LAND COURT OF QUEENSLAND

CITATION:	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 4)* [2022] QLC 3
PARTIES:	**Waratah Coal Pty Ltd** ACN 006 670 300 (applicant) v **Youth Verdict Ltd, The Bimblebox Alliance Inc, Scott and Julie Ann Brown, Dmitri Sharov and Svetlana Sosnina, John and Susan Brinnand** (active objectors) and **Chief Executive, Department of Environment and Science** (statutory party)
FILE NOs:	MRA050-20 (ML 70454) EPA051-20 (EPML 00571313)
PROCEEDING:	Application to determine jurisdiction
DELIVERED ON:	18 March 2022
DELIVERED AT:	Brisbane
HEARD ON:	9 March 2022
HEARD AT:	Brisbane
PRESIDENT:	FY Kingham
ORDERS:	**1. I refuse the application to defer the challenge to jurisdiction to the conclusion of the hearing.** **2. I find the Court can and should hear the applications and objections based on the revised mine-plan.** **3. Costs are reserved, unless a party applies for a different order within 7 days, in which case I will make directions on that application.**

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – PROCEDURE – where the applicant revised its mine-plan after the applications for a mining lease and environmental authority had been referred to the Court for hearing – whether the Court can or should defer the challenge to jurisdiction until the hearing has concluded – whether the Court can conduct the hearing on the revised mine-plan – where the Court must comply with the requirement to afford parties procedural fairness.

Environmental Protection Act 1994
Mineral Resources Act 1989
State Development and Public Works Organisation Act 1971

Federated Engine-Drivers & Firemen's Association of Australasia v Broken Hill Co Ltd (1911) 12 CLR 398, considered
Hazeldell Ltd v The Commonwealth (1924) 34 CLR 442, considered
Hearne v Street (2008) 235 CLR 125, considered
Khatri v Price and Another [1999] FCA 1289, considered
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited
New Acland Coal Pty Ltd v Smith & Ors (2018) 230 LGER 88; [2018] QSC 88; [2018] 20 QLR, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [2021] HCA 2, cited
Plaintiff S164/2018 v Minister for Home Affairs [2018] HCA 51, cited
Re Boulton; Ex parte Construction, Forestry, Mining & Engineering Union (1998) 73 ALJR 129, cited
Vicinity Funds Re Ltd v Commissioner of State Revenue [2021] VSC 200, cited
Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 3) [2021] QLC 36, cited

APPEARANCES: P Ambrose QC with J O'Connor, T Jackson (instructed by Hall & Wilcox) for the applicant
E Nekvapil with K McAuliffe-Lake (instructed by the Environmental Defenders Office) for Youth Verdict Ltd and The Bimblebox Alliance Inc
D Harris (solicitor), Donnie Harris Law, for Scott and Julie Ann Brown
John and Susan Brinnand, active objectors (self-represented)
J Horton QC with A Hellewell (instructed by Litigation Unit, Department of Environment and Science) for the statutory party

[1] Youth Verdict Ltd and The Bimblebox Alliance Inc say the Court does not have jurisdiction to hear applications for permits and objections to their grant based on a revised mine-plan for the Waratah Coal Project.

[2] The original mine-plan included two open cut mine pits called 'Open Cut One South' and 'Open Cut Two South'. Both would have affected the Bimblebox Nature Refuge on the property known as Glen Innes. In 2021, Waratah Coal Pty Ltd notified the Court and the active parties that, having considered the objections made by YV and TBA, it had revised its mine-plan to abandon those two pits.

[3] YV and TBA say that the revised mine-plan amounts to a substantially and materially different project to the one applied for and the Court lacks jurisdiction to make recommendations about it.

[4] This was argued in September 2021, when I adjourned the hearing to allow the statutory party time to request and assess information from Waratah about the implications of the change for the assessment of impacts.[1] That took some months.

[5] The hearing resumed on 9 March 2022. The statutory party is now satisfied with the information provided and filed an 'assessment report' about the revised mine-plan.

