Mentha v Australian Securities and Investments Commission (Costs) [2024] FCA 375

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| File number(s): |  |
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| Judgment of: | **BUTTON J** |
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| Date of judgment: | 16 April 2024 |
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| Catchwords: | **COSTS** – where proceedings dismissed by consent with no hearing on the merits – whether Respondents “in substance surrendered or capitulated” – whether Applicants entitled to costs of the proceeding – whether Respondents’ conduct following judgment delivery in related proceedings unreasonable – whether Applicants entitled to indemnity costs – application dismissed  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 15, 16*Corporations Act 2001* (Cth) s 447A, Pt 5.3A, Pt 5.9, Div 1, Sch 2 (*Insolvency Practice Schedule (Corporations)*) s 90-15*Judiciary Act 1903* (Cth) s 39B |
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| Cases cited: | *Balanggarra Aboriginal Corporation v State of Western Australia* [2018] FCA 1538*FCA US LLC v Mahindra Automotive Australia Pty Ltd* [2021] FCA 1091*In the matter of ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq)* [2023] NSWSC 461*Mentha v Australian Securities and Investments Commission* [2023] FCA 667*Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicants: | V Whittaker SC with A Di Stefano |
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| Solicitor for the First Respondent: | Australian Securities and Investments Commission |
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| Counsel for the Second Respondent: | D J Williams KC |
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| Solicitor for the Second Respondent: | Polczynski Robinson |

ORDERS

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|  | VID 200 of 2023 |
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| BETWEEN: | MARK FRANCIS XAVIER MENTHAFirst ApplicantMARTIN MADDENSecond ApplicantBRYAN WEBSTERThird Applicant |
| AND: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONFirst RespondentATRADIUS CREDITO Y CAUCION SA SEGUROS Y REASEGUROSSecond Respondent |

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| order made by: | BUTTON J |
| DATE OF ORDER: | 16 APRIL 2024 |

THE COURT ORDERS THAT:

1. The Applicants’ application for costs be dismissed.
2. Subject to:
	1. paragraph 2 of the orders made on 20 June 2023; and
	2. paragraph 3 of these orders,

each party bear its own costs of the proceeding.

1. The Applicants pay the Respondents’ costs of and incidental to the Applicants’ application for costs, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BUTTON J:

# Background

1. In early April 2023, the Applicants (**Liquidators**) commenced this proceeding seeking judicial review of a decision by the First Respondent (**ASIC**) to authorise the Second Respondent (**Atradius**) as an eligible applicant for the purposes of Div 1 of Pt 5.9 of the *Corporations Act 2001* (Cth) (the **Act**) in relation to AC Distribution Company Pty Limited (formally known as, inter alia, the Arrium Creditor Distribution Company Pty Limited and SSX Pty Limited) (subject to Deed of Company Arrangement) (ACN 082 181 726) (the **Authorisation Decision**).
2. The Authorisation Decision was made on 7 June 2022. ASIC determined, on 14 August 2023, to revoke Atradius’ eligible applicant status (the **Revocation Decision**).
3. On 12 September 2023, the Court made orders, by consent, dismissing the proceeding, while preserving the Liquidators’ ability to pursue an application for costs.
4. While no formal application (in the sense of an interlocutory application) was filed by the Liquidators, on 3 October 2023, the Liquidators filed submissions seeking orders for their costs of the proceeding. The submissions were supported by an affidavit of the Liquidators’ solicitor. All parties proceeded on the basis that the Liquidators’ submissions and affidavit constituted their application for costs, in accordance with the orders made on 12 September 2023 (the **costs application**).
5. By their costs application, the Liquidators sought their costs of the entire proceeding, with those costs on an indemnity basis from 4 May 2023. Both ASIC and Atradius contended that each party should bear its own costs, but that the Liquidators’ should pay their costs of the costs application as the Liquidators had rejected ASIC and Atradius’ repeated offers to resolve the proceeding on the basis that the parties bear their own costs.
6. No party sought to disturb costs orders that were made in respect of an application brought by Atradius, seeking suppression orders over certain information in a bundle of documents produced by ASIC: see *Mentha v Australian Securities and Investments Commission* [2023] FCA 667 (***Mentha v ASIC***).
7. Two costs orders were made in respect of the suppression application:
8. on 20 June 2023, I ordered that Atradius pay the Liquidators’ costs of the suppression application; and
9. on 11 July 2023, following receipt of further submissions from the parties, I ordered that ASIC bear its own costs in relation to the suppression application.
10. As noted, the Authorisation Decision was made on 7 June 2022. About two months later, on 1 August 2022, Atradius commenced proceedings in the Supreme Court of New South Wales against persons including the Liquidators and some 60 or so financiers of the Arrium group of companies (**Arrium Group**).
11. Over three days in early April 2023, Black J heard an interlocutory process brought by Atradius to extend the time for service of its originating process in the NSW proceedings, and an application by the Liquidators (and financiers) seeking the summary dismissal of the NSW proceedings (or other relief). In a judgment running to 100 pages, Black J delivered judgment on those applications on 3 May 2023: *In the matter of ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq)* [2023] NSWSC 461 (the **NSW Judgment**). The background to that proceeding is summarised at [5]–[9] of *Mentha v ASIC*. I need not repeat it here.
12. The findings made by Black J included that Atradius was no longer a creditor of any Arrium Group entity. Black J did not, however, exclude that Atradius may be an “interested person” with standing to make an application under s 447A of the Act, due to its economic interest as the credit insurer of several trade creditors of companies within the Arrium Group.
13. On 3 May 2023, following delivery of the NSW Judgment, the solicitors for the Liquidators (**ABL**) sent a copy of the judgment to ASIC and referred ASIC to certain findings, including the finding (at [197]) that Atradius was not a creditor of OneSteel Trading Pty Ltd (the Arrium company in respect of which debts had been assigned to Atradius), which meant that Atradius no longer had standing to seek relief under s 90-15 of the *Insolvency Practice Schedule (Corporations)* (being Sch 2 to the Act) (**IPS**). ASIC was asked whether it would then “repeal, rescind, revoke or vary the Eligible Applicant [status] granted to Atradius and if so on what terms in light of the judgment”.
14. On 4 May 2023, ASIC advised Atradius’ solicitors (**PR**) that ASIC had been asked to revoke the Authorisation Decision and was considering its position.
15. On 8 May 2023, ASIC responded to ABL. It sought to clarify whether a formal request was being made for ASIC to exercise its power to revoke Atradius’ authorisation as an eligible applicant. It said further that: “Any formal consideration of revocation of the authorisation would require the provision of procedural fairness to Atradius.”
16. ABL responded shortly thereafter, saying that:

ASIC now has the benefit of the detailed reasoning of Black J. Given His Honour’s judgment the Kordamentha Defendants submit that ASIC ought to now revoke the eligible applicant status granted to Atradius. Please let us know if ASIC will do so and if not, why not.

1. On 22 May 2023, referring to a conversation had on 4 May 2023, ASIC emailed PR, saying that: “As we discussed, ASIC is currently considering whether, given the [NSW Judgment], the eligible applicant authorisation granted to your client on 7 June 2022 ought now be revoked.”
2. On 26 May 2023, Atradius served a Notice of Intention to Appeal in respect of the NSW Judgment. Any appeal was required to be filed by 3 August 2023. Ultimately, no appeal was filed.
3. On 14 August 2023, ASIC wrote to PR, informing PR of the Revocation Decision. In communicating its Revocation Decision, ASIC referred to four earlier emails to PR, stated that the revocation did not have retrospective effect, and said as follows concerning its reasons for deciding to revoke the authorisation:

There is no indication that your client is pursuing an appeal of the decision. Your client is also seeking to resolve the Federal Court proceeding before final hearing and determination. Since May 2023, ASIC has invited your client several times to indicate whether it still requires the authorisation and, if so, why. No substantive response has been received. In all the circumstances, ASIC infers that your client no longer intends to use the authorisation in any way. On that basis, ASIC considers that it is appropriate to revoke the authorisation.

1. On 15 August 2023, PR emailed the parties’ representatives in this proceeding about proposed consent orders. That communication made ABL aware for the first time of the Revocation Decision.
2. On 12 September 2023, this proceeding was dismissed by consent.
3. Following further correspondence from the parties in relation to the listing of the costs hearing, on 30 October 2023, orders were made referring the costs dispute to mediation. That mediation occurred before a Registrar of this Court on 11 December 2023. It was unsuccessful.
4. Further orders were made on 28 February 2024 permitting the parties to file any further affidavit evidence and supplementary submissions in relation to the costs application. Each of the parties did (save that the Liquidators did not file any further evidence).
5. The Court is now called on to determine the costs application. The parties were content for the dispute to be determined on the papers.

# parties’ positions and submissions

1. The parties’ positions on costs were as follows:
2. The Liquidators sought their costs of the proceeding on a standard (party and party) basis and on an indemnity basis on and from 4 May 2023.
3. ASIC contended that (save for the costs the subject of the 20 June 2023 costs order) each party bear its own costs of the proceeding and that the Liquidators pay ASIC’s costs of and incidental to the Liquidators’ costs application.
4. Similarly, Atradius opposed orders being made that it pays the Liquidators’ costs of the proceedings; and on an indemnity basis from 4 May 2023 (or any other date). It also contended that the Liquidators should pay its costs of and incidental to the Liquidators’ costs application.

