expenses where it is in the interests of all parties to a fund that the allocation of it amongst entitled parties be correct and complete.
27. The applicants contend that they are entitled to their costs irrespective of their ultimate success or failure, and that such costs must be paid by the truly entitled claimants (this much necessarily follows from the pre-emptive nature of the orders sought and the exclusive reliance upon O 66 r 4).
28. The plaintiffs submit that such a construction of O 66 r 4 (which is unsupported by authority) is misconceived. That is because in construing both the ambit of the Rule, and the *Supreme Court Act 1935* from which it emanates, the ordinary principles of statutory construction are to be applied. In particular, as Bowen LJ held in *London and North Western Railway Co v Evans* [1893] 1 Ch 16 at 28:

[T]he Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him.

See also *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

29. Accordingly, any construction of the rule should avoid inconsistency with the legal presumption that legislation is presumed not to confiscate a person's proprietary interests.

### **Other Discretionary Issues**

30. *Fourth*, the following matters are adversely relevant to the applicants' pre-emptive costs order being granted now (or at all):
- (a) the Growers have failed to (timely) lodge a defence which condescends to explain the Growers ability to cure the defaults under the Head Leases and Subleases or the Liquidators alleged breaches of duty;

- (b) the application seeks that the Court order costs pursuant to a costs agreement:
- (i) the terms of which have not been produced to the Court or the other parties; and
  - (ii) as to which there is no evidence that any fourth defendant has entered that agreement.
- (c) no evidence has been provided as to the prejudice suffered by the applicants: it is entirely unknown what the magnitude of the professional fees are, the terms on which they were incurred, whether fee notes have been issued or satisfied and the role of Save Our Trees; and
- (d) the application, evidence and submissions are each silent as to what will occur if the Court ultimately finds that the applicants' claims are misconceived and have been advanced by making grave and ill-founded allegations of impropriety. In such a circumstance, it would be quite unjust that the truly entitled claimants (whether those be the asset contributories or, perhaps, growers in some schemes but not others) bear the costs of such applications on an indemnity basis. To the extent that the application supposes that no variation be made to the costs orders in that event, a further reason to reject the application can be identified. To the extent that the applicants accept that, in such a circumstance, a variation of the sought costs orders would be appropriate, they have failed to provide for any mechanism to effect such a variation, and the present orders give no indication of such a possible variation to present or prospective applicants. In such a circumstance, the trustees of the Fund would be required to pursue recovery of the costs paid out under the proposed orders, at the expense of, and to the prejudice of, the parties who are properly entitled to the Fund.

R W Douglas

J M Healy

31 August 2010



## Legislation

1. *Rules of the Supreme Court 1971* (WA), Order 66 r 4, 9(2).
2. *Supreme Court Act 1935* (WA).
3. The Supreme Court Practice 1982 Volume 1 "White Book", Order 62 r 28.

## Cases

4. *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.
5. *Banque Commerciale SA (In Liq) v Akhill Holdings Ltd* (1990) 169 CLR 279.
6. *Commonwealth of Australia v Albany Port Authority* [2006] WASCA 185.
7. *Corporate Systems Publishing Pty Ltd v Lingard [No 4]* [2008] WASC 21 at [48].\*
8. *Corporate Systems Publishing Pty Ltd v Lingard* [2009] WASCA 158 at [71] and [154].\*
9. *Crown Lands, Minister for v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201.
10. *Falkingham v Habison* (1899) 5 ALR 254.
11. *Gava & Anor v Grljusich & Anor* (BC9600510, Supreme Court of Western Australia, Kennedy J, 22 February 1996, Library No. 850071).\*
12. *Golden Eagle International Trading Pty Ltd & Anor v Zhang & Anor* (2007) 234 ALR 131 at 132; [2007] HCA 15.\*
13. *Gray v Sirtex Medical Ltd formerly known as Paragon Medical Ltd* [2009] WASC 126; BC200903883.
14. *London and North Western Railway Co v Evans* [1893] 1 Ch 16.
15. *Miller v Cameron* (1936) 54 CLR 572.
16. *Naidoo v Williamson* [2008] WASCA 179; BC200807578.
17. *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15.
18. *Permanent Trustee Co v Redman* (1917) 17 SR (NSW) 353.
19. *Preston v Preston* [1982] 1 Fam 17.
20. *Re Timbercorp Securities Ltd (in liq) and Or* (2009) 74 ACSR 626 at [17]-[22], [35] – [36],

[57(h)] and [62].\*

21. *Swain v Noakes* (BC9201315) (1992) WASC Library No. 920173 at [9].\*

**Other**

22. Dal Pont, G, *The Law of Costs*, 2<sup>nd</sup> Edn, 2009 Butterworths at [10.1].