[6] The parties disagree about two matters:

1. whether the Court should defer deciding the challenge to jurisdiction; and

2. whether it has jurisdiction to make recommendations on the revised mine-plan.

Should the Court defer deciding the challenge to jurisdiction?

[7] Since September 2021, there has been substantial progress in preparing for the objections hearing. Waratah has responded to a series of requests by the statutory party for further information about the change to the mine-plan. The statutory party has provided an assessment report. The parties have continued to prepare for the hearing. The expert witnesses have prepared or will prepare reports on both the original and the revised mine-plan.

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1 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 3)* [2021] QLC 36.

[8] That progress explains a shift in the position taken by some parties about when the challenge to jurisdiction should be decided.

[9] When first argued, YV and TBA said it was the Court's 'first duty' to determine the matter then. Now they say there is good reason to defer the question. Last year, Waratah said the Court could defer the question to the hearing. Now it says the Court has sufficient information about the revised mine-plan and must or should determine jurisdiction now. The statutory party has made submissions on the different impacts arising from the revised mine-plan. Although that was delivered only recently, no party requested this hearing be adjourned to allow them to prepare.

[10] The other active parties who participated in the hearing either favoured deciding the matter now or would not be prejudiced if it were.

[11] The phrase 'first duty' was used by Griffiths CJ in *Federated Engine-Drivers & Firemen's Association of Australasia v Broken Hill Pty Co Ltd.* His Honour found that the 'first duty' of any judicial officer is to satisfy herself that she has jurisdiction, if only to avoid putting the parties to unnecessary risk and expense.[2]

[12] The issue is when that 'first duty' must or should be fulfilled.

[13] In *Re Boulton; Ex parte CFMEU* Kirby J said that, "every court or tribunal in this country must, where objection is taken to its jurisdiction, determine that objection as a preliminary question. If it has no lawful jurisdiction, it may not assume that it has and ought not to pretend that it has".[3] Kirby J went on to say, "I find it difficult to see how resolution of the issue can properly be avoided when it lies at the threshold of proceedings".

[14] That is consistent with the earlier decision by Isaacs ACJ in *Hazeldell Ltd v The Commonwealth*, that "the very first duty of any Court, in approaching a cause before it, is to consider its jurisdiction. And so we have to consider at the threshold what is our jurisdiction".[4]

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2 *Federated Engine-Drivers & Firemen's Association of Australasia v Broken Hill Co Ltd* (1911) 12 CLR 398, 415.

3 *Re Boulton; Ex parte Construction, Forestry, Mining & Engineering Union* (1998) 73 ALJR 129, 133, [21].

4 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442, 446.

[15] Recently, in *Plaintiff S164/2018 v Minister for Home Affairs,* Edelman J followed that reasoning in describing this 'first duty' as a "threshold consideration".[5]

[16] In *Hearne v Street,* the High Court acknowledged that while it may be "conventional" for a court to deal with matters of jurisdiction at an initial stage, and a court "normally" has no business entering to substantive arguments without jurisdiction, it did not rule out exceptions to the proposition.[6]

[17] In *Khatri v Price*, Katz J acknowledged that the statement by Griffith CJ in *Federated Engine-Drivers & Firemen's Association of Australasia v Broken Hill Pty Co Ltd* implies that duty must be fulfilled 'first' in the sense that the court concerned must determine the question of its jurisdiction before hearing any evidence or argument on issues which would arise in the proceeding if it did have the jurisdiction properly invoked.[7]

[18] However, his Honour said the duty has not been generally understood to be 'first' in that sense. Rather, "the duty has been generally understood instead as permitting the court concerned to exercise a discretion … to postpone determining the question of its jurisdiction until after it has heard the whole case, provided, however, that having done so, it then 'first' determines that question".[8]

[19] Further, in *Vicinity Funds Re Ltd v Commissioner of State Revenue,* the Victorian Supreme Court held that while the jurisdiction that the court is being called upon to exercise should first be *considered, Hazeldell* does not stand for the proposition that the question must be decided by a preliminary, separate question. Rather, the point in proceedings at which jurisdiction is determined depends upon when is appropriate.[9] That will depend on the issues before the Court in the case before it.[10]

[20] There is an unusual feature to the challenge to jurisdiction in this case which led to the question being deferred for some months. The parties agree that the jurisdiction of the Court was properly invoked by the referral of the applications and objections

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5 *Plaintiff S164/2018 v Minister for Home Affairs* [2018] HCA 51 [8].
6 *Hearne v Street* (2008) 235 CLR 125 [17].
7 *Khatri v Price and Another* [1999] FCA 1289 [14].
8 Ibid.
9 *Vicinity Funds Re Ltd v Commissioner of State Revenue* [2021] VSC 200 [16].
10 Ibid [17].

to the Court for hearing. They did not challenge the Court's jurisdiction to continue to hear the application as referred to the Court.

[21] The challenge by YV and TBA arises only because of the revision of the mine-plan. They argue the change amounts to a materially different application, which has not been assessed under the relevant statutory framework.

[22] Waratah acknowledged that the Court could defer deciding the challenge until there was further information about the different impacts of the revised plan and the scope of the objections. YV and TBA now agree.

[23] The latter identified several reasons for the Court to proceed with a hearing on both mine-plans.

[24] First, they say the factual basis for the two issues of jurisdiction and whether to recommend the grant of the applications are intertwined.

[25] At the first hearing, Waratah, YV and TBA and the statutory party agreed that the critical factor in the challenge to jurisdiction was the different impacts of the revised mine-plan. To that extent, there is a common factual foundation. However, the findings required to determine jurisdiction, and what the Court's recommendation should be, are distinct. They involve different enquiries for different purposes.

[26] To answer the challenge to jurisdiction, the Court must consider whether the revised mine-plan is so fundamentally different as to amount to a different application that has not complied with the statutory pre-conditions to referral to the Court.

[27] To decide what recommendations to make on the revised mine-plan, the Court must consider prescribed matters and properly made objections and weigh them in the balance in assessing the merits of the proposal.

[28] The changed activities and impacts must be considered for both, but to a different degree and with a different purpose.

[29] Second, YV and TBA submitted that the parties would suffer limited inconvenience if the Court conducted the hearing on both mine-plans. Waratah disputes that. The Court would be put to the trouble of hearing evidence about the original mine-plan,

and the parties would be put to the trouble and expense of making or meeting a proposal that Waratah has decided not to pursue.

[30] Third, YV and TBA argue that the original mine-plan has continuing relevance even if the Court has jurisdiction to make recommendations on the revised mine-plan. It may be relevant to explain the history of the matter and the evolution in the evidence, but its relevance would be limited.

[31] Fourth, YV and TBA raise the risk of complex evidential contests in drawing the jurisdictional line. That would most likely arise in hearing the evidence of expert witnesses. Sensibly, the parties have briefed the witnesses to address their evidence to alternative scenarios on the two mine-plans. That will assist both the parties and the Court in drawing that line.

[32] Finally, YV and TBA said that the hearing might be delayed by a judicial review of a ruling on jurisdiction. It is contrary to the orderly administration of justice to defer deciding a critical issue because it may be challenged.

[33] A challenge to jurisdiction is a threshold question and the circumstances of this case do not justify deferring it until after the hearing has concluded.

Does the Court have jurisdiction to hear the applications and objections based on the revised mine-plan?

[34] The referral of Waratah's application and objections to the Court for hearing properly invoked the Court's jurisdiction in relation to the application for a mining lease under the *Mineral Resources Act 1989* (Qld) (MRA), and the application for an environmental authority under the *Environmental Protection Act 1994* (Qld) (EP Act). That is not in contest.

[35] YV and TBA's challenge to the Court's jurisdiction arises because of the revised mine-plan notified by Waratah after the Court was seized of the matter. YV and TBA say the revised mine-plan has not been assessed, as the original one was, under a carefully staged statutory process prior to referral. Although their submissions centred on the environmental assessment of the proposal, I understood the challenge was to the Court's jurisdiction to hear both applications and the objections to them.

Although there is no dispute about that process, the following summary provides context for the parties' arguments.

[36] The applications for the mining lease and environmental authority were made under the MRA and EP Act respectively and were also assessed under the *State Development and Public Works Organisation Act 1971* (Qld) (SDPWOA).

[37] The MRA and EP Act prescribe the requirements for the applications,[11] public notice to affected parties and the public generally,[12] and environmental assessment under the EP Act, including of a draft environmental management plan.[13]

[38] Because the project was declared "a significant project" which required an Environmental Impact Statement under the SDPWOA,[14] the Coordinator-General conducted an environmental assessment under that Act.[15]

[39] That involved public consultation on terms of reference for the EIS;[16] preparation and public notification of the EIS;[17] a supplementary EIS;[18] and an evaluation report by the Coordinator-General.[19]

[40] The next step was for the statutory party to prepare a draft environmental authority,[20] which was publicly notified,[21] and there was an opportunity for any person to object to either or both applications.[22]

[41] Because objections were made to both applications, the applications and the objections were referred to the Court.[23] The Court's function is to hear evidence about the applications and objections and provide a non-binding recommendation to

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11 *Mineral Resources Act* 1989 (Qld) (MRA) s 245, *Environmental Protection Act 1994* (Qld) (EP Act) s 154. Both Acts have been used as they were at 2013.
12 MRA s 252A, 252B; EP Act s 254.
13 EP Act Chapter 5, Part 6.
14 *State Development and Public Works Organisation Act 1971* (Qld) (SDPWOA) s 26(1), (3). This Act has been used as it was at 2013.
15 SDPWOA Part 4.
16 SDPWOA s 29.
17 SDPWOA ss 32, 33.
18 SDPWOA ss 35(2).
19 SDPWOA s 35.
20 EP Act s 208.
21 MRA s 252A, 252B; EP Act s 254.
22 MRA s 260; EP Act s 216.
23 MRA s 265(2); EP Act s 219.

the relevant decision maker.[24] In the case of the mining lease, that is the Minister for Resources. For the environmental authority it is the Chief Executive of the Department of Environment and Science, the statutory party for this hearing.

[42] YV and TBA say the revised mine-plan was not assessed through that anterior process and is a fundamentally different application, including in terms of its impacts, for which the Land Court does not have jurisdiction.

[43] As noted in my decision of 5 October 2021,[25] the boundary between questions of jurisdiction and power may be difficult to discern, but all parties identified that the degree of change, whether to activities or impacts or both, is the critical factor.

[44] Waratah accepts that a change to a mining project could be so significant, whether by way of activities or impacts, that it amounts to a different project, but their revised mine-plan does not involve changes of that nature. It does not add any new activities; it does not expand any activities identified in the original plan; and abandoning the two open cut pits will reduce the impacts.

[45] The statutory party submits the change falls within the scope of the original application. As such it is not a question of jurisdiction, but of power. The Court has subject matter jurisdiction but must observe procedural fairness in exercising its administrative function.[26] The statutory party identified four circumstances in which the Court might not proceed with a hearing as a matter of procedural fairness. It says none of those arise here.

[46] Two primary issues arise from the parties' submissions:

1. Does the revised mine-plan propose a fundamentally different application to the one assessed?

2. As a matter of procedural fairness, ought the hearing be adjourned so the revised mine-plan can be assessed?

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24 MRA s 268, 269; EP Act ss 222, 223.
25 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 3)* [2021] QLC 36 [11]-[12].
26 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 [48].

Is the revised mine-plan a fundamentally different application?

[47] YV and TBA say it is the application, defined by the application documents, [27] that is referred to the Court,[28] and that this defines the scope of its jurisdiction.

[48] That submission is at odds with the relevant provisions. The Court is not confined to the application documents whether dealing with the application for a mining lease or an environmental authority.

[49] For the mining lease, MRA s 268 states the Court's function and jurisdiction is "to determine the relative merits of the mining lease application, and objections, and other matters…and make a recommendation to the Minister". MRA s 269(4) provides the framework within which the Land Court's decision must take place.[29] It specifies criteria the Court must consider. Waratah says the revised mine-plan is relevant to several of them. [30]

[50] For the environmental authority, the Court's function is to make an objections decision, taking into account specified matters.[31] However, that does not limit the criteria or matters the Court may consider in making its decision.[32]

[51] In any case, YV and TBA submit that the revised mine-plan is substantially and materially different from the original, including in terms of its impacts.

[52] Whether by change in activities or impacts, I am not persuaded the revised mine-plan proposes a fundamentally different application.

[53] Dealing first with activities, what is important is what will be authorised if the applications are granted.

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27 EP Act s 223.
28 EP Act s 219.
29 *New Acland Coal Pty Ltd v Smith & Ors* (2018) 230 LGER 88 [30].
30 MRA s 269(4)(i)-(m).
31 EP Act s 223.
32 EP Act s 557; *New Acland Coal Pty Ltd v Smith & Ors* (2018) 230 LGER 88 [57] considering s 316 of a later version of the EP Act, which is in the same terms as s 557 of the Act as at 2013.

[54] One objective of the MRA is "to provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals".[33] The MRA establishes a range of tenures to authorise those activities. The Minister for Resources may grant a mining lease:[34]

> for all or any of the following purposes –
> (a) to mine the mineral or minerals specified in the lease and for all purposes necessary to effectually carry on that mining;
> (b) such purposes, other than mining, as are specified in the mining lease and that are associated with, arising from or promoting the activity of mining.

[55] An applicant for a mining lease must "identify the mineral or minerals or purpose for which the grant of the proposed mining lease is sought".[35]

[56] If granted, the holder of a mining lease:[36]

> (a) may enter and be –
> (i) within the area of the mining lease; and
> (ii) upon the surface area comprised in the mining lease;
> for any purpose for which the mining lease is granted or for any purpose permitted or required under the lease or by this Act;

[57] In this case, the application for the mining lease states the purpose of the application as "coal". The revised mine-plan makes no change to that purpose.

[58] For the environmental authority application, Waratah and the statutory party submit that the activities identified in the revised mine-plan fall within the scope of the application. I accept that.

[59] The statutory party referred to Waratah's statement of "activities to be undertaken" if the authority is granted, which is "open cut and underground mining operation for the extraction of coal". The original mine-plan had both open cut and underground mining taking place within the BNR. The revised mine-plan abandons the open cut mining in that area. It does not add a new activity in the BNR. The abandonment of the two pits did not involve an expansion of the activities to be undertaken, and thus falls within the scope of the application.

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33 MRA s 2(f).
34 MRA s 234.
35 MRA s 245(1)(k).
36 MRA s 235(1)(a).

[60] Turning to the impacts, YV and TBA submit that abandoning the open cut pits will result in materially different impacts. They have not explained the differences or how they make the mine-plan fundamentally different to the application.

[61] YV and TBA say their argument is supported by statements made by both the Coordinator-General and the statutory party.

[62] The Coordinator-General concluded the revised mine-plan would amount to a change in the project.[37] I was concerned that this was founded on a misapprehension that the revised mine-plan involved an extension to underground mining in the BNR, which it does not. That has since been clarified by the Coordinator-General, who says this:

> "By way of clarification of the response provided on 18 June 2021 and again on 25 November 2021, the project's EIS did not contemplate underground mining only in the area of Open Cut Two South. The project's EIS contemplated underground mining under an open cut mine in this area. As a result, the previous response remains correct that the underground mining alone and associated impacts were not assessed by the Coordinator-General (for example, subsidence impacts)".[38]

[63] The Coordinator-General remains of the view that this is a project change for the purposes of the SDPWOA, but does not propose initiating a further assessment. Nor does Waratah. In those circumstances, it seems there is no mechanism to initiate further assessment under the SDPWOA.

[64] The subsidence impacts of underground mining alone in the area of the former Open Cut Two South has been considered by the statutory party. In its assessment report, it identifies "significantly different impacts" on environmental values.[39] It goes on to describe those different impacts as "reduced", or "lesser" impacts or as "localised" impacts.

[65] YV and TBA say that the different impacts need not be worse for the project to be fundamentally different. If that were so, the Court would be unduly constrained in advising the ultimate decision makers on the applications. Parties to a mining objection hearing often lead evidence from expert witnesses who might propose changes to the mine-plan or the method of mining in response to the objections. The

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37 Ex DES.0016.0001, pages 13 and 40.
38 Ex DES.0022.0001, page 2.
39 Ex DES.0018.0001, page 64.

Court's function in the administrative decision-making process is to assess the merits of the application and objections and make recommendations to the ultimate decision makers, who ought to consider the most current material available to them.[40]

[66] In conclusion, the Court is not confined by the application documents, and I find the revised mine-plan is not a fundamentally different application whether by reference to the change in activities or the impacts of those activities.

As a matter of procedural fairness, ought the hearing be adjourned so the revised mine-plan can be assessed?

[67] At the September 2021 hearing, the statutory party identified four circumstances in which the Court might decline to proceed with a hearing to observe procedural fairness, which is central to the implied conditions of the statutory process under the EP Act.[41] They were as follows:

> "The Court ought not proceed at the point that any one of the following arise:
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> a. if, following receipt of the further information requested by the Statutory Party and indicated at paragraph 19-20 of our Primary Outline it becomes clear that the reassessment by DES of the Draft EA would not be possible or practicable;
> b. if the Court were satisfied the changes sought are outside of Waratah's Application which was referred to this Court;
> c. if the objections originally made are not wide enough fairly to raise the effects that flow from Waratah's changed activities which could not reasonably be identified from the Application given what was then stated in the Environment Management Plan and the Environmental Impact Statement (and if there is no mechanism by which those additional objections could be incorporated, for example, by Waratah agreeing to take no issue with their inclusion);
> d. if this Court's process and procedures or considerations of fairness would not reasonably permit any necessary adjustments and amendments to be made in the course of this objections hearing".

[68] The statutory party says none of those circumstances arise here.

[69] First, the statutory party has prepared an assessment report on the revised mine-plan that identifies and justifies proposed changes to the draft environmental authority.

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40 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 45.
41 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 [47], [55], [57], [65].

[70] Second, the changes are not outside Waratah's applications which were referred to the Court.

[71] Third, both Waratah and the statutory party consider that YV's and TBA's objections are broad enough to cover the issues that arise for consideration because of the mine-plan change. On Waratah's concession about that, YV and TBA accept there is no question of procedural fairness because of the scope of the objections.[42] The statutory party has a duty to assist the Court and has prepared to do so, identifying potential changes to the draft environmental authority in response to the revised mine-plan and Waratah's further information about the expected impacts.

[72] Finally, as matters currently stand, I am satisfied adjustments can be made to the Court's process and procedures to ensure procedural fairness to all parties. Some adjustments have already been made. Facilitated by the CMEE Convenor, and with the commendable collaboration of the parties, the expert witnesses have been briefed to squarely address the implications of the revised mine-plan for their opinions. Further, the parties are assisted in preparing for the hearing by having now received the statutory party's view on possible adjustments to the draft environmental authority.

[73] Whether considered as a matter of jurisdiction, or as power, I find the Court can and should hear the applications and objections based on the revised mine-plan.

Orders

1. **I refuse the application to defer the challenge to jurisdiction to the conclusion of the hearing.**
2. **I find the Court can and should hear the applications and objections based on the revised mine-plan.**
3. **Costs are reserved, unless a party applies for a different order within 7 days, in which case I will make directions on that application.**

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42 Ex YVL.0284.0038, paragraph 19.