## The Liquidators’ submissions

1. The Liquidators acknowledged that the ordinary approach is to make no order as to costs where there has been no hearing on the merits (referring to *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin* (1997) 186 CLR 622 at 624–5; [1997] HCA 6 (McHugh J) (***Lai Qin***)). They submitted, however, that the ordinary approach is displaced in circumstances where a party has “in substance surrendered or capitulated” by its conduct. In those circumstances, the Liquidators submitted, the usual rule of costs following the event will be applied to the party that is, in substance, successful: referring to *FCA US LLC v Mahindra Automotive Australia Pty Ltd* [2021] FCA 1091 (***Mahindra Automotive***) at [35] (Halley J).
2. The Liquidators submitted that the “present proceedings are the archetypal case of capitulation”. They contended that ASIC’s Revocation Decision was a clear capitulation to the arguments advanced by the Liquidators (that Atradius was not a creditor) and accepted by Black J in the NSW Judgment. The Liquidators contended that the effect of the Revocation Decision was to grant the Liquidators the entirety of the substantive relief they sought.
3. As to their claim for indemnity costs on and from 4 May 2023, the Liquidators submitted that the “fundamental vice” that infected the Authorisation Decision — that Atradius was not a creditor — should have been obvious to ASIC at the outset, or at least from the delivery of the NSW Judgment. The Liquidators contended that it was incumbent on ASIC and Atradius to seek to minimise costs in the proceeding, and that following delivery of the NSW Judgment, ASIC should have been “expeditiously considering whether to revoke Atradius’ eligible applicant status”. At the very least, the Liquidators submitted, the Respondents should have sought a short stay while determining what their positions were. The Liquidators also complained of Atradius’ conduct in not responding promptly to ASIC’s requests of it to explain why it required eligible applicant status.

## ASIC’s submissions

1. ASIC’s submissions drew a distinction between the Authorisation Decision (the legal validity of which was at issue in these proceedings) and the Revocation Decision (which had no effect on the validity of the Authorisation Decision). In ASIC’s submission, there had been no “capitulation” by it, because ASIC had never conceded that the Authorisation Decision is or was invalid. ASIC submitted, by reference to its letter to Atradius advising it of the Revocation Decision, that the Revocation Decision was made on the basis that Atradius no longer intended to use the Authorisation Decision in any way, and had not somehow accepted the Liquidators’ arguments as to Atradius’ status as a creditor. ASIC also emphasised that the judicial review proceedings would have to have been determined on the basis of the information that was available to ASIC at the time, and not by reference to subsequent events (including the NSW Judgment).
2. As to the claim that ASIC should have, following delivery of the NSW Judgment, promptly reviewed Atradius’ standing as a creditor and made the Revocation Decision, ASIC said that the submission:
3. makes no allowance for an appeal from the NSW Judgment;
4. ignores Atradius having given notice of its intention to appeal; and
5. more fundamentally, fails to acknowledge that even if Atradius was not a creditor, that does not mean the Authorisation Decision was invalid, or that ASIC would be compelled to make the Revocation Decision.
6. In any event, ASIC submitted that it proceeded to deal with the Liquidators’ request to make the Revocation Decision, and, in dealing with that request, it was not unreasonable for it to afford Atradius procedural fairness, as it did. As to any onus on the Respondents to seek a stay of these proceedings following delivery of the NSW Judgment, ASIC submitted that the Liquidators could equally have applied for an adjournment or short stay pending the determination of their own revocation request.
7. As to the costs of the costs application itself, ASIC pointed to its offers to the Liquidators to resolve the question of costs on the basis that each party bear its own costs. Therefore, ASIC submitted, if the Court determines that the parties are to bear their own costs of the proceeding, an order should be made that the Liquidators pay ASIC’s costs of and incidental to the proceeding.

## Atradius’ submissions

1. Atradius advanced similar arguments to ASIC, and submitted that:
2. This was not a case of complete capitulation. Instead, an external event (the Liquidators having achieved their objective by another administrative process, or ASIC’s Revocation Decision) has rendered the litigation otiose. That does not mean the Authorisation Decision was wrong. Atradius, like ASIC, drew a distinction between the Authorisation Decision and the Revocation Decision.
3. Black J left open the possibility that Atradius was an “interested person” with standing to make an application under s 447A of the Act, which would have been a further basis for ASIC to consider Atradius suitable for authorisation as an eligible applicant.
4. As to the costs consequences on and from 4 May 2023, the Liquidators had not identified any unnecessary expense they incurred after 4 May 2023 by reference to the conduct of Atradius that is not otherwise captured by the 20 June 2023 costs order. In fact, the Liquidators conceded that no substantive step had been taken in the proceeding since the orders made on 11 July 2023 that ASIC bear its own costs of the suppression application.

