



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B34 of 2020

BETWEEN:

Oakey Coal Action Alliance Inc
Appellant

NEW Acland Coal Pty Ltd ACN 081 022 380
First Respondent

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Chief Executive, Department of Environment and Science
Second Respondent

Paul Anthony Smith, Member of the Land Court of Queensland
Third Respondent

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**FIRST RESPONDENT'S WRITTEN SUBMISSIONS ON ITS APPLICATION FOR
SECURITY FOR COSTS**

Unless otherwise noted, the First Respondent adopts the terms as defined in the written submissions (**SoO**) of the Appellant (**OCAA**) in this application.

Part I: Certification

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1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. NAC agrees with the statement of the principal issue, noting that the application seeks \$90,000 or such further or other sum as the Court may order.

Part III: Facts

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3. As to paragraphs 7 and 13 of the SoO, the Queensland Court of Appeal (**QCA**) ordered costs against OCAA in circumstances where:

- (a) The effect of the Court of Appeal's substantive findings on the appeal and cross-appeal, which are not in issue in the appeal to this Court, is that NAC ought to have been wholly successful on all significant issues at first instance before Bowskill J and was in fact successful on all significant issues argued in the Court of Appeal across 3 days of hearing;
- (b) OCAA's appeal was dismissed;

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- (c) NAC's cross-appeal, that was opposed by OCAA, was upheld; and
- (d) In the knowledge of and irrespective of a dispute about the relief the Court of Appeal should grant, OCAA proposed the costs orders that were made against it¹, namely that it pay NAC's costs of the proceedings before Bowskill J, the appeal and the cross-appeal.

4. As to paragraph 8 of the SoO, there is no evidence of:

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- (a) the identity of the 60 OCAA members (other than Mr King and Mrs Harrison²);
- (b) the actual financial means or circumstances of OCAA's 60 members;
- (c) the 60 members being asked whether they can or simply do not want to contribute money towards any order for security;
- (d) any qualified person being given access to the financial information of OCAA's 60 members to make an assessment of whether they are in a position to contribute towards an order for security;
- (e) any attempt otherwise to raise money towards any order for security, noting that OCAA previously raised \$40,000 as security for costs in the Court of Appeal.

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5. No undertaking has been offered by any of OCAA's 60 members to be personally liable in the event of an adverse costs order being made by this Court. This includes the absence of any offer from the office bearers who are its directing minds and who have made the decision that results in costs being incurred.

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6. OCAA has not sought to have the \$40,000 security for the appeal in the QCA³ paid to NAC despite the adverse costs orders made against it and despite it having no basis to be concerned about NAC's capacity to return the \$40,000 (if ordered).

7. As to paragraphs 10-11 of the SoO, the substance of NAC's resources is not disputed. The significance of the \$90,000 in security sought by NAC lies also in:

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- (a) The funds it expended in the proceedings before Bowskill J, which have not been quantified but can be expected to be very substantial;
- (b) The funds it expended in the appeal and cross-appeal, which can be inferred to be more than the \$736,823.41 the subject of an unchallenged assessment in its favour. Those funds were expended directly in consequence of OCAA's decision to appeal; the cross-appeal was purely responsive to that appeal;

¹ As noted in submissions in the Special Leave Application – T1/P8/L235-239 (Kwan/ExAK7/P48).

² King/[14].

³ King/[9].

(c) To date, OCAA refusing to release the security held for the costs of the appeal and cross-appeal with the result that none of those funds have been recovered or (apart from the security already held) ever likely to be recovered from OCAA.

8. For the purposes of this application, NAC otherwise does not contest the facts set out in the SoO.

10 **Part IV: Argument**

9. It is accepted that the general approach to security for costs orders is as set out in paragraph 17 of the SoO.

10. On the basis of the matters submitted below, it is submitted that this is an occasion where the interests of justice will be served in ordering OCAA to pay \$90,000 as security or such further or other sum as the Court may order.

OCAA's members

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11. This Court has ordered security for costs against impecunious foreign appellants in circumstances where there was no evidence that those behind the appellant were not in a position to put the appellant in sufficient funds to provide security⁴.

12. It is submitted that in the circumstances of this appeal, it makes no difference to the outcome that OCAA is not a foreign entity.

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13. The significance of the grant of special leave to appeal is acknowledged, however, those who stand behind OCAA have been litigating against NAC to protect their own private interests, so much is made clear by Mr King in his affidavit⁵. OCAA ought not therefore be regarded as a litigant that is pursuing what it perceives to be a cause principally for the public. The precedential effect of the Court of Appeal's decision is very limited given the unique factual circumstances of the case. Moreover, the position adopted by OCAA involves that decisions that the Court of Appeal did not set aside, are of no legal effect and can be challenged in other proceedings. On OCAA's argument, that challenge can still be mounted.

