CASE NOTES

New South Wales

Costs of Litigation in Public Interest Environmental Cases

Richmond River Council v Oshlack

The future for public interest environmental litigation in New South Wales has been seriously eroded by the recent Court of Appeal decision in *Richmond River Council v Oshlack*[1] in which the Court (Clarke Shelter and Col JA) held that the public interest nature of proceedings was an irrelevant consideration in the exercise of judicial discretion to refuse an award of costs to a successful party in civil enforcement proceedings before the Land and Environment Court. This decision effectively overrules a line of authority in the Land and Environment Court stretching back more than 10 years[2] in which the Court's approach has indicated consistently that the public interest nature of proceedings, although not decisive in its own right, is nevertheless a significant factor which, when taken into account with other factors, could reveal special circumstances which would justify the court in refusing an award of costs to a successful party.

The Background

In December 1993 the Land and Environment Court (Stein J) had dismissed a challenge by *Oshlack* to the validity of a development consent granted by the council. Costs were subsequently claimed by the successful respondent against the unsuccessful applicant. Stein J refused an award of costs on the basis that there were sufficient special circumstances to justify a departure from the usual rule that costs should follow the event in legal challenges; that is, that the successful party should be awarded costs. Those special circumstances were the fact that the proceedings could properly be characterised as public interest litigation; that the basis of the legal challenge was arguable; that the proceedings raised serious and significant issues concerning environmental law and that the respondent was moved to litigate by worthy motives, namely, the protection of endangered fauna (koalas) and a desire to uphold public environmental laws.[3] The unsuccessful applicant appealed this finding, not on the basis that the original litigation could not be characterised as public interest litigation but that this characterisation together with the other special circumstances identified by Stein J were in fact irrelevant to the judicial discretion to award costs contained in s69 of the *Land and Environment Court Act* 1979 (NSW) (the *LEC Act*).

The Court of Appeal agreed with this submission. The basis of its finding was the majority High Court decision in *Latoudis v Casey*.[4] That case turned on s97(b) of the *Magistrates (Summary Proceedings) Act* 1975 (Vic) which authorised the court, when it dismissed an information or complaint, to order the informant or complainant to pay such costs of the defendant as the court thought just and reasonable. This legislation, like similar provisions in other states, including New South Wales at the time, displaced the old rule that the Crown neither paid nor received costs. Although clearly concerned with criminal rather than civil proceedings, in the course of judgment Mason CJ said:[5]

> "If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings".

Mason CJ went on to add that ordinarily costs should be awarded in favour of a successful defendant.[6]

1 Unreported CA 40120/94, June 19, 1996
2 The relevant authorities are cited in the judgment of Stein J in the Land and Environment Court decision in Oshlack (1994) 82 GERA 236
3 Oshlack v Richmond River Council (1994) 82 LGERA 236
4 (1990) 170 CLR 534
5 Ibid at 542-3
6 Ibid at 544

McHugh J also added:[7]

> "The fact that the informant has acted in good faith in the public interest or may have to meet the costs out of his or her own pocket is not a ground for depriving the defendant of his or her costs"

McHugh J considered that the only circumstances in which a successful defendant should be deprived of costs were where the defendant was guilty of some misconduct such as unreasonably inducing the informant to believe a charge could be successfully brought against the defendant or by unnecessarily increasing the costs of the action.[8]

By contrast, Brennan and Dawson JJ, although agreeing with the majority that it was appropriate for the court to lay down general principles to guide the exercise of the discretion, considered that the public interest or the public purpose of the litigation was a legitimate consideration in the exercise of discretion to award costs.

Clarke JA in *Oshlack* summarised the effect of the High Court Judgment in *Latoudis* in the following way:[9]

* where proceedings have failed it will ordinarily be just and reasonable to award the successful defendant costs;
* the purpose of an award of costs is to compensate the successful party - costs are not awarded to penalise the unsuccessful party
* its conduct may provide a sound basis for refusing to award it costs. The conduct of the unsuccessful party is, in general, not relevant.
* the fact that an unsuccessful plaintiff has acted in good faith in the public interest is not a ground for depriving the successful defendant of its costs.

On the basis of a split decision in the High Court based on a statutory discretion to award costs in criminal proceedings which are very different from the civil litigation brought under the statutory scheme established under the *Land and Environment Court* and *EPA Acts*, the Court of Appeal could find no basis for distinguishing *Latoudis* in its application to the *Oshlack* case; but Clarke JA did add that

> "while the reasoning in *Latoudis* excludes the public interest motives of a prosecutor from the ambit of relevant considerations it may be that the High Court will, in the future, be required to consider whether such a consideration is of relevance in the light of legislative changes in the law, such as open standing provisions".