# costs of the proceeding

## There has been no capitulation

1. In my view, there is no basis to depart from the usual course that no order for costs be made where there has been no hearing on the merits. In *Lai Qin*, McHugh J identified (at 624–5) two circumstances in which a costs orders may be made in the absence of determination on the merits: one party behaving so unreasonably that the other should have its costs, or a judge feeling confident that, although both parties acted reasonably, one party was almost certain to win had the matter been fully tried*.* Neither circumstance applies here. Nor, for the reasons I go on to explain, do I accept that the Liquidators should have their costs on the basis that ASIC and Atradius capitulated.
2. This is a judicial review proceeding. By their originating application, the Liquidators sought review under one or both of ss 39B(1) and (1A)(c) of the *Judiciary Act 1903* (Cth) or ss 5, 15 and 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The originating application set out many and varied grounds by which it was said the Authorisation Decision was affected by error. The originating application raised grounds that concerned the efficacy and effect of a Deed of Assignment dated 5 April 2022, in addition to the Deed of Company Arrangement dated 17 August 2022. The originating application asserted that ASIC wrongly concluded that Atradius would have standing to bring proceedings against the Liquidators when Atradius was not a creditor, was not an “interested person” on any basis, and, even if it were a creditor, the Liquidators owed no duties to individual creditors. The originating application further impugned ASIC’s decision on the basis that it was unlikely that Atradius would obtain funding for a claim that benefitted creditors of the Arrium Group as a whole, and, even if it did obtain funding, Atradius would lack standing to represent the interested creditors. It also asserted that Atradius would not enjoy reasonable prospects of success in any claim for financial compensation, and stated that the power under s 90-15(1) of the IPS would not be exercised by a court to order any payment by the administrators to Atradius for reasons including that it would not achieve any objective of Pt 5.3A of the Act.
3. The originating application also included a series of paragraphs in support of a contention that ASIC “improperly exercised its power by failing to take relevant matters into account when making the [Authorisation] Decision”. The originating application brought the multitude of specific contentions together with the claim that: “In the circumstances set out above, the [Authorisation] Decision was so unreasonable that no decision maker, acting reasonably, could have made the [Authorisation] Decision.”
4. The relief sought by the Liquidators was a declaration that the Authorisation Decision was contrary to law, an order quashing or setting aside the Authorisation Decision, and an order remitting the matter to ASIC for further consideration in accordance with law.
5. The proceeding was dismissed following the making of the Revocation Decision, but that decision does not entail a capitulation to the Liquidators’ claim. Not only does the originating application seek review of a different decision (the Authorisation Decision), it does not, of its nature and by reference to the circumstances in which the Revocation Decision came about, necessarily entail capitulation to the substance of the Liquidators’ case, as set out in the originating application.
6. The Liquidators’ submissions in this regard misconceive the nature of the proceeding and the relief sought. As set out above, the proceeding sought judicial review of a particular decision, that was made at a particular time, based on particular information and with particular processes having been adopted. In bringing the proceeding, the Liquidators contended, inter alia, that ASIC had “improperly exercised its power”. ASIC’s Revocation Decision was made:
7. at a time that post-dated the NSW Judgment and the expiry of the appeal period in respect of that judgment; and
8. when ASIC had decided, based on Atradius’ failure to respond to its enquiries between May and August 2023, that Atradius was no longer intending to *use* the authorisation in any case.

There is nothing in that that amounts to capitulation to the judicial review case the Liquidators advanced in respect of the Authorisation Decision.

1. *Balanggarra Aboriginal Corporation v State of Western Australia* [2018] FCA 1538, relied on by the Liquidators, is an example of a case where the respondent capitulated on the central, substantive point (whether certain legislation applied to require that the applicant in that case obtain a permit to conduct traditional burning). But, as I have said, ASIC did not capitulate on the central, substantive points in this litigation, which concerned whether or not its Authorisation Decision was infected by error and ought to be quashed.
2. While a costs order may be made in favour of a party where there is something short of complete success, but the outcome “sufficiently achieves the party’s purpose in bringing the proceedings” (*Mahindra Automotive* at [35(d)] (Halley J)), that is not this case. While it might be said, at a high level of generality, that the Liquidators’ evident “purpose” in bringing the proceedings was to ensure that they were not examined by Atradius in connection with the affairs of the Arrium Group, the proceedings themselves were directed to having the Authorisation Decision set aside. The Revocation Decision rendered the pursuit of that objective futile, but it did not secure that objective.
3. In light of my conclusion that there ought not be any general costs order in the Liquidators’ favour, it is not strictly necessary to say anything about their submission that they should have their costs on an indemnity basis from 4 May 2023. The significance of that date is that it is the day after the NSW Judgment was delivered and the day on which Liquidators’ solicitors had emailed ASIC asking whether ASIC would repeal, rescind, revoke or vary the “eligible applicant” status granted to Atradius.
4. I will, however, record for completeness that even if I had been persuaded that the Liquidators should have their costs, I would not have awarded costs on an indemnity basis. I do not consider that the Respondents can be said to have acted unreasonably in not immediately “folding” following the issue of the NSW Judgment. There were a number of difficulties with the Liquidators’ submission that they should have their costs on an indemnity basis after delivery of the NSW Judgment.
5. The first difficulty is that the NSW Judgment does not, ipso facto, mean that the originating application would have succeeded. The Liquidators highlighted Black J’s conclusion as to Atradius not being a creditor but, as already set out, the originating application travelled well beyond that point. Had it gone to trial, ASIC’s decision-making and processes leading to the Authorisation Decision *in June 2022* would have been closely examined. The issue of a substantial judgment following a contested hearing, nearly a year after ASIC’s impugned decision was made, does not necessarily reveal the kind of error that would result in a successful judicial review case in respect of the Authorisation Decision made, as it was, in June 2022. The Liquidators’ submission seems to be that ASIC and Atradius should have “folded” immediately upon the issue of the NSW Judgment, but that conclusion simply does not follow.
6. Secondly, and as Atradius’ submissions noted, Black J expressly left open that Atradius may be an “interested person” on another basis, as to which it should be noted that part of the Liquidators’ originating application concerned whether ASIC should have ruled Atradius out as an “interested person”.
7. Thirdly, the Liquidators’ submissions failed to account for the prospect of an appeal against the NSW Judgment. Atradius filed a Notice of Intention to Appeal. Once the deadline for it to file an appeal had passed, ASIC made its Revocation Decision fairly promptly (albeit that the stated basis of that decision did not lie in the NSW Judgment). The evidence also shows that ASIC had made repeated attempts to engage with Atradius in the intervening period after the NSW Judgment was delivered. I reject the suggestion, made by the Liquidators, that ASIC “let the issue drift”.
8. Fourthly, the Liquidators’ submissions invited the Court to, in effect, conduct a mini-trial and treat the outcome of the NSW Judgment as a blueprint for how matters the subject of this proceeding would have been analysed. The Liquidators contended that the outcome was so obvious that ASIC should have recognised it immediately. Not only is a costs application not the occasion for a de facto mini-trial, but the submission ignores the fact that Black J heard the applications over three days and issued a judgment running to 100 pages.
9. Fifthly, pinning the application for indemnity costs to the NSW Judgment overlooks that, according to its terms, the Revocation Decision was made on other bases; it was not a direct and inevitable administrative reflection of the NSW Judgment.

# costs of this application

1. ASIC and Atradius made a number of offers to the effect that the parties bear their own costs.
2. On 15 September 2023, PR wrote to ABL inviting the Liquidators to consent to an order that there be no order made as to the costs of the proceeding as between the Liquidators and Atradius.
3. On 7 and 19 September 2023, ASIC made the Liquidators an offer to accept that there be no order as to the costs of the proceeding between the Liquidators and ASIC.
4. On 30 November 2023, prior to the mediation of the costs dispute, Atradius repeated its offer to resolve the costs dispute on the basis that each party bear its own costs.
5. ASIC also repeated its offer in relation to the costs dispute both before and after the unsuccessful mediation.
6. Despite those offers, the Liquidators maintained their position. The maintenance of that position has led to ASIC and Atradius incurring costs in resisting the Liquidators’ costs application. They have prevailed in resisting that application and should have their costs of so doing.
7. The Liquidators’ dogged pursuit of costs has resulted in substantial further affidavit material being filed, lengthy submissions being prepared, and the Court’s time being taken up determining a costs dispute that became disproportionate to what was at stake, noting that the Liquidators already had a costs order in their favour concerning the suppression dispute, and little else of substance occurred in the litigation before it was settled.
8. I will order the Respondents have their costs of the costs application. Those costs will be on a standard basis, noting that ASIC and Atradius did not seek those costs on an indemnity basis.

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| I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Button. |

Associate:

Dated: 16 April 2024