

CITATION: *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd (No 2)* [2023]
NTSC 58

PARTIES: RALLEN AUSTRALIA PTY LTD

v

SWEETPEA PETROLEUM PTY LTD

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2022-00344-SC

DELIVERED: 5 July 2023

HEARING DATES: Issue of costs decided on the papers

JUDGMENT OF: Barr J

CATCHWORDS:

COSTS – INTERLOCUTORY APPLICATION – STAY APPLICATION –
Applicant sought stay of orders of Northern Territory Civil and
Administrative Tribunal pending outcome of leave to appeal against
Tribunal’s decision – Stay application unsuccessful – Costs of stay
application reserved – Appeal ultimately dismissed – Appellant ordered to
pay the respondent’s costs of the application for leave to appeal – Order that
appellant pay the costs of the unsuccessful stay application – SCR 63.18

REPRESENTATION:

Counsel:

Applicant:

K Merrick

Respondent:

B Katekar SC, H Baddeley

Solicitors:

Applicant:

Gadens

Respondent:

Squire Patton Boggs

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd (No 2) [2023]
NTSC 58
No. 2022-00344-SC

BETWEEN:

RALLEN AUSTRALIA PTY LTD
Appellant

AND:

SWEETPEA PETROLEUM PTY LTD
Respondent

CORAM: BARR J

REASONS FOR DECISION ON COSTS OF STAY APPLICATION

(Delivered 5 July 2023)

- [1] On 20 and 21 June 2022, I heard an application by Rallen Australia Pty Ltd (“Rallen”) for leave to appeal against the decision of the Northern Territory Civil and Administrative Tribunal made on 7 February 2022, and the consequential orders made on 4 May 2022 determining an approved access agreement to Tanumbirini Station. On 20 April 2023, I made an order granting leave to appeal but dismissed the appeal and confirmed the decision of the Tribunal.¹ I then made an order that Rallen pay Sweetpea’s costs of the application for leave to appeal, to be taxed in default of agreement.

¹ *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd* [2023] NTSC 36 at [153] – [155].

- [2] On 20 June 2022, the first day of the hearing of the application for leave to appeal, Rallen filed a summons seeking a stay of the “further operation of the decision of the Tribunal contained in the orders made by the Tribunal on 4 May 2022, and the access agreement attached to those orders, until the determination of the applicant’s application for leave to appeal, and if granted, the applicant’s appeal”.
- [3] Rallen’s stay application was heard on 15 July 2022.
- [4] For reasons published to the parties on 2 August 2022, I ordered that the stay application be dismissed.²
- [5] I also ordered that the question of costs of the stay application be reserved.
- [6] After dismissing the appeal, as referred to in [1] above, I made a number of procedural orders to apply in the event that Sweetpea sought an order that Rallen pay Sweetpea’s costs of the stay application. The parties subsequently provided written submissions in relation to that issue.³
- [7] Sweetpea seeks an order that its costs of the stay application be paid by Rallen on the standard basis. Rallen opposes the making of that order.

2 *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd* [2022] NTSC 60.

3 Specifically: ‘Respondent’s outline of submissions on costs of the appellant’s summons filed 20 June 2022’, dated 2 June 2023; ‘Appellant’s outline of submissions in reply on costs of the appellant’s summons filed 20 June 2022’, dated 16 June 2023; and the ‘Respondent’s submissions in reply to the appellant’s submissions on costs ...’, dated 23 June 2023.

Relevant Supreme Court Rules

- [8] The time-honoured principle, reflected in Order 63.03 *Supreme Court Rules 1987*, is that the costs of the proceeding are in the discretion of the Court, which has the power to make an order for costs in relation to a particular question in, or a particular part of, a proceeding.⁴
- [9] Several of the rules in Order 63 of the *Supreme Court Rules 1987* refer to the situation where costs are reserved.
- [10] Rule 63.02(2) is an interpretation provision. It provides that, subject to the general rule in Rule 63.03, certain expressions “when used in an order for costs” have a particular indicated effect. The expression ‘Costs reserved’ has this effect:
- Subject to Rule 63.20, the party in whose favour an order for costs is made at the conclusion of a proceeding is entitled to the costs of any application in that proceeding in respect of which the order is made.
- [11] It is arguable in the present case that Rule 63.02 has the effect that Sweetpea is automatically entitled to the costs of the stay application because an order for costs was made in its favour at the conclusion of the application for leave to appeal.
- [12] However, the proposition in [11] may not be correct. Rule 63.20 deals with ‘costs reserved’, and provides as follows:

4 SCR 63.05.

- (1) Where, by order of the Court, the costs of an interlocutory or other application ... are reserved, the Court may direct by and to whom those costs are to be paid.
- (2) Where the Court makes no direction under subrule (1), a party may, within 21 days after the conclusion of the proceeding, apply to the Court for a direction as to the payment of costs reserved.

[13] There is a possible inconsistency between Rule 63.02 and Rule 63.20 insofar as the former has the effect that the party in whose favour a costs order is made at the conclusion of a proceeding has an *automatic* entitlement to the costs of any application in that proceeding, whereas the latter does not provide for any such automatic entitlement but rather permits the court to make a costs order or direction and, in default of such direction, permits a party to apply. The drafting of Rule 63.20 does not acknowledge the effect of Rule 63.02. However, Rule 63.20 would prevail because the stated effect of the expression ‘costs reserved’ in Rule 63.02 is subject to Rule 63.20. I should qualify that by saying that Rule 63.20 would only ‘prevail’ if the Court makes a specific direction pursuant to Rule 63.20(1) or a direction under Rule 63.20(2) on an application made by a party.

[14] Another relevant rule is Rule 63.18, which deals specifically with the costs of interlocutory and ‘other’ applications:

The costs of an interlocutory or other application in a proceeding, whether made on or without notice, are to be costs in the proceeding unless the Court otherwise orders.

[15] In my opinion, Rule 63.18 is the specific rule most relevant to Sweetpea's application. This raises the need to consider the meaning and effect of the term 'costs in the proceeding' as used in Rule 63.18, which is explained in Rule 63.02(2):

The party who is successful in the proceeding is entitled to the party's costs of the application, or part of the proceeding, in respect of which this order is made.

[16] Therefore, Rule 63.18, read with Rule 63.02 (2), provides in effect that 'winner takes all', unless the Court orders otherwise.

The parties' contentions

[17] Sweetpea contends that it was successful in opposing not only Rallen's stay application but also Rallen's substantive appeal/application for leave to appeal. In those circumstances, Sweetpea relies on Rule 63.18 for its submission that the costs of the stay application should be costs in the proceeding, with the result that Sweetpea, the ultimately successful party, would be entitled to its costs of the stay application.

[18] As to the nature and quantum of such costs, Sweetpea submits that, "at least up until 14 July 2022", Rallen had sought a blanket or complete stay of the operation of the access agreement until the final determination of Rallen's appeal. As a result, Sweetpea had to prepare a significant amount of evidence in response.⁵ It was only on 13 July

5 Sweetpea's submissions 2 June 2023, par 11; Reply submissions 23 June 2023, par 4(b).

2022 that Rallen indicated that it sought a revised stay.⁶ The clear implication of Sweetpea’s contention is that much of the work carried out by its lawyers (and witnesses, both lay and expert) in response to the stay application was unnecessary in light of Rallen’s change of position, said to have been a “major and fundamental shift” in its position.⁷

[19] Rallen contends that the ordinary rule, that the costs of an interlocutory application should be costs in the proceeding, is displaced in whole or in part in the present case and that the Court should reject Sweetpea’s submission that Rallen should pay its costs of the stay application.

[20] Rallen’s core contention is that, although Sweetpea was pressed for many weeks to inform Rallen of the activities which Sweetpea proposed to carry out on Tanumbirini Station, Sweetpea did not respond in any meaningful way until 11 July 2022, just a few days prior to the hearing listed for 15 July 2022. It was only at that late stage that Sweetpea provided Rallen with details of the works proposed to be carried out over the period of July 2022 to May 2023. In response to that contention, Sweetpea points out that Rallen filed the stay application on the first day of the appeal hearing, 20 June 2022, before it had made any request for Sweetpea’s future works program. Senior counsel for Rallen told the court at the time that the reason for the stay

⁶ It is unclear as to whether the revised stay proposal was notified on 13 or 14 July 2022; both dates are referred to in Sweetpea’s written submissions dated 2 June 2023, pars 10 and 12.

⁷ Reply submissions 23 June 2023, par 4(b).

application was that Sweetpea had given Rallen notification on 7 June 2022 that it intended to commence a series of operations on Tanumbirini, including the clearing of seismic lines for the purposes of the proposed seismic survey.⁸

[21] Sweetpea also suggests that Rallen did not request information as to Sweetpea's proposed activities on Tanumbirini, for the remainder of 2022, until 7 July 2022.⁹ However, that suggestion falls short of a clear submission and in any event is difficult to reconcile with the fact that Rallen's lawyers wrote to Sweetpea's lawyers on 26 June 2022, in the following terms:

We have written on a number of occasions requesting proposals from your client as to how it might conduct its activities without causing damage and interference to our client's activities on Tanumbirini. ... Our client has also repeatedly requested information about the activities which your client wishes to undertake, with sufficient notice in detail to permit our client to engage with your client in respect of those activities, and take steps to protect its own pastoral activities from harm.

To date, no proposals have been forthcoming from your client, and any information provided has been at the highest level only, and has not been adequate to permit our client to take steps to guard against or mitigate harm.

[22] With respect to the extract contained in the previous paragraph, I make no finding except as to the fact that Rallen had requested information as to Sweetpea's proposed activities prior to 7 July 2022.

⁸ Transcript 21 June 2022, p 157.

⁹ Reply submissions 23 June 2023, par 11.

[23] As to its change of position, Rallen contends that, from 11 July 2022, it conducted itself reasonably in that its lawyers wrote to Sweetpea's lawyers setting out the revised orders which it would invite the Court to make, essentially providing for a 'permissive stay', namely a stay with express exceptions which would permit Sweetpea to carry out certain works to accommodate what Rallen understood to be the immediate priorities of Sweetpea.¹⁰

[24] My decision to refuse the stay application was substantially informed by the works program stated or clarified on 11 July 2022.¹¹ In my reasons for decision on the stay application, I also noted that Rallen did not oppose the activities to be carried out under that proposed works program and that the terms of its proposed permissive stay substantially accommodated the carrying out by Sweetpea of the stated works over the following three months or more.¹² For that reason, I considered that the proposed stay was unnecessary. However, I was also concerned that activities which Rallen described as 'excluded activities', that is permitted activities excluded from the operation of the proposed stay, were likely to be subject to contested interpretations leading to further litigation about issues of compliance or non-compliance with the terms of the proposed stay.

10 *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd* [2022] NTSC 60 at [16].

11 *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd* [2022] NTSC 60 at [22].

12 *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd* [2022] NTSC 60 at [21].

Consideration

- [25] An obvious legal policy reason for a Court to be able to make an interlocutory order reserving the question of costs is to enable the Court to assess the position in retrospect once the competing cases of the parties have been finally decided.
- [26] In the present case, the underlying basis for Rallen's stay application – asserted errors of law on the part of the Tribunal, and the need to protect Rallen's position pending possible correction of those errors – was ultimately not established. After considering and deciding Rallen's application for leave to appeal the Tribunal's decision and orders, I dismissed the appeal on all grounds. Assessing the position in retrospect, I am now able to conclude that the stay application lacked fundamental merit.
- [27] Therefore, it is irrelevant that Sweetpea may have provided details of its proposed works relatively late (that is, relative to the hearing date of the stay application), or that Rallen may have conducted itself reasonably in adjusting the conditions of the stay sought by it. I say that because the Court's final decision on the appeal demonstrates that there was no 'real' foundation for the stay application.
- [28] I am satisfied that Sweetpea did not engage in any conduct which disentitled it to the costs order now sought. In my view, the combined fact that Sweetpea was successful in both resisting the stay and in

defending the appeal is determinant. Rallen should pay Sweetpea's costs of the unsuccessful stay application, on the standard basis. I order accordingly. I also order that Rallen pay Sweetpea's costs of the costs application (including the drafting of written submissions). Further, to the extent necessary, I certify for senior and junior counsel, pursuant to Rule 63.72 (10) *Supreme Court Rules 1987*.