Further Developments

Latoudis has since been referred to by the Supreme Court of Victoria in *South Melbourne City Council v Hall*am (No 2)[10] where an unsuccessful local government authority argued it should not have to pay costs because the litigation was brought in the public interest. Although the court could find no reason in this case why the normal expectation that costs should be awarded to the successful party should not be applied, in the course of judgment Tadgell J, admitting that there had been some latitude to this question in "public interest litigation" recognised

> "that there are cases which it is appropriate to treat as test cases raising questions of general public importance or interest in which the normal principles for an award of costs are not applied."[11].

The court recognised that these cases turned on their own circumstances; and that no definitive rules should be laid down. Stein J had clearly adopted a similar approach in *Oshlack*. Even a majority (Kirby P and Clarke JA) of the NSW Court of Appeal in *Attrill v Richmond River Shire Council*[12] in a case brought to clarify the meaning and extent of a local councils' exemption from liability for flood damage under s582A of the *Local Government Act* 1919 (substantially re-enacted in s733 of the *Local Government Act* 1993, agreed that costs should not follow the event in favour of council because

> "(t)he issue raised in the appeal is one of importance to local government. There has been a division of opinion within the Supreme Court. The determination of that dispute in this court is in the public interest."[13]

Inexplicably Clarke JA, having determined in *Oshlack* that public interest considerations were irrelevant to costs awards because of *Latoudis*, agreed with Kirby P that the public interest nature of the proceedings in *Attrill* was relevant to exercising a discretion not to award costs in that case. The power of the Land and Environment Court to

7 Ibid at 569
8 Ibid
9 Unreported, CA 40120/94, p6
10 ie (1994) 83 LGERA 30
11 Ibid at 309
12 (1995) 38 NSWLR 545
13 Ibid at 556 per Kirby P.

award costs under s69 (1) of the *Supreme Court Act* 1970 (NSW). *Latoudis* was not mentioned in *Attrill.*

Commentary

Latoudis could at least have been confined to the Land and Environment Court's ability to award costs in criminal proceedings under s52 of the *LEC Act.* Section 52 provides, similarly to the provision which was under scrutiny in *Latoudis*, that such costs as the judge determines to be "just and reasonable" can be awarded to either the defendant or prosecutor dependant on the outcome of the proceedings.

In searching for a basis upon which to argue that *Latoudis* should not be automatically applied to civil public interest environmental cases the mention by Clarke JA of open standing provisions provides an immediate point of reference. *Oshlack* brought his case under s123 *Environmental Planning and Assessment Act* 1979 (NSW) (the *EP&A Act*) which allows "any persons" to seek an order to remedy or restrain a breach of that Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach. These open standing provisions reflect the general philosophy and intent of the legislation, that members of the public should have access to and be able to participate in environmental decision-making. As Sheller JA acknowledged in *Oshlack* s123:

> "there was an acknowledgment in part at least, that those directly responsible for the administration of the Act and those seeking dispensations pursuant to its provisions might not always be relied upon to ensure that breaches of the Act were remedied or restrained".

The public interest in enforcing the law is clearly matched by the statutory acknowledgment in s5 of the Act that the public also has an interest in participation in environmental planning in other ways. As Street CJ said in *Hannan Pty Ltd v Electricity Commission of NSW* (No 3)[14], cited in part by Sheller JA in *Oshlack.*[15]

> "[I]t is the duty (of the Land and Environment Court) in formulating "such order as it thinks fit", to have regard at all times to the pursuit of the objects of the (*EPA Act*) as set out in s 5. This involves, in appropriate cases, the evaluation of matters extending beyond the mere determination of the rights and matters in dispute between the immediate parties. It involves due weight being given to the public interest and the interests of other affected persons in the overall context of the pursuit of the objects broadly set out in s5...the task of the court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes".

These observations lead to a somewhat illogical conclusion that whereas public purpose and the public interest is a relevant consideration in decision-making and law enforcement under the *EP&A Act*, it is irrelevant to the exercise of a judicial discretion to award costs arising out of proceedings brought under that Act. This is not a situation brought about by the *EP&A* Act or indeed s69 of the *LEC Act*, nor validly deduced from interpretation of the relevant provisions of the legislation, but brought about supposedly by the application of general guidelines on the award of costs generally in civil and criminal cases. This approach ignores the scope, purpose and intent of the *EP&A Act* in its approach to public participation considerations which have clearly influenced the approach of the Land and Environment Court in its attitude to costs, and which have been regarded also as relevant in other jurisdictions.

Scope, Purpose and Intent of the EP&A Act

It is well settled that the application of discretionary powers may be constrained and directed by the scope, purpose and intent of the legislation under which they are conferred. Clearly the expressed purposes of the *EP&A Act* include public participation as a relevant consideration and its provisions expedite public participation and public enforcement of environmental laws. That being so, public interest considerations should surely be relevant not only to the substantive s123 proceedings. In other words the purpose and intent of the *EP&A Act* should govern the discretion to award costs arising out of s123 proceedings conferred under s69 of the *LEC Act.*

Interestingly in 1989, Toohey J, in the majority in *Latoudis*, had this to say about the open standing provisions of s123 and the issue of costs:

> "[R]elaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event it will be a factor that looms large in any consideration to initiate litigation"

One can only speculate whether Toohey J would have been surprised at the way in which the judgment he helped to formulate in *Latoudis* has been applied to public interest litigation by the New South Wales Court of Appeal in

14 (1985) 66 LGRA 306 at 313

15 Unreported CA 40210/94, p9

Oshlack.

Using s5 to define the scope of parliamentary intent under the *EP&A Act* has been raised again in the *Rosemount* case. In the Land and Environment Court , Stein J used the objects clause, s5 to qualify the broad discretion to make State Environmental Planning Policies (SEPPs) under ss37 and 39. The Court of Appeal however indicated that the language of ss37 and 39 indicated that the discretions conferred were not to be confined by reference to s5. The language used in ss37 and 39 was specific, detailed, clear and unambiguous and although in cases of ambiguity reference to an objects clause might be appropriate that was not the case here. The court in Rosemount was effectively stating that the specific discretions conferred upon the Minister overrode the general application of s5 objectives, an approach open to some argument.

Leaving that aside, however, s69 of the *LEC Act* confers a wide discretion to award costs; but if the provisions of the *EP&A Act* were not relevant to an exercise of this discretion in Oslack, why were general principles relating to awards of costs relevant? If the discretion in s69 is wide enough to exclude the general principles relating to costs awards outlined in *Latoudis.* On the other hand if the discretion was to be guided by those general principles spelt out in *Latoudis*, why was it not to be guided by the legislation which had spawned the litigation?

In *Woollahra MC v Minister for Environment* [16] a differently constituted Court of Appeal interpreted a broad discretion conferred on the Minister to approve developments in national parks to be confined by the scope intent and purpose of the *National Parks and Wildlife Act* 1974 (NSW) (there was no objects clause). Similarly any discretion to award costs should be confined within the intent of the statutory provisions under which an action is brought. As Tadgell J remarked in *Hallam*:

> "it has often been said that a discretionary power with respect to the incidence of costs ought not to be fettered by glosses which would lead to frustration of the obvious purposes of the discretion".[17]

Application to Other States

In one sense the decision in *Oshlack* has been assisted by the failure of the New South Wales legislature to introduce the sorts of reforms to environmental laws in general and costs awards in particular which other States have implemented in recent years. Paradoxically New South Wales' civil enforcement provisions and the establishment of the Land and Environment Court have been held up as the successful model to emulate. Other States have since broadened their standing rules in environmental litigation (although not adopting the any person provision) and the Land and Environment court model has been used to establish similar specialist courts or tribunals in all States except Western Australia (Victoria has a division of the Administrative Appeals Tribunal). Importantly when other States created specialist environmental courts the legislation was more specific about the powers of the courts to award costs. Arguably this legislation displaces the guidlines adopted by the High Court in *Latoudis* and therefore public interest environmental litigation in other States is not likely to be as disadvantaged in relation to costs awards as it may be in future in New South Wales.

In Tasmania for example, the power of the Resource Management and Planning Appeal Tribunal to make an order for costs is derived from s28 of the *Resource Management and Planning Appeal Tribunal Act* 1993 (Tas) which provides that the tribunal must make an order in relation to costs as it thinks fit, but in making such an order it must take into account:

* the result of the appeal;
* whether a party has raised frivolous or vexatious issues (in which case the appeal must be dismissed with costs.

It will be noticed immediately that this legislation requires the Tribunal to take into account the conduct of all parties to an appeal. By contrast, the approach adopted in *Latoudis* and applied by the New South Wales Court of Appeal in *Oshlack* regards as irrelevant the conduct of the unsuccessful party.

In dealing with applications for costs the Tasmanian Tribunal has consistently indicated that all cases will be considered on their own facts and a successful party might not be awarded costs.

Consequently, the fact that the appellants were successful in their appeal was not necessarily an acceptable argument in itself that costs should be awarded in their favour. The general approach taken by the tribunal has recently been upheld in the Supreme Court of Tasmania in *Carnevale v Hobart City Council*[18] where Underwood J confirmed the tribunal's approach to costs orders. Underwood J agreed that costs ought never to be considered as a penalty or punishment but merely as a consequence of a party having created litigation in which it has failed,[19] but more importantly the power to award costs was entirely the creation of statute and there was no prima facie rule that costs should follow the event, although that was a general principle the common-law courts had adopted (see also *Wyatt v Albert Shire Council*) *Carnevale* was a case dealing with an award of costs flowing from a merits appeal to theTribunal.

16 (1991) 23 NSWLR 710

17 Ibid at 309

18 Unreported, Supreme Court of Tasmania, Underwood Serial No A3/1996

19 Applying Dicta of Lord Cranworth in Clarke & Chapman v Hart (1859)

The practice of the Land and Environment Court has been not to award costs in merits appeals. Importantly, however, unlike the Land and Environment Court the TasmanianTribunal has never distinguished between its approach to costs in merits appeals and its approach in legal appeals and civil enforcement cases. Neither the Tasmanian legislation nor the Tribunal has ever made such a distinction in planning and environment cases and the Supreme Court in *Carnevale* did not raise it. Indeed s64 (12) of the *Land Use Planning and Approvals Act* 1993 (Tas) under which civil enforcement proceedings are brought, is cast in like terms to s28 of the *Resource Management and Planning Tribunal Act.*

In New South Wales s69 of the *LEC Act* also makes no distinction between merits and legal cases. In merits appeals however, the court has determined that only in exceptional cases would costs be awarded in planning and building appeals but that in legal cases costs should follow the event unless special circumstances indicate otherwise.

The High Court in *Latoudis* did not refer to merits appeals and neither did the Court of Appeal in *Oshlack.* Theoretically the effect of *Oshlack* extends to merits appeals and although it would be unthinkable that administrative appeals should be treated in this way as no different to legal appeals, the possibility cannot be dismissed. This would be a disaster for merits appeals under the *EP & A Act*, and the situation really needs immediate clarification.

Other States also broadly adopt the position that the parties should generally bear their own costs unless some frivolous or vexatious conduct can be identified. In Queensland, the parties will generally be expected to bear their own costs and the circumstances in which discretion may be exercised to depart from this rule are restricted to defined circumstances.[20] These are frivolous and vexatious conduct:

* default on the proceedings
* no reasonable notice of adjournment; and
* a local authority not taking an active part in the proceedings where it had a responsibility so to do.

Relevant considerations for an award of costs under the *Judicial Review Act* 1991 (Qld) specifically include the public interest (s 40(2)(b)).

In South Australia, the court may only make an order for costs where the proceedings are frivoulous or vexatious or have been instituted for the purpose of delay or obstruction.[21]

In Victoria, s50 of the *Administrative Appeals Tribunal Act* 1987 (Vic) provides that the parties will bear their own costs but the tribunal has a discretion to depart from this rule if the circumstances justify.

The Federal Court may award costs in its discretion unless any other Act provides to the contrary.[22]

It will be noticed that in all the State jurisdictions the conduct of the unsuccessful party is, either expressly or by necessary implication relevant to the exercise of the statutory discretion to award costs. This suggests that the High Court decision in *Latoudis* cannot apply to environmental litigation before the specialist environment courts and tribunals in States other than New South Wales.

Conclusion

It is unacceptable that a High Court decision on costs in criminal proceedings aimed principally at discouraging prosecutors from bringing what almost amounts to vexatious litigation should be used as a basis on which to wind back the legitimate exercise of judicial discretion in public interest civil proceedings in environmental litigation in New South Wales. It has already affected a litigant who, when legal proceedings were commenced, might reasonably have expected the Land and Environment Court to consider exercising its discretion as to costs in that case based on public interest considerations (*Seaton v Mosman Municipal Council* (*the Balmoral Bather's Pavilion* case)) where Stein J felt compelled to apply *Oshlack* albeit under protest.

The New South Wales legislature needs to respond to the Court of Appeal decision in *Oshlack* by swift and effective amendment to the *LEC Act* to make it clear that the conduct of all parties to litigation before the court may be taken into account in the exercise of the statutory discretion to determine where the costs of an action should fall. It would be regrettable if New South Wales which for so long has led the way in enforcement of environmental laws, should suddenly find itself with arguably the least restrictive procedures on enforcement of environmental laws but the most restrictive citizen capacity to take advantage of such laws.

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20 Local Government (Planning and Environment Act 1990 (Qld) s 76
21 Environment Resources and Development Court Act 1994 (SA) ss 29.44
22 Federal Court of Australia Act 1976 (C'th) s 43