

SUPREME COURT OF QUEENSLAND

CITATION: *BUMA Australia Pty Ltd v Queensland Power Company Pty Ltd* [2026] QSC 157

PARTIES: **BUMA AUSTRALIA PTY LTD**
ABN 28 649 634 579
(Applicant)
v
QUEENSLAND POWER COMPANY PTY LTD
ACN 087 295 583
(First Respondent)
QUEENSLAND POWER (AUSTRALIA) PTY LTD
ACN 087 293 409
(Second Respondent)
MILLMERRAN INVESTMENT COMPANY I PTY LTD
ACN 088 432 599
(Third Respondent)
MILLMERRAN INVESTMENT COMPANY II PTY LTD
ACN 088 432 615
(Fourth Respondent)
MILLMERRAN INVESTMENT COMPANY III PTY LTD
ACN 088 432 642
(Fifth Respondent)
MILLMERRAN INVESTMENT COMPANY IV PTY LTD
ACN 088 432 679
(Sixth Respondent)
MILLMERRAN INVESTMENT COMPANY V, PTE. LTD.
ARBN 088 432 722
(Seventh Respondent)
MILLMERRAN INVESTMENT COMPANY VI, PTE. LTD.
ARBN 088 432 795
(Eighth Respondent)

FILE NO/S: BS 13604/24

DIVISION: Trial

PROCEEDING: Interlocutory Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 26 June 2026

DELIVERED AT: Brisbane

HEARING DATE: 23 June 2026

JUDGE: Freeburn J

ORDERS: **1. The respondents are granted leave under section 64 of the *Supreme Court of Queensland Act 1991* (Qld) to appeal the orders made on 28 April 2026 in this proceeding.**

2. I will hear the parties on the costs of this application.

CATCHWORDS: PROCEDURE – COSTS – APPEALS AS TO COSTS – where costs of the proceeding were determined after judgment in the substantive proceeding was delivered – where the respondents commenced an appeal of the substantive decision – where the respondents subsequently filed a second notice of appeal in respect of the costs decision – where the second notice of appeal is only in relation to costs – whether the respondents require leave under s 64(1) of the *Supreme Court of Queensland Act 1991* (Qld) to appeal the costs decision – whether the court should exercise its discretion to grant leave for the respondents to appeal the costs decision

Supreme Court of Queensland Act 1991 (Qld) s 64(1), s 64(2)

ASIC v Jorgensen [2009] QCA 20, cited
Emmanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd [2003] QSC 484, cited

COUNSEL: M Doyle
 (Counsel for the Applicant)
 P O'Shea KC, with D Turner and T Smith
 (Counsel for the Respondents)

SOLICITORS: Corrs Chambers Westgarth (Applicant)
 Herbert Smith Freehills Kramer (Respondents)

- [1] This proceeding was commenced in October 2024. Some 26 issues were required to be decided. Those 26 issues were then tried over two weeks in November 2025. On 10 December 2025, I delivered reasons which are published as *BUMA Australia Pty Ltd v Queensland Power Company Pty Ltd* [2025] QSC 338. On 12 January 2026, I made orders consistent with those substantive reasons.
- [2] In the meantime, on 7 January 2026, the respondents (**MPP**) filed a notice of appeal in the Court of Appeal.¹ That substantive appeal is to be heard on 19 and 20 August 2026.
- [3] In January and February 2026, the parties exchanged submissions on the costs of the proceeding. On 28 April 2026, I delivered reasons and made orders on the costs of the proceeding. Those reasons are published as *BUMA Australia Pty Ltd v Queensland Power Company Pty Ltd* [2026] QSC 55.
- [4] On 21 May 2026, MPP filed a second notice of appeal² – this time against the costs judgment in April 2026.

¹ This is appeal 36 of 2026.

² This is appeal 2241 of 2026.

- [5] MPP applies to the court for two alternative orders:
- (a) A declaration that [MPP does not] require leave under section 64 of the *Supreme Court of Queensland Act 1991* (Qld) to appeal against the [costs] orders made... on 28 April 2026.
 - (b) In the alternative, pursuant to section 64 of the *Supreme Court of Queensland Act 1991* (Qld), [MPP is] granted leave to appeal from the [costs] orders made...on 28 April 2026.
- [6] The applicant (**BUMA**) resists the making of those alternative orders.