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14. By letter dated 16 July 2020⁶, NAC (by its solicitors) wrote to OCAA (by its solicitors) noting concerns about OCAA's ability to pay an adverse costs order and seeking \$90,000. In that letter it was noted that no evidence has been provided by OCAA of:

(a) the identity of its members (other than Mr King, Mrs. Harrison and Mr Stewart⁷);

⁴ *P S Chellarmam & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321; citing *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1.

⁵ King/[3] and [5].

⁶ Cook/ExBSC-7/P128-132.

⁷ King/[13].

- (b) the financial position of its members; or
- (c) the ability of its members to provide security⁸.

15. That is still the position. The views Mr King expresses about OCAA's members should be given no weight because:

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(a) his qualification⁹ to form a view as to the ability of Members to pay or contribute a sum of money towards an order for security is not disclosed;

(b) the basis for the views expressed by Mr King can be fairly described as superficial and without any proper analysis¹⁰;

(c) there is no evidence that Mr King (or anybody else) having asked any of OCAA's 60 Members to disclose relevant financial information about their individual financial circumstances;

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(d) there is no evidence of Mr King having asked any of OCAA's 60 members whether they would or can contribute an amount towards a sum ordered by way of security;

(e) there is no evidence of Mr King's personal financial circumstances; and

(f) there is no evidence that Mr King cannot himself contribute an amount towards a sum ordered by way of security.

16. The response from OCAA to the letter of 16 July 2020 was a one sentenced email that it "*will not be meeting [NAC's] request for security*"¹¹.

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17. Mr King deposes to Mrs. Harrison being about to raise money to seek advice from solicitors¹². What the expression "*raised money*" means in Mr King's affidavit is not explained. The point being Mrs. Harrison appears to have financial means of some kind.

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18. Mr King's evidence in relation to OCAA's members ought to be contrasted with the evidence given in respect of funding from other sources. On the subject of funding from other sources, Mr King indicates that it is "*doubtful*" and that he considers it "*likely that OCAA would not be able to raise \$90,000*"¹³ from other sources. Mr King does not depose to the same view in respect of OCAA's 60 members (including its office bearers). The highest Mr King is prepared to put his evidence, in respect of the members is a bare assertion that he believes that the current pandemic has had an impact on "*many*" (not all) of OCAA's 60 members¹⁴.

⁸ Cook/ExBSC-7/P131.

⁹ *Clark v Ryan* (1960) 103 CLR 486, 491; *Makita (Aus) Pty Ltd v Sprawles* (2001) 52 NSWLR 705 at 743-744 (*Makita*).

¹⁰ *Makita*, 743-744.

¹¹ Cook/ExBSC8/P134.

¹² King/[14].

¹³ King/[17] and [21] respectively.

¹⁴ King/[11].

This assertion is inadmissible opinion or hearsay. Alternatively, no weight should be attributed to it.

19. It is submitted that OCAA has not established that its members, who stand to benefit from the litigation if successful, are without means. Contrary to paragraph 18 of the SoO, it is not established that OCAA's members cannot pay. OCAA's reliance in paragraph 15 of the SoO on the proposition that its members may be deterred from funding is concerned with willingness rather than ability. The evidence before the Court suggests an unwillingness rather than demonstrates an inability.
20. In the above circumstances, the Court cannot be satisfied that an order for security will have the effect of shutting out the appeal or that, if it will, that results from any impecuniosity of those who stand behind OCAA rather than their unwillingness to forego limited liability protection.

No undertakings

21. Further, none of OCAA's 60 members have offered to give an undertaking to be personally liable in the event of an adverse costs order being made against OCAA. In any event, for the reasons set out above, the value of any such undertaking is unknown.

NAC's conduct is not oppressive

22. NAC's conduct has not been "oppressive". NAC has acted in a manner that is consistent with a party concerned about litigation it is engaged in with a hopelessly insolvent party that has no prospect of paying adverse costs orders. NAC is seeking to protect itself from a situation where it has been put to tremendous costs and any costs orders being worthless (in a practical sense).
23. Otherwise:
- (a) The circumstances of NAC proceeding with a winding up application against OCAA, including after the grant of special leave included the following:
- i. the costs of appeal and cross-appeal were assessed in the amount of \$736,823.41¹⁵, no review of the assessment was sought by OCAA and judgment was entered for that amount;
 - ii. OCAA did not seek a stay of the judgment, notwithstanding the indication of the judge hearing the matter that that was an appropriate course for it to adopt;
 - iii. there was no dispute that OCAA was hopelessly insolvent;

¹⁵ Cook/[10]; *New Acland Coal Pty Ltd v Oakely Coal Action Alliance Inc* [2020] QSC 212 at [34] – (Kwan/ExPK-6/P61.)

