# Land and Environment Court of New South Wales



# Blue Mountains Conservation Society Inc v Delta Electricity [2009] NSWLEC 150 (9 September 2009)

Last Updated: 14 September 2009

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Blue Mountains Conservation Society Inc v Delta Electricity [2009] NSWLEC 150

PARTIES: PLAINTIFFBlue Mountains Conservation Society IncDEFENDANTDelta Electricity

FILE NUMBER(S): 40358 of 2009

CATCHWORDS: COSTS :- application by plaintiff for protective costs order limiting costs recoverable by either party - civil enforcement of POEO Act in relation to discharge of waste water into river - application prior to points of defence or evidence of defendant being filed - purpose of protective costs order in public interest cases - factors to consider in making protective costs order - whether litigation public interest - protective costs order made

LEGISLATION CITED: Civil Procedure Act 2005 s 58, 60Civil Procedure Rules 1998 (UK) r 1,1, 3.1, 44.3Disability Discrimination Act 1952 (Cth)Family Provisions Act 1982Federal Court Rules 1979 order 62A Land and Environment Court Rules 2007 r 4.2Protection of the Environment Operations Act 1997 s 55, 88, 120, 252Supreme Court Act 1981 (UK) s 51Uniform Civil Procedure Rules 2005 r 42.4

CASES CITED: Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) (No 4) [2008] FCA 858British Columbia (Minister of Forests) v Okanagan Indian Band 2003 SCC 71 at 2003 SCC 71; 313 N.R. 84 Corcoran v Virgin Blue Airlines Pty Ltd [2008] FCA 864Dalton v Paull (No 2) [2007] NSWSC 803Darlinghurst Residents' Association v Elarosa Investments Pty Ltd (No 3) (1992) 75 LGRA 214 Environment Protection Authority v Leaway Pty Ltd [2006] NSWLEC 44Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Review Agency) 2007 SCC 2, J.E 2007–211Oshlack v Richmond River Shire Council (1994) 82 LGERA 236 Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72R v Secretary of State for the Home Department ex parte Salem [1999] UKHL 8; [1999] 2 All ER 42 R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] 4 All ER 1Re Sherborne Estate (No 2); Vanvalen v Neaves [2005] NSWSC 1003; (2005) 65 NSWLR 268Richmond River Council v Oshlack (1996) 39 NSWLR 622 Tobin v Ezekiel [2008] NSWSC 1108Woodlands v Permanent Trustee Co Ltd (1995) 58 FCR 139

TEXTS CITED: Australian Law Reform Commission, Report No. 75: Costs Shifting – Who Pays For Litigation (1995)

CORAM: Pain J

DATES OF HEARING: 18 August 2009

JUDGMENT DATE: 9 September 2009

LEGAL REPRESENTATIVES

PLAINTIFFMr T HowardSOLICITORSEnvironmental Defender's Office (NSW)DEFENDANTMr B Coles QC with Ms H IrishSOLICITORSMiddletons

JUDGMENT:

**THE LAND AND**

**ENVIRONMENT COURT**

**OF NEW SOUTH WALES**

**Pain J**

**9 September 2009**

**40358 of 2009 Blue Mountains Conservation Society Inc v Delta Electricity**

**JUDGMENT ON APPLICATION FOR PROTECTIVE COSTS ORDERS**

1 **Her Honour**: The Plaintiff commenced civil enforcement proceedings seeking declarations and orders in relation to possible breaches of s 120 of the *Protection of the Environment Operations Act* 1997 (POEO Act) by the Defendant between May 2007 and April 2009. The proceedings are enabled by s 252 of the POEO Act which states that any person can seek an order in this Court to remedy or restrain a breach of the POEO Act. The declaration sought is that the Defendant polluted the Cox's River near Lithgow between May 2007 and April 2009. The orders sought are that the Defendant stop polluting the Cox's River and mitigate harm caused to the Cox's River. The Plaintiff has filed a Notice of Motion on 11 June 2009

which seeks a protective costs order.

2 The Points of Claim state that the Defendant, as owner, occupier and operator of, and having the management and control of, the Wallerawang Power Station (WPS) has introduced salt, copper, zinc, aluminium, boron, fluoride and arsenic into the waters of the Cox's River. It is claimed that the change in condition of the waters caused by the introduction of this matter has made, or is likely to make, the waters unclean, noxious, poisonous, impure and harmful to aquatic life, animals, birds or fish. The introduction of this matter is said to be a result of the Defendant discharging waste waters from the cooling towers and/or associate plant into the Cox's River at a point approximately 200m to the south-south east of the point where the Cox's River exits Lake Wallace (the Tortuous Watercourse). The Defendant is the holder of environment protection licence No 766 issued under s 55 of the *Protection of the Environment Operations Act* 1997 (the POEO Act).

3 An amended Notice of Motion which I gave leave to the Plaintiff's counsel to file at the hearing on 18 August 2009, sought two orders, orders 3 and 4 set out below, in addition to the original motion. The orders sought were:*1. A order that the maximum costs that may be recovered by one party from another in these proceedings is the sum of ten thousand dollars ($10,000).2. In the alternative to the order sought in prayer 1 above, an order that the maximum costs that may be recovered by one party from another in these proceedings be such sum as is specified by the Court upon determination of this motion.3. An order that the maximum costs that may be recovered by one party from another in relation to this Notice of Motion is the sum of five thousand dollars ($5,000) or such other sum as is specified by the Court upon determination of this motion.4. An order that the application for the order sought in paragraph 3 above, be dealt with prior to the hearing of the Notice of Motion for a maximum costs order sought in paragraph 1, above.*

(Note: underlining denotes amendment)

*Costs under the Civil Procedure Act 2005/Uniform Civil Procedure Rules 2005*4 The relevant sections of the *Civil Procedure Act* 2005 (the CP Act) are s 58 and s 60 which provide:

***58 Court to follow dictates of justice***

*(1) In deciding:*

*(a) whether to make any order or direction for the management of proceedings, including:*

*(i) any order for the amendment of a document, and*

*(ii) any order granting an adjournment or stay of proceedings, and*

*(iii) any other order of a procedural nature, and*

*(iv) any direction under Division 2, and*

*(b) the terms in which any such order or direction is to be made,*

*the court must seek to act in accordance with the dictates of justice.*

*(2) For the purpose of determining what are the dictates of justice in a particular case, the court:*

*(a) must have regard to the provisions of sections 56 and 57, and*

*(b) may have regard to the following matters to the extent to which it considers them relevant:*

*(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,*

*(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,*

*(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,*

*(iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),*

*(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,*

*(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,*

*(vii) such other matters as the court considers relevant in the circumstances of the case.*

*...*

***60 Proportionality of costs***

*In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.*

5 The Plaintiff seeks an order pursuant to r 42.4 of the *Uniform Civil Procedure Rules* 2005 (the UCPR) known as a protective costs order (PCO):

***42.4 Power to order maximum costs***

*(1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.*

*(2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party:*

*(a) has failed to comply with an order or with any of these rules, or*

*(b) has sought leave to amend its pleadings or particulars, or*

*(c) has sought an extension of time for complying with an order or with any of these rules, or*

*(d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:*

*(i) progress of the proceedings to trial or hearing, or*

*(ii) trial or hearing of the proceedings.*

*(3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:*

*(a) progress of the proceedings to trial or hearing, or*

*(b) trial or hearing of the proceedings.*

*(4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).*

*Should order 4 in the Notice of Motion be dealt with first?*6 At the outset of the hearing the Plaintiff sought to have the Court determine whether to make prayer 4 before hearing the substantive issues in relation to prayers 1 and 2. The Defendant opposed the Court considering prayer 4. After argument on whether order 4 should be dealt with first, I held the substantive orders sought in the motion would proceed, namely prayers 1 and 2, and held that prayer 3 can be dealt with at the finalisation of any orders. I did not deal with prayer 4

first and it has no further role to play.

*Evidence relied on by the Plaintiff*7 The evidence of the Plaintiff read on the motion was the evidence filed so far in the proceedings to support the principal claim. The Plaintiff read the affidavits of Tara Cameron, President of the Blue Mountains Conservation Society (BMCS), affirmed 2 June 2009 which identifies the objectives and activities of the BMCS. The BMCS was formed in 1996 by the merging of the Upper and Lowe Blue Mountains Conservation Societies which themselves were descendants of a conservation society formed in 1961. The BMCS is the peak environmental group in the Blue Mountains region and, according to its mission statement, aims to promote ecological sustainability, promote the natural environment and oppose human activities which degrade or destroy it. Its main object as provided for in it Constitution is to disseminate and foster an understanding of the ideals of conservation among its members and in the public generally particularly in relation to the unique resources of the Blue Mountains. The BMCS does not employ staff and the members of its various committees are volunteers. It derives income from membership fees, donations, sales from its own nursery, a government grant and interest on investments. In the year ending 28 February 2009 the BMCS recorded a loss of $53,727. The loss arose from the depreciation of the value of the managed investments which wiped out modest surpluses in the previous three years. I note that the balance sheet for 28 February 2009 attached to the affidavit shows the BMCS has $134,257 in managed investments.

8 Ms Cameron stated that the BMCS is pursuing this litigation as it believes that the water quality in the Cox's River which forms part of the Sydney Water Drinking Catchment was degraded by the actions of the Defendant and that the case is in the public interest. The BMCS has communicated with the Department of Environment and Climate Change (DECC) on this issue which Ms Cameron believes has not taken any action to date. Ms Cameron states that the BMCS's income sources are not guaranteed. She states that the BMCS has committed financial resources to the proceedings including engaging a water

quality monitoring expert and making a Freedom of Information application and has committed to paying other expert and legal fees in the future. The BMCS management committee meeting on 22 November 2008 resolved to pursue these proceedings only if the PCO can be sought. Continuing litigation without making such an order could threaten the BMCS's ongoing viability and cause it to become insolvent.

9 Ms Cameron gave brief oral evidence that $20,000 (order 1 states $10,000) was the amount of costs beyond which she believed that BMCS would not continue with the litigation if a PCO was not made. This was based on consultation by telephone with some members of the BMCS's management committee and would need to be confirmed in a meeting of the committee. According to minutes of the management committee dated 22 November 2008 attached to her affidavit, legal aid has been refused. She was cross-examined about how the decision to proceed with the case was determined, it being by the management committee with notification to members through the newsletter. There has been no request to members to make individual contributions to the case.

10 Mr Christiaan Jonkers affirmed an affidavit dated 29 July 2009 concerning water testing for salinity conducted in the vicinity of the Tortuous Waterway and the Cox's River over many months. Mr Jonkers is a volunteer of Streamwatch, a water monitoring program that supports local communities to investigate water quality, including the Lithgow Environment Group of which Mr Jonkers is a part. Mr Jonkers has undertaken training in water quality testing provided by Streamwatch for the purposes of testing water quality at 35 sites along the Cox's River. This included sites within the vicinity of the Tortuous Watercourse. Each of 12 sites initially nominated for testing were and continue to be monitored about once a month and the other sites are monitored less frequently. Testing is conducted in accordance with guidelines in a manual produced by Streamwatch in association with Sydney Water and the Sydney Catchment Authority. Mr Jonkers sets out in detail how this testing is conducted and by

whom. Mr Jonkers states that he has identified “OverRange” salinity levels in the vicinity of the Tortuous Watercourse and has observed water of the Cox’s River at the top of the Lake Wallace dam wall which appeared to be grey with dirt brown froth. He attests that the water temperature appeared warmer than the water below a nearby dam wall and that this water had elevated phosphate levels.

11 An expert report of Dr Ian Wright, freshwater ecologist, was exhibited to Mr Wright’s affidavit affirmed 28 May 2009 (exhibit B). Dr Wright investigated water quality in the upper Cox’s River in July and August 2008 focussing on the assessment of any impact of wastewater discharges from the WPS. Testing of water occurred at five sites including three sites on the Cox’s River and one site on the Tortuous Watercourse. Further testing was undertaken on 24 March 2009. Dr Wright also considered the results of testing set out in the affidavit of Mr Jonkers and data reported by the Defendant to the Environment Protection Authority as a condition of its licence. Dr Wright relied on water guidelines for toxicants published by the Australian and New Zealand Environment and Conservation Council in drawing conclusions as to toxicity. The conclusion of Dr Wright’s report states that there is water quality impairment due to the inflow of WPS wastewaters into the Cox’s River from the Tortuous Watercourse. This impairment is a change in the physical, chemical and biological nature of the water from 2007 to 2009. Dr Wright states that the Tortuous Watercourse is contaminated with elevated levels of salt and heavy metals including aluminium, arsenic, copper, nickel, zinc, boron and fluoride. He opines that it is likely that more sensitive species across many biological groups would be damaged or killed by the elevated toxic levels. He also states that other studies he reviews in his report suggest there is a high risk of bioaccumulation of heavy metals such as copper and zinc which may pose a risk to consumers of locally caught fish.

12 The Plaintiff tendered a bundle of the following documents:· Letter from the Environmental Defender’s Office (EDO), the Plaintiff’s solicitor, to DECC dated 10 March 2008 drawing DECC’s attention

to concerns of water quality in the Cox's River due to discharges from the Defendant's and another company's wastewater discharges. This letter formally requests DECC to take action against the Defendant and another company for water pollution offences. The EDO states that it requests confirmation if such action will be taken so that it can consider whether to advise its client to commence proceedings in this Court.· Letter in reply from DECC to the EDO dated 18 April 2008 in which DECC states that, inter alia, it is aware of the results of water quality testing referred to by the EDO and confirming DECC is not intending to prosecute the Defendant for water pollution offences.· Letter from the EDO to the Defendant dated 28 November 2008 demanding that the Defendant cease causing and/or permitting pollution of water. Evidence of water pollution relied on by the Plaintiff is referred to and a study of the Sydney Catchment Authority titled "Electrical Conductivity of the Upper Cox's River" dated August 2007 is attached.· Letter in reply from the Defendant's solicitors to the EDO dated 24 December 2008 stating that the Defendant acts in accordance with its environment protection licence and will continue to do so. It states that the Defendant has and is prepared to investigate the allegations further but will strenuously defend the matter if it proceeds further in the absence of new evidence.· Two newspaper articles published in the Sydney Morning Herald on 18 June 2009 and 19 June 2009, respectively which refer to the water testing undertaken by Mr Jonkers and Dr Wright, the Defendant's environment protection licence, correspondence between DECC and the Sydney Catchment Authority and the current position of DECC in relation to the allegations of water pollution.

13 The Defendant's environment protection licence No 766 was tendered by the Plaintiff. Attention was drawn to the monitoring conditions relating to four permissible discharges into the Cox's River.

14 The Plaintiff also tendered extracts of the Defendant's 2008 financial report identifying total assets of Delta in 2008 of $2,738,866 billion and total equity of $869.970 million. Profit for 2008 was

$87,667 million.

*Defendant's evidence*15 The Defendant accepted for the purposes of these proceedings that the Plaintiff has an arguable case. Its evidence was directed to the likely legal and other costs if this matter proceeds to hearing.

16 Two affidavits of Timothy Webster, solicitor for the Defendant, affirmed on 5 August 2009 and 12 August 2009 respectively were read. Mr Webster's first affidavit estimates the legal costs and other disbursements that the Defendant is likely to incur in defending the proceedings up to and including a hearing. Mr Webster attests to having become familiar with the costs and disbursements ordinarily incurred by parties to proceedings and to the process of assessing costs through his experience as a litigator in private legal practice. Mr Webster reviews in his affidavit the court appearances in this matter to date, the issues raised by the Summons and Points of Claim and correspondence between the parties as to the evidence that the Plaintiff is likely to rely on in the substantive proceedings. His affidavit annexes a schedule of the likely costs to be incurred by the Defendant in defending the proceedings based on assumptions as to rates for solicitors, counsel and experts. Mr Webster estimates the total costs to be incurred by the Defendant at $332,581. If the Defendant is successful and the Plaintiff is required to pay the Defendant's costs on an assessed basis then the Plaintiff is likely to be liable to pay between $232,000 and $266,000.

17 An affidavit of Alyson Ashe, solicitor and costs consultant, was sworn 17 August 2009 and read for the Defendant. Ms Ashe provides an expert report as to the fairness and reasonableness of the costs estimated by Mr Webster. Ms Ashe states that the estimate of Mr Webster is reasonable. Ms Ashe independently assesses the likely costs to be incurred as $285,420.50 exclusive of GST. The assumptions on which this estimate is based are set out in her affidavit.

*Plaintiff's submissions*18 The litigation is in the public interest. In holding that an unsuccessful litigant was not required to pay the successful party's costs, Stein J in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 discussed public interest litigation and its relationship with costs at 238:

*The notion of public interest litigation has been gaining ground in Australia over the last decade. The concept derives from principles of public law rather than private. The development springs from the increasing access of individual members of the public and groups to approach the courts to seek to enforce aspects of public law. This is particularly so in the area of environmental law where many New South Wales statutes include open standing provisions enabling "any person" to seek to enforce breaches of the law*

19 Stein J quoted Toohey J from an address his Honour gave to the International Conference on Environmental Law in 1989:

*...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.*

20 Stein J also referred to his decision in *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd (No 3)* (1992) 75 LGRA 214 which he summarised as follows:

*I made no order for costs following an unsuccessful challenge to a development consent. I found that the proceedings could properly be characterised as public interest litigation. I took account of the notoriety of the application, the public controversy, the considerable environmental impact of the forty-three storey tower block and the*

*significant number of diverse objectors. I also noted that the challenge was arguable and raised significant and serious issues which contributed to the wider understanding of aspects of environmental law. In summary I concluded that the circumstances of the litigation established sufficient special reason to depart from the ordinary rule.*

21 In the High Court, Gaudron and Gummow JJ summarised the matters Stein J took into account at 80-81 of *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72:

*...the primary judge took various matters into account. They included the following:*

*(i) The "traditional rule" that, despite the general discretion as to costs being "absolute and unfettered", costs should follow the event of the litigation "grew up in an era of private litigation". There is a need to distinguish applications to enforce "public law obligations" which arise under environmental laws lest the relaxation of standing by s 123 have little significance.*

*(ii) The characterisation of proceedings as "public interest litigation" with the "prime motivation" being the upholding of "the public interest and the rule of law" may be a factor which contributes to a finding of "special circumstances" but is not, of itself, enough to constitute special circumstances warranting departure from the "usual rule"; something more is required.*

*(iii) The appellant's pursuit of the litigation was motivated by his desire to ensure obedience to environmental law and to preserve the habitat of the endangered koala on and around the site; he had nothing to gain from the litigation "other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna".*

*(iv) In the present case, "a significant number of members of the*

*public" shared the stance of the appellant as to the development to take place on the site, the preservation of the natural features and flora of the site, and the impact on endangered fauna, especially the koala. In that sense there was a "public interest" in the outcome of the litigation.*

*(v) The basis of the challenge was arguable and had raised and resolved "significant issues" as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and relating to the ambit and future administration of the subject development consent; these issues had "implications" for the Council, the developer and the public.*

*(vi) It followed that there were "sufficient special circumstances to justify a departure from the ordinary rule as to costs".*

22 At 91 Gaudron and Gummow JJ held that these considerations were relevant ones and that the Court of Appeal decision in *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 disturbing the order made by Stein J was incorrect (Kirby J concurring, Brennan CJ and McHugh J dissenting).

23 The criteria applied in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 4 All ER 1 (*Corner House*) at [74] are also relevant to the decision whether to make a PCO under r 42.4.

24 Protective costs orders have been made in the Federal Court under Federal Court Rules 1979 order 62A r 1 (in similar terms to UCPR r 42.4) by Wilcox J in *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 and by Bennett J in *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

25 Whether there is potential for special orders to be made given there has been no determination of the issues in a final hearing requires consideration. The special factors are: (i) the critical importance of

water quality in the Sydney drinking water catchment, as identified in the evidence of Dr Wright(ii) the proper approach to major infrastructure in the catchment(iii) significant issues in the construction of environmental protection licences and construction of s 120 of the POEO Act.

26 One issue that could arise is if an environmental protection licence requires certain substances to be monitored does that mean the holder of the licence is permitted to discharge these substances without express authorisation of the licence. The respective financial resources of the parties can also be weighed up. Section 60 of the CP Act does not limit the making of a PCO under r 42.4.

27 The Plaintiff has a prima facie case, and the evidence of Ms Cameron, the President of the BMCS, is that the matter will not proceed unless an order is made by the court limiting the costs payable by the Plaintiff in the event the Plaintiff is unsuccessful in the proceedings.

*Defendant's submissions*28 The unfettered discretion to award costs under r 42.4 complements the obligation imposed by s 60 of the CP Act that the practice of a court must be to ensure that costs are proportionate to the issues in a case. There are three cases in which the Supreme Court has made orders under r 42.4.

29 In *Re Sherborne Estate (No 2); Vanvalen v Neaves* [2005] NSWSC 1003; (2005) 65 NSWLR 268, Palmer J declined to make any special or capping order in proceedings under the *Family Provisions Act* 1982, *"a family dispute between people of quite modest means"*, on application by an unsuccessful party following four days' hearing and judgment in the substantive proceedings.

30 In *Dalton v Paull (No 2)* [2007] NSWSC 803, involving *"a small estate"*, which *"must have been plainly obvious to the plaintiff from early in the proceedings"*, and in the context of Supreme Court Practice Note SC Eq 1, announced 17 August 2005 (which *"makes it*

*clear that in cases where the estate is under $500,000, the court may cap the costs of a successful claim"*), the plaintiff achieved only a very modest result, and did not make a full and frank disclosure to the Court in respect of a matter important to his eligibility. Macready AJ made a capping order providing that the plaintiff's costs on the ordinary basis be capped at the amount of $25,000 and the defendants on an indemnity basis be paid or retained out of the estate of the deceased.

31 In *Tobin v Ezekiel* [2008] NSWSC 1108, *"a dispute between brothers and sisters over their mother's will"*, where the plaintiffs had served 49 affidavits and reports (and there were more to come) and served 71 subpoenas on third parties to produce documents, and the defendants had served 20 affidavits and reports and issued two subpoenas and it appeared that there were more to come, and the defendants (the executors of the estate) sought the Court's permission to mortgage the estate for more than a third of its value to pay their lawyers to conduct their case, Palmer J observed that *"Both sides have already incurred enormous legal costs, grossly disproportionate to the amount in dispute and to the issues involved"*. His Honour formed the view on a tentative basis (having not yet heard the parties on the question) that the trial of the case should not occupy more than four days and foreshadowed a further case management hearing including as to why the costs to be incurred from then until the conclusion of the trial should not be capped under UCPR r 42.4. The unreported judgments do not disclose what happened next.

32 These cases emphasise that the power in r 42.4 is directed to the need to ensure that costs are proportionate to the issues the parties are raising so that a Court may put a brake on intemperate and disproportionately expensive conduct of proceedings. It is not a tool in the armoury of well intentioned public interest litigants but it is to be applied in the context of s 60 of the CP Act to ensure proportionality of costs relative to the complexity of the issues. It is not to provide risk minimisation to protect other activities of BMCS. The rule is not intended as a lever for those who do not want to risk

too much money in litigation.

33 Although the order limiting costs is sought by the Applicant prospectively and early in the course of the proceedings, r 42.4 empowers a court to specify maximum costs recoverable following the determination of the proceedings. The rule assumes an entitlement to recover and that any amount specified by the order will in fact be recoverable. If an order was to be made at this stage of the proceedings it is unclear how such an order would operate if the proceedings were discontinued or if the Court later declines to make an order for the payment of costs where the proceedings are held to be in the public interest.

34 The income sources of the Plaintiff are volatile and not guaranteed. It is not clear that the Plaintiff would be able to meet a costs order even if the PCO is made.

35 The Court cannot be satisfied that the litigation is within the objects of the Plaintiff's constitution and there is no evidence that prayers 1 and 2 are supported by the decisions of BMCS's management committee.

36 The Plaintiff has already expended more than $10,000 and the Defendant will necessarily incur costs greater than $10,000 in answering the Plaintiff's case and such expenditure beyond $10,000 by either party would not be intemperate or disproportionately excessive. The complexity of the case that the Defendant must answer is exacerbated by the civil nature of the proceedings which requires the Defendant to answer on affidavit at an early stage of the proceedings the material on which reliance is placed by the Plaintiff in seeking a declaration that the Defendant has committed a criminal offence. Specialised skill, knowledge, time and travel will be involved in the expert assessment of the Plaintiff's evidence, the carrying out of further water quality testing and the preparation of independent expert evidence. The Plaintiff is also protected from incurring costs by experts and lawyers willing to cap fees. The Defendant cannot

expect such financial assistance.

37 A PCO could act as a licence to one party to be inefficient in incurring costs. The proceedings have been commenced by a Plaintiff which does not have any experience in making proper and efficient use of public resources and it has not sought to resolve the issue before commencing litigation. The Plaintiff has not litigated against any other party, has failed to succeed in persuading a regulatory authority to commence litigation and has failed to obtain legal aid.

38 The willingness of the individual members of BMCS to engage in and contribute to the litigation is untested. There has been no request to members to contribute to a fund for the litigation, only the management committee has decided to pursue the case and told its members by newsletter. It is unfair to the Defendant which will incur substantial costs to be limited to what BMCS's management committee decides it will spend. The fact this Plaintiff only wants