Leave under section 64

- [7] Section 64 of the *Supreme Court of Queensland Act 1991* (Qld) is as follows:

64 Leave required to appeal in relation to costs

(1) An appeal only in relation to costs lies to the Court of Appeal from a judgment or order of the court in the Trial Division only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another judge of the court in the Trial Division.

(2) However, if, after an appeal to the Court of Appeal is properly started, the appeal becomes an appeal only in relation to the costs of the original proceeding—

- (a) subsection (1) does not apply; and
- (b) the appeal may be heard and determined only by leave of the Court of Appeal.³

- [8] The rationale for s 64(1) was explained by Keane JA in *ASIC v Jorgensen*:

The evident purpose of s 253 of the *Supreme Court Act* [the predecessor to s 64(1)] is to impose a filter upon appeals about the exercise of the discretion to award costs where the disposition of the costs is left by law in the discretion of the judge. The evident intent of the provision is to ensure that the primary judge's balancing of discretionary considerations should not be reconsidered on appeal save in cases where the primary judge has first addressed the question whether there is good reason to allow his or her exercise of the discretion to be reviewed.⁴

- [9] The evident purpose of s 64(2) is to cater for those situations where:
- (a) an appeal is properly commenced, and the appeal is not one that can be characterised as 'only in relation to costs'; and
 - (b) the non-costs aspects subsequently do not proceed because, for example, that non-costs aspect is dismissed by consent, abandoned or rejected.

³ Subsection 64(2) was added in September 2012.

⁴ [2009] QCA 20 at [29] (Holmes and Fraser JJA agreed). There are differences between the former s 253 of the *Supreme Court Act 1995* (Qld) and the present s 64(1) but they are not material.

- [10] In that event, the leave that is required is the leave of the Court of Appeal.
- [11] Section 64(2) does not apply here.⁵ The question is whether s 64(1) applies here and therefore whether the second notice of appeal requires the leave of the trial judge. In my view, s 64(1) does apply and leave is required.⁶ The ordinary and literal meaning of s 64(1) is that, if the appeal can be characterised as “*only in relation to costs*”, then the leave of the primary judge must be obtained.⁷
- [12] In my view, it is plain that the second notice of appeal has the character of an appeal “*only in relation to costs*”. *First*, the second notice of appeal identifies the costs judgment of 28 April 2026 as the judgment appealed against.
- [13] *Second*, the grounds of appeal are stated to be:
- The learned primary judge erred by finding that the appellants [i.e. MPP] pay the respondent’s costs [i.e. BUMA’s costs] of the proceeding on the standard basis up to and including 14 May 2025 and on the indemnity basis on and from 15 May 2025.
- [14] That refers *only* to the costs order made on 28 April 2026.
- [15] *Third*, the orders sought by the notice of appeal are as follows:
1. The appeal is allowed.
 2. The orders of the primary judge are set aside.
 3. If the appellants [MPP] are successful in Proceeding CA 36/26 [i.e. the first/substantive appeal] to set aside the primary judge’s orders in *BUMA Australia Pty Ltd v Queensland Power Company Pty Ltd* [2025] QSC 338:
 - (a) the respondent [BUMA] pay the appellants’ [MPP’s] costs of the proceeding at first instance:
 - (i) on the standard basis up to and including 8 October 2025; and
 - (ii) on the indemnity basis on and from 9 October 2025;
 - (b) in the alternative to order 3(a), the respondent pay the appellants’ costs of the proceeding at first instance on the standard basis.
 4. In the alternative to order 3, the appellants pay the respondent’s costs of the proceeding at first instance on the standard basis.
 5. The respondent pay the appellants’ costs of and incidental to the appeal.

⁵ Neither party argued that it did.

⁶ As the submissions for MPP point out, the requirement to obtain leave under section 64(1) need not be satisfied before a party commences an appeal: *Khoury v Kooij* [2025] QCA 134 at [37].

⁷ Of course, if that judge is not available then the leave of another trial division judge must be obtained.