- iv. OCAA did not address in its submissions that it had agreed to pay NAC's costs of the proceedings before Bowskill J, the appeal and the cross-appeal and did not advance any arguable basis upon which it might disturb those costs orders¹⁶; and
- v. as OCAA now accepts, the attempt by it to disturb the costs orders of the proceedings before Bowskill J, the appeal and the cross-appeal involves it seeking to resile from a position it adopted when represented by experience solicitors and both senior and junior counsel.

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(b) NAC has put OCAA's office bearers (and potentially other members) on notice that it may seek third party costs orders. Authority dictates that a party who may seek such orders should promptly notify their intention as delay can be a factor against a court making such an order¹⁷.

OCAA is hopelessly insolvent

24. It is not understood to be in issue that OCAA is, presently, hopelessly insolvent.

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25. The argument as to what costs orders the High Court will ultimately make in respect of the hearings below is a matter for the appeal proper. However, in the circumstances in which the costs orders were made, it is submitted that OCAA has poor prospects of overturning the costs orders made below. Importantly, in this regard:

- (a) Bowskill J made no order as to costs of the proceedings at first instance in circumstances where OCAA failed in relation to several issues but succeeded in relation to the substantial issue of apprehended bias. In addition to OCAA agreeing before the Court of Appeal that it should pay NAC's costs of the proceedings before Bowskill J, that was a natural consequence of the effect of the Court of Appeal's findings being that it ought to have lost the whole of the event before Bowskill J;
- (b) OCAA's attempt on appeal to this Court to disturb the orders for costs of the proceedings before Bowskill J, the appeal and cross-appeal involves an attempt by it to resile from the position it adopted before the Court of Appeal. It adopted that position in the knowledge and irrespective of the dispute about the question of relief. In response to the question of what costs orders the Court of Appeal should have made if it had granted the relief OCAA seeks in this Court, the answer is the same orders it in fact made because those were the orders both OCAA and NAC agreed should be made. In substance, the Court of Appeal ordered OCAA to pay NAC's costs of the appeal and cross-appeal by consent; and

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¹⁶ OCAA's submissions dated 8 June 2020/[6].The second affidavit of Brett Stuart Cook sworn 19 August 2020, at "BSC-9".

¹⁷ *The Beach Retreat P/L v Mooloolaba Yacht Club Marina Ltd & Ors* [2009] QSC 84 at [69] per Martin J, citing *Yates v Boland* [2000] FCA 1895; *Gore v Justice Corporation* [2002] 119 FCR 429; and *Vestris v Cashman* (1999) 72 SASR 449.

(c) special leave was not given in respect of the costs orders¹⁸.

26. In the context of the matters set out above about OCAA's members, the expense NAC has been put to, against a worthless party such as OCAA is a factor that favors the granting of security.

OCAA has not released the \$40,000

10 27. It is submitted that it is also relevant to note that OCAA has not made arrangements to pay the \$40,000 security it paid as security for the appeal in the QCA.

Delay

20 28. The application for security could have been made earlier. However, NAC wrote to OCAA about security on 16 July 2020¹⁹ and pursued the winding up proceedings in the Supreme Court (as it was entitled to). The Supreme Court has, in effect, put that application on hold, noting that it is a matter for NAC to seek to protect itself by applying for an order for security in the High Court²⁰. Therefore, OCAA was on notice that NAC may seek security for its costs. There is also no evidence of it being prejudiced as a result of the application not being made earlier.

What costs orders will be made in respect of the appeal

29. For the reasons submitted above, NAC contends that the principle character of the appeal is not one of a party seeking to pursue a public interest. OCAA is litigating against NAC in respect of the private interests of its members²¹.

Matters to note in respect of the amount of security

30 30. It is acknowledged that, in light of recent events, outlays such as airfares and accommodation are unlikely to be incurred.

31. It is also noted that the estimate of costs prepared by Mr Deane, assumed that two counsel will appear for NAC, ultimately, only 1 counsel will appear for NAC in this application.

40 32. Otherwise, it is noted that no evidence contradicting the estimates given by Mr Deane has been provided by OCAA. It is, of course, acknowledged that if this application is successful, the amount of any security is ultimately a matter for the Court.

Dated 19 August 2020

Nicholas Andreatidis QC

¹⁸ Special leave application – T1/P8/L235- P49L320 (Kwan/ExAK7/P48-49).

¹⁹ Cook/ExBSC-7/P128-132.

²⁰ *New Acland Coal Pty Ltd v Oakely Coal Action Alliance Inc* [2020] QSC 212 at [59]-[62] – (Kwan/ExPK-6/P67-68.)

²¹ King/[3] and [5].