
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : JB FOODS PTY LTD -v- COMMISSIONER OF
POLICE [2022] WASC 352

CORAM : SMITH J

HEARD : BY WRITTEN SUBMISSIONS FILED ON
30 SEPTEMBER 2022 AND 7 OCTOBER 2022 AND
ON THE PAPERS

DELIVERED : 25 OCTOBER 2022

FILE NO/S : GDA 6 of 2022

BETWEEN : JB FOODS PTY LTD
Appellant

AND

COMMISSIONER OF POLICE
First Respondent

CHIEF HEALTH OFFICER
Second Respondent

PILBARA COMMUNITY ALCOHOL AND DRUG
SERVICE
Third Respondent

Catchwords:

Practice and procedure - Costs - Appellant successful in the appeal - Decision of the Liquor Commission quashed - Matter remitted to be determined according to law - Costs of appeal where the grounds of appeal were in part conceded by the first respondent following amendments made to the grounds and following

conferral about the grounds with the first respondent's legal representatives - Discretion of the court to modify the usual costs orders to reflect the conduct of the parties

Legislation:

Liquor Control Act 1988 (WA)

Result:

Appellant and first respondent to bear their own costs of the appeal

Category: B

Representation:

Counsel:

Appellant : No appearance
First Respondent : No appearance
Second Respondent : No appearance
Third Respondent : No appearance

Solicitors:

Appellant : Hotchkin Hanly
First Respondent : State Solicitor's Office
Second Respondent : In Person
Third Respondent : In Person

Case(s) referred to in decision(s):

Grove v Grove [2022] WASC 86

Heartlink Ltd v Jones as liquidator of HL Diagnostics Pty Ltd (in liq)
[2007] WASC 254 (S)

Liquorland (Australia) Pty Ltd v Director of Liquor Licensing [2021] WASC
366

Strzelecki Holdings Pty Ltd v Jorgensen [2019] WASC 96

Zaghloul v Woodside Energy Ltd [2019] WASC 187

SMITH J

SMITH J:

1 Following the making of orders on 23 September 2022, allowing
the appeal on two grounds, the appellant makes an application for costs
of the appeal to be paid by the first respondent.

2 The first respondent opposes the appellant's application for its
costs of the appeal and makes an application for a portion of his costs
of the appeal be paid by the appellant. In the alternative, the first
respondent submits that the appropriate order is that there be no order
as to costs.

3 For the reasons I give below, I am of the opinion that there should
be no order as to costs of the appeal.

1.0 The result of the appeal

4 On 3 May 2022, the appellant filed an appeal against a decision
made by the Liquor Commission on 12 April 2022, refusing the
appellant's application for a liquor store license for a proposed liquor
store at Tambrey Village Shopping Centre in Karratha, on grounds that
the appellant had failed to satisfy the Commission that s 36B(4) of the
Liquor Control Act 1988 (WA) had been met.

5 Pursuant to the provisions of the *Liquor Control Act*, the appellant
was required to establish two matters: that the grant of the application
would be in the public interest (s 38), and the requirements of s 36B(4)
had been met. The Commission did not consider and determine the
question of whether the grant of the licence would be in the public
interest.

6 Section 36B(4) provides that:¹

The licensing authority must not grant an application to which this
section applies unless satisfied that local packaged liquor requirements
cannot reasonably be met by existing packaged liquor premises *in the
locality* in which the proposed licensed premises are, or are to be,
situated.

7 The appellant filed a minute of proposed substituted grounds of
appeal on 27 July 2022, and a subsequent amended minute of proposed
substituted grounds of appeal on 23 August 2022. The amended minute
of proposed substituted grounds contained eight proposed grounds.

¹ (my emphasis).

SMITH J

8 The appeal was listed to be heard for one day on Wednesday
28 September 2022.

9 On Friday 23 September 2022, the parties filed a minute of
consent orders to dispose of the appeal. After considering the amended
grounds and the proposed orders sought by the parties, the hearing of
the appeal was vacated and the following orders were made:

1. The appellant's grounds of appeal are amended so that
ground 1(a) and 1(d) of the proposed grounds of appeal filed on
23 August 2022 stand as the appellant's only ground of appeal.
2. The appellant is refused leave to otherwise amend its grounds of
appeal.
3. The appeal is allowed.
4. The decision of the Liquor Commission dated 12 April 2022 is
quashed.
5. Pursuant to Section 28(5)(c) of the Liquor Control Act 1988
(WA), the Application be remitted to the Commission,
differently constituted, to be heard and determined according to
law.
6. The parties shall file and serve written submissions on the
question of costs of these proceedings by on or before 4.00pm
30 September 2022.
7. The parties shall file and serve responsive written submissions
by on or before 4.00pm 7 October 2022.
8. The question of costs shall be determined on the papers.

10 Ground 1(a) and (d) of the amended grounds of appeal provided:

The Commission erred in law in that it misconstrued the concept of
'locality' in s36B(4) of the Liquor Control Act 1988 (WA) (Act) by
having regard to matters that were irrelevant to that concept, and by
failing to have regard to matters that were relevant to that concept and
which it was bound to take into account.

Particulars

The Commission -

- a. in its reasons at [29], [30], [36], [43] to [45], regarded (or in
effect regarded) the population who were likely to use the store
and the areas from which they would come, their current
shopping habits, existing liquor stores and existing consumer

patterns, as being relevant to the determination of locality, when none of those matters were relevant considerations;

...

- d. in its reasons at [59], [60], [61], held, in effect, that harm and ill health issues and the spread of at-risk communities were relevant in determining the locality, when those matters were not relevant;

11 The reason why the parties and the court agreed that the appeal be allowed on the errors alleged in ground 1(a) and (d) was, in summary, as follows.

12 Part of ground 1(a) identified a fundamental error of law by the Commission in determining the proper construction of the meaning of the words 'in the locality' in s 36B(4) of the *Liquor Control Act*. The Commission found that the current shopping habits of consumers (as to existing premises) may well be highly relevant and could be considered when first deciding the relevant locality.² This is because the current consumer patterns or shopping habits of consumers at existing packaged liquor premises in Karratha were not relevant considerations to be taken into account when determining what 'the locality' is for the purposes of s 36B(4). What the current shopping habits of consumers are as to existing premises is a consideration that is relevant to the determination of a retail catchment area.³ This consideration is not relevant to the determination of what the relevant 'locality' of a proposed premises is.

13 The approach of the construction of the meaning of the word 'locality' applied by the Commission was contrary to the binding finding made by Archer J in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing*.

14 Although, her Honour found in that matter that there will be a variety of factual situations that may arise and it is impossible to prescribe the specific test to be applied or even an exhaustive list of factors that will or may be relevant in the determination of 'the locality' in any given case, her Honour found what constitutes a 'locality' relates to the geographical area surrounding, and what is relatively close to, the proposed site.⁴ Importantly, her Honour found that s 36B(4) seeks to

² [36]; see also the findings about existing consumer shopping patterns for liquor within the locality adopted by the appellant [44] - [53].

³ *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 [181] and [184].

⁴ *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 [186] and [190].

ensure that there are not multiple premises in close proximity to one another selling packaged liquor.

15 Her Honour found that the word 'locality' in s 36B was intended to connote the same concept of neighbourhood, that is it denotes an area that surrounds, and is geographically close to, the location of the proposed premises, and is not intended to equate to the areas from which consumers would come.⁵ As her Honour pointed out, if the legislature had intended the relevant area to be the retail catchment area, it could have easily said so.⁶

16 In addition, her Honour found the shape of 'the locality' may be defined by topographical features including roads and the areas from which the site could be accessed reasonably easily on foot or by bike. The geographical spread of any community in the area of the proposed site may also influence the shape and size of the 'locality' within the meaning of that word in s 36B(4).⁷

17 As to ground 1(d), the Commission also erred in law in its construction of the meaning of the word 'locality' by taking into account the fact of the distribution of at-risk groups throughout the town of Karratha as being relevant for determining 'the locality'. This error was clearly material because the Commission identified the spread or distribution of at-risk groups as one of the factors establishing why the entire town of Karratha was an entire community, and this finding of fact was a key reason for the finding that the entire town constituted the relevant 'locality' under s 36B(4).

18 The relevant findings by the Commission in respect of ground 1(d) were as follows:⁸

The Applicant has submitted that the 'locality' should be considered the same for the purposes of section 38(2) and section 36B. Generally the 'locality' for the purposes of section 38 is considered as per the Director's Policy referred to in paragraph 23 above. The policy clearly indicates that the 'locality' is *'the area most likely to be affected by the granting of the application in relation to amenity issues'*.

It is also established in precedent and policy that country and remote areas are treated differently to metropolitan areas when it comes to liquor and the Act.

⁵ *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 [181] - [182].

⁶ *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 [184].

⁷ *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 [185].

⁸ [57] - [61].

The Commission must further consider harm and ill health concerns, particularly in respect of 'at risk' groups who may be situated within or typically traveling through or to a 'locality'.

In considering these issues, the Commission considers that due to:

- a the isolation of the town;
- b the nature of the community;
- c the spread of the at risk groups throughout the town; and
- d the manner in which the town has been forced to expand,

the town of Karratha operates as an entire community that encompasses the whole of the township.

In considering the nature and character of the local community as a largely isolated country town that has its limited population spread over a long thin area, but with the majority of residents located in the western side of the township, as well as the distribution of, and impacts on, 'at risk' persons, the Commission considers that the entire township, by its nature and the amenity provided to its population, is fundamentally connected and cannot be artificially separated into smaller areas, and should comprise an entire 'locality' for the purposes of section 36B in respect to this Application.

- 19 The findings made at [57] - [61] constituted an error in the construction of s 36B(4) because at law there is no logical or rational connection between the spread or distribution of at-risk groups in a town and the identification of 'locality' in the sense of an area that is geographically close to the location of the proposed premises.

2.0 Background – Matters relevant to the question of costs of the appeal

- 20 The appeal notice filed by the appellant on 3 May 2022 contained three grounds of appeal. None of these grounds raised the errors identified in ground 1(a) or (d).

- 21 On 11 May 2022, the first respondent filed a notice in the appeal that he intended to take part in the appeal. On the same day, the second respondent filed a notice stating that he 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.

- 22 On 20 May 2022, the solicitor employed by the State Solicitor's Office who had the conduct of the appeal on behalf of the first respondent sent an email to the appellant's lawyers which attached a

letter outlining a number of what was said to be deficiencies in the appellant's grounds of appeal and inviting the appellant to amend its grounds of appeal. In the letter it was stated that the first respondent accepted that ground 1 could be reframed to allege an error of law, ground 2 should be withdrawn and ground 3 should be re-drafted.⁹ The letter also suggested that the parties agree to bear their own costs of the appeal, regardless of the outcome.¹⁰

23 The appellant's lawyer responded on the same day by email indicating that the first respondent's objection to the original grounds of appeal should await the appellant's written submissions, and stated that if it transpired in the drafting of those submissions the grounds should be amended then that would follow.

24 The appeal was listed for directions on 28 July 2022. On 22 July 2022, the first respondent's lawyer sent an email to the appellant's lawyers putting the position again, as set out in the letter dated 20 May 2022, and stated that the appeal grounds should be amended before any further substantive step is taken in the appeal.¹¹

25 The first respondent's lawyer subsequently engaged in conferral with the appellant's counsel about the appellant seeking leave to amend its grounds.

26 On 26 July 2022, the appellant's counsel sent an email to the first respondent's lawyer attaching a minute of proposed substituted grounds and proposed directions. In the email the appellant's counsel stated that he was awaiting instructions regarding the first respondent's costs proposal.¹²

27 The appellant filed a minute of proposed substituted grounds of appeal on 27 July 2022.

28 At a directions hearing on 28 July 2022, the first respondent informed the court that the first respondent needed further time to consider the minute of substituted grounds which raised entirely new grounds of appeal. As a result, the matter was listed for a further directions hearing on Tuesday 9 August 2022, and an order was made that the costs of the directions hearing be costs in the appeal.

⁹ Affidavit of Gregory John Stockton affirmed on 27 September 2022, Attachment GJS1,5 - 6.

¹⁰ Affidavit of Gregory John Stockton affirmed on 27 September 2022, Attachment GJS1, 6.

¹¹ Affidavit of Gregory John Stockton affirmed on 27 September 2022, Attachment GJS4, 11.

¹² Affidavit of Gregory John Stockton affirmed on 27 September 2022, Attachment GJS5, 12.

29 On 3 August 2022, after having considered the proposed substituted grounds of appeal filed on 27 July 2022, the first respondent's lawyer sent a letter to the appellant's lawyer in which it was stated:¹³

Having considered the proposed substituted grounds, we consider that the appeal ought to be allowed on the basis of grounds 1(a) and 1(d).

In our view, your client's success on those grounds will be sufficient to dispose of the appeal, and it will be unnecessary for the Court to deal with the remaining grounds.

However, to the extent that your client wishes to pursue the remaining grounds, we make the following comments on them and invite your client to amend or withdraw these proposed grounds as indicated below.

We would welcome the opportunity to confer with you regarding the most efficient way to progress the appeal before the next directions hearing.

Ground 1

Notwithstanding our view that the appeal ought to be allowed on the basis of grounds 1(a) and 1(d), we consider this ground, as currently framed, to be deficient to the extent it alleges that the Commission erred 'by failing to have regard to matters that were relevant' to the concept of 'locality' in s 36B(4) of the *Liquor Control Act 1988 (WA) (Act)*.

...

In our view, for the ground to be competent, if the particulars of this ground which relate to a failure to have regard to matters that are relevant is to be pursued it will need to be amended to allege that the Commission failed to take regard to relevant matters and *that the Commission was obliged* to take those matters into account.

30 The first respondent then went on in the letter to address proposed grounds 3 to 7 and indicated that some of these grounds should be withdrawn, and others re-drafted.

31 On 5 August 2022, the appellant's counsel sent an email to his instructor and to counsel for the first respondent in which he stated that the appellant would amend proposed ground 1 by adding the words suggested by the first respondent in the letter dated 3 August 2022. Further, the appellant's counsel stated he would provide particulars of proposed grounds 3 and 5, and make one deletion in respect of

¹³ Affidavit of Gregory John Stockton affirmed on 27 September 2022, Attachment GJS6, 15.

grounds 6, but would seek to pursue those grounds at the hearing of the appeal.¹⁴

32 At the directions hearing on 9 August 2022, orders were made that the appellant was to file and serve its proposed further amended grounds of appeal by 23 August 2022, which must include particulars for proposed grounds 3 and 5. The question as to whether the appellant had leave to rely upon its proposed further amended grounds of appeal was referred to the hearing of the appeal. Orders were also made listing the hearing of the appeal on 28 September 2022, for the filing of written submissions prior to the hearing of the appeal, and the costs of the directions hearing be costs in the appeal.

33 As required by the orders made on 9 August 2022, the appellant filed its amended minute of proposed substituted grounds of appeal.

34 On 6 September 2022, the appellant filed its written submissions in support of the appeal.

35 On 19 September 2022, the first respondent filed his outline of submissions which set out the basis of why he conceded that ground 1(a) and (d) should be allowed, and in particular that the error raised in ground 1(d) was material to the Commission's decision to refuse the appellant's application.

3.0 The parties submissions as to costs of the appeal

3.1 First respondent's application for costs and submissions

36 The first respondent claims that the appellant should not be entitled to its costs, and seeks an order that the appellant pay 50% of the first respondent's costs incurred after 3 August 2022, fixed in the sum of \$2,500.

37 In opposing the appellant's claim for costs, and in support of his application for costs, the first respondent makes the following submissions.

38 The first respondent contends that in the present case, the appellant was only partially successful on appeal, in that it was largely unsuccessful in obtaining leave to amend all of its grounds and pursue all of its grounds, and did not obtain the orders that it sought regarding

¹⁴ Affidavit of Gregory John Stockton affirmed on 27 September 2022, Attachment GJS7, 18.

s 36B(4). For the reasons I give below in 3.3, 4.0 and 5.0, this submission cannot be accepted.

39 The first respondent does, however, properly point out that the only grounds the appellant was successful in pursuing were those grounds which the first respondent conceded at the first reasonable opportunity.

40 The first respondent claims that these concessions were made before any substantial costs were incurred in the appeal and claims that had the appellant accepted the proposal put forward by the first respondent in the letter dated 3 August 2022, neither party would have incurred the costs of preparing for the hearing of the appeal, including the drafting of comprehensive written submissions which must form the bulk of each parties' incurred costs.

41 In addition, the first respondent contends that had the appellant accepted the cost proposal put forth in the letter of 20 May 2022 (and repeated on 22 July 2022), neither party would have incurred the costs of preparing these submissions. For the reasons that I give below in 5.0, I do not accept this submission in its entirety because it was necessary for the court to be satisfied that the orders sought by the parties should be made.

42 The first respondent argues it is readily identifiable that the costs incurred after 3 August 2022 by both parties were wasted.

43 Accordingly, the first respondent submits that he should be entitled to around 80% of his costs in the appeal incurred after 3 August 2022. However, in order to acknowledge the fact that the appellant needed to appeal the decision of the Commission in order to have the erroneous decision quashed, the first respondent submits that it would be reasonable in all of the circumstances for the appellant to pay 50% of the first respondent's costs incurred post 3 August 2022, fixed in the sum of \$2,500.

44 In the alternative, if the court is not satisfied that the first respondent should receive his costs, the first respondent submits that the appropriate order is that there be no order as to costs.

3.2 The appellant's application for costs and submissions

45 The appellant is firmly of the view that it should be entitled to an order that the first respondent should pay its costs of the appeal.

SMITH J

46 The appellant does not contend that the first respondent, or any of the respondents, acted unreasonably at any point in time, but rejects any contention that the appellant's conduct should deprive it of its costs as a successful appellant.

47 The appellant properly points out that as a general rule, the reason a party who succeeds in a matter is entitled to costs is because they were justified in instituting the proceedings in the proper administration of justice. Thus, a successful appellant is said to be entitled to expect that where any administrative decision is determined according to law in the appellant's favour, the appellant should not have to bear his, her or its own costs in obtaining that outcome.

48 The appellant claims that its rejection of the 'offer' made by the first respondent in respect of costs by letter dated 20 May 2022 was not unreasonable, because it required the appellant to bind itself to not seek any order for costs regardless of the future conduct of the first respondent and regardless of the outcome of the appeal, including not only whether the appeal would be allowed, but what appropriate orders would be for the further disposition of the appeal.

49 The appellant says it was not unreasonable for it to continue with the appeal by filing the minute of its proposed amended grounds and written submissions, because:

- (a) it was necessary to file submissions in any event in order to satisfy the court that any concession by the first respondent was properly made; and
- (b) the parties had not formally conferred about the proper disposition of the appeal if the court accepted that the concession was properly made.

50 The appellant says that its counsel was unable to read the submissions filed by the first respondent until the morning of 23 September 2022 due to other commitments and the intervening holiday declared in light of the passing of Queen Elizabeth II.

51 Upon reading the submissions, the appellant's counsel observed that:

- (a) the first respondent formally conceded the merit of grounds 1(a) and (d), and provided an explanation for why it accepted the appellant's submissions in that respect;

- (b) the first respondent conceded that at least one error was material, which required the application to be reconsidered;
- (c) the first respondent did not object to the appellant's proposed order that the application be reconsidered by the Commission differently constituted, but only observed that no explanation had been given for why that order was sought particularly; and
- (d) the first respondent was not contending in his submissions that the grounds of appeal relating to 'consumer requirements' should be rejected on a proper construction of the *Liquor Control Act*, but rather disputed whether they revealed errors of law and whether the appellant's characterisation of the reasoning of the Commission in respect of those matters was correct.¹⁵

52 As soon as counsel had read the first respondent's submissions, he initiated conferral with the first respondent's lawyers to agree orders that the appeal be allowed and the application be reconsidered by the Commission differently constituted, without being bound by any findings of fact or law made by the previous Commission, so that the application would be determined afresh. Agreement with the first respondent was reached on that basis, leaving only the question of costs to be determined as the parties were unable to agree on an appropriate costs order.

53 The appellant claims that it was reasonable to raise the question of a proper construction of the scope of 'consumer requirements' under the *Liquor Control Act* and whether the Commission had misconstrued the scope of 'consumer requirements' in its reasons because those matters may well have been relevant for any reconsideration by the Commission, particularly if it was remitted to the same constituted Commission as that which had made the decision in the first instance.

54 The appellant contends that it appeared from the first respondent's submissions that this issue was not being joined about the proper construction of the *Liquor Control Act* in that respect, but rather what the Commission had said, or meant to say, in its reasons. This would change the purpose of the grounds for review on that issue from one in which the proper construction of the *Liquor Control Act* would be

¹⁵ The first respondent in his reply submissions states that this is not quite correct because he did in one respect submit that the alleged 'consumer requirement' could not properly be a 'requirement for packaged liquor' under s 36B(4) of the *Liquor Control Act 1988* (WA).

declared, to a detailed analysis of precisely what the Commission had said in the context of all of the reasons it had expressed. The appellant saw no need for a hearing in pursuit of that purpose.

55 The appeal was listed for only one day and the written submissions were relatively short.

56 The appellant claims that the first respondent would be inviting the court to examine relatively minor aspects of such an appeal in order to find a reason for depriving the appellant of its costs in succeeding to have the application being reconsidered by a differently constituted Commission when, until the parties had reached agreement, that outcome was not reasonably clear to the appellant.

57 The appellant therefore contends that it is appropriate for the first respondent (as the active contradictor) to be ordered to pay the appellant's costs of the appeal.

58 There were three directions hearings at which the costs of those directions were ordered to be the costs in the appeal. The appellant should be entitled to receive those costs. If it had acted unreasonably in respect of those directions hearings, it would have received an adverse costs order. It would not be fair to deprive the appellant of those costs now.

3.3 The parties' submissions in reply

59 The appellant properly points out in its reply submissions that as the parties agreed that the appeal should be determined only on two grounds, and that leave should not be granted on the appellant's remaining grounds of appeal, a finding cannot be made that the appellant was only partially successful in the appeal.

60 The remainder of the appellant's reply submissions substantially deal with the reasons why the appellant was prepared to agree not to pursue the remaining grounds, which, for the reasons I give below, are not matters that are relevant for this court to consider in determining an appropriate order for costs of the appeal.

61 Although the first respondent in his reply submissions properly points out that the court should not consider the merits of the grounds that were not pursued by the appellant, the first respondent then goes on to contend that he was successful in resisting those grounds.

62 The balance of the first respondent's submissions engage with the issue between the parties as to the circumstances which led to the abandonment of the remaining grounds of appeal, the reasonableness of the conduct of the parties, and the lengthy submissions that were filed by the first respondent to address those abandoned grounds.

63 Other than to note that the parties both filed lengthy submissions which addressed the abandoned grounds, the court is not in a position to engage with the arguments about the prospects of success of those grounds or whether it was reasonable to agree not to pursue those grounds. To do so would be to engage in satellite litigation.

64 As the Court of Appeal recently reiterated, satellite litigation as to costs should not be allowed to assume a life of their own, disproportionate to its significance. It is in the interests of the parties and the public that disputes as to costs be resolved quickly, efficiently and as inexpensively as possible.¹⁶

65 It is unfortunate in this matter that the appellant and the first respondent have both engaged in expending disproportionate resources in the pursuit of their respective applications for costs. Both parties filed initial written submissions on 30 September 2022. The first respondent filed an affidavit in support of its application on 30 September 2022. The appellant filed an affidavit in response on 7 October 2022, and both parties filed responsive reply written submissions on the same day. It is also unfortunate that some of the supporting affidavit material and much of the written submissions raised matters going to the proposed grounds of appeal that were withdrawn; matters which are irrelevant to the disposition of the issue of costs of this appeal.

66 It was clear to the court from the grounds that were allowed that the appeal could properly succeed, and on the basis of the demonstrated error it was necessary that the decision be set aside at first instance and remitted for rehearing by the Commission differently constituted. Consequently, it was not necessary for the court to consider the remaining grounds of appeal. In the circumstances, where a point has not been considered by the court, no finding could be made as to the reasonableness of pursuing or not pursuing these grounds.

¹⁶ *Grove v Grove* [2022] WASC 86 [34]; applying *Heartlink Ltd v Jones as liquidator of HL Diagnostics Pty Ltd (in liq)* [2007] WASC 254 (S) [21] (Martin CJ).

4.0 Relevant legal principles as to the discretion to award costs

67 The general principles that apply to making an award of costs following an appeal were summarised by the Court of Appeal in *Zaghloul v Woodside Energy Ltd*:¹⁷

The starting point in relation to the award of costs is that the Court will generally order that the successful party to the appeal will recover their costs. However, what constitutes 'success' in any proceeding is to be determined by the reality of the circumstances involved in the case. The Court may depart from the general rule that costs follow the event to take into account matters such as the failure of a party on one or more issues. The Court may order that a successful party recover only part of its costs, but that step should only be taken where there are discrete and severable issues on which the generally successful party failed, and which added to the costs of the proceedings in a significant and readily discernible way. Where the Court decides to modify the usual costs orders to reflect the limited success of a successful party, that power will be exercised broadly and as a matter of impression, without any attempt at mathematical precision.

68 Where a successful party to an appeal is not entirely successful on all grounds of the appeal, and where the grounds the party has succeeded on were not grounds originally as formulated and particularly where the success on that ground or grounds was due, in part, to a proper concession made by the other party, the successful party may not be entitled to their costs.

69 This was the outcome in *Zaghloul v Woodside Energy Ltd*. The result of the appeal in that matter was that the appeal was upheld in favour of the appellant but the first respondent was substantially successful on the appeal, and wholly successful in so far as the appeal concerned the substantive order made by the primary judge. The Court of Appeal found that the appellant should be denied his costs. The basis of the decision not to award the appellant his costs or regard him as a successful appellant was that although he succeeded, he did so on a ground not as originally formulated and where his success was due, in part, to the first respondent's proper concession. The Court of Appeal also found that the first respondent was not entirely successful on the appeal, which should be reflected in a 10% reduction in the costs the first respondent was entitled to recover from the appellant in the appeal.¹⁸

¹⁷ *Zaghloul v Woodside Energy Ltd* [2019] WASCA 187 [130] (citations omitted); citing *Strzelecki Holdings Pty Ltd v Jorgensen* [2019] WASCA 96 [50] - [52].

¹⁸ *Zaghloul v Woodside Energy Ltd* [2019] WASCA 187 [131] - [132].

5.0 Disposition

70 It is clear that the Commission did make a material error of law in its decision which necessitated the bringing of an appeal to this court, the setting aside of the decision, and a rehearing. Consequently, the appellant properly instituted an appeal to the court, which usually would result in an award of costs being made in favour of the appellant.

71 It is relevant that it is common ground that there was nothing in the conduct of any of the parties at the hearing at first instance which led the Commission into error.

72 Although the appeal was resolved by the consent of the parties, I agree that it was necessary for the parties to file written submissions, at least in respect of the successful grounds of appeal, as it was necessary for the court to form its own view of the disposition of the appeal.

73 However, the grounds upon which the appellant was successful in the appeal were not contained in the appellant's initial grounds of appeal. The formulation of ground 1(a) and (d) only came about, not only because of the very early concessions made by the first respondent, but also because of suggestions made by the first respondent's lawyers as to the proper drafting of ground 1.

74 In circumstances where the court cannot be in a position to make any judgment about the prospects of success of the remaining grounds of appeal, in my opinion it is not appropriate to consider the extent of the work carried out by the parties to address in their submissions, the points raised in respect those grounds, or to consider whether it was reasonable for the appellant to agree to abandon those grounds.

75 Given that the successful grounds of appeal were not contained in the appellant's initial grounds of appeal, and only came about because of concessions made by the respondent, I am not satisfied that the appellant should be allowed its costs of the appeal.

76 However, because it was appropriate that the appellant institute an appeal and that the decision of the Commission be set aside and the matter be remitted for rehearing, I am of the opinion that the appropriate order is that there be no order as to the costs of the appeal.

77 For these reasons also, I am of the opinion that the orders made on 28 July 2022 and 9 August 2022, stating that the costs of the directions hearings be costs in the appeal, be vacated.

SMITH J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

TS
Associate to the Honourable Justice Smith

25 OCTOBER 2022