- [16] On any view, the attack is on the costs order. What is sought is a re-casting of the costs ordered on 28 April 2026.
- [17] It is true that there is a reference to MPP’s substantive appeal. But what is sought is a costs order consequent on a successful substantive appeal. It is an odd cross-reference because, as counsel for BUMA points out, a successful substantive appeal would necessarily mean that the costs in the trial division would need review.
- [18] MPP submits that the second notice of appeal is not “*only in relation to costs*” because order 3 that is sought by MPP is contingent on MPP succeeding in the substantive appeal. I do not accept that submission. A fair reading of the second notice of appeal makes clear that what is sought by that appeal is a re-casting of the costs orders. The contingency does not alter that character.
- [19] MPP submits that:
- Order [4] is advanced in the alternative and is to become operative only if MPP is unsuccessful in the Substantive Appeal. If that occurs, then the Costs Appeal will “*become*” an appeal only in relation to costs and the question of leave will be one for the Court of Appeal to determine pursuant to section 64(2) of the SCQA.⁸
- [20] Again, I do not accept that the contingency changes the character of MPP’s challenge.
- [21] I accept the submission on behalf of BUMA that the only orders the subject of the costs appeal are the costs orders. Thus, MPP needs leave to appeal the orders made on 28 April 2026.

Leave to Appeal

- [22] The parties are largely agreed about the principles that apply to applications for leave under s 64(1). The question is whether there is good reason to allow the costs discretion to be reviewed.⁹ To warrant a costs order being reviewed on appeal, the appellant must identify an error of the kind described in *House v The King*.¹⁰ The factors to be considered by a trial judge are the primary judge’s view as to the balance of the competing arguments, whether those arguments relate to matters of legal principle or disputed questions of fact, the importance and difficulty of such arguments and, on occasion, the amount of money involved.¹¹
- [23] In *Emmanuel Management Pty Ltd (in liq) v Foster’s Brewing Group Ltd*, Chesterman J discussed the approach of the trial judge who is asked to grant leave to appeal:
- [the trial judge] should not be defensive about the orders made or overly reluctant to give leave. Nevertheless the cases make it clear that leave should not be given unless there is an arguable case that,

⁸ MPP’s submissions at [20(b)]. The abbreviation SCQA means the *Supreme Court of Queensland Act 1991* (Qld).

⁹ See the reasons of Keane JA in *ASIC v Jorgensen* (quoted above).

¹⁰ (1936) 55 CLR 499; [1936] HCA 40 at 505.

¹¹ *Morrison v Hudson* [2006] 2 Qd R 465; [2006] QCA 170 at [24].

applying the principles of *House v The King* the discretion will be overturned on appeal.¹²

- [24] Leave to appeal should be given for the following reasons.
- [25] *First*, MPP has raised six proposed grounds of appeal. The six proposed grounds have their problems because they seek to interfere with a discretion in circumstances where the legal principles applied are not challenged. Nevertheless, the six grounds are arguable, although of course that is something of a spectrum.
- [26] Incidentally, counsel for MPP argued that the fact that counsel for BUMA, in effect, stood up to argue about the proposed grounds of appeal illustrated that the grounds were arguable. I reject that rather surprising argument. It would mean that the most spurious of arguments could be given credibility by opposing counsel merely rising to point out the flaws. The determination of whether there is an arguable case is not such a glib, pedestrian exercise.
- [27] *Second*, the granting of leave is a matter of judgment and impression.¹³ That is no doubt why leave is allocated to the trial judge. The circumstances of the Calderbank offer were not straight forward and involved, in a sense, a number of factors affecting the discretion.
- [28] *Third*, the attack on the exercise of the discretion includes an argument that I have allowed extraneous or irrelevant matters to impact the exercise of the discretion. I am not persuaded that is correct, but it is a matter that favours the grant of leave so that issue can be determined.
- [29] *Fourth*, this case was a commercial case involving significant sums and significant costs.
- [30] Leave to appeal the costs orders will be given.
- [31] So far as the costs of this application are concerned, my preliminary view is that the costs of the application should be reserved to the Court of Appeal. However, I will hear the parties on whether that or some other order is appropriate.

¹² [2003] QSC 484 at [41].

¹³ *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd (No 2)* [2020] QSC 323 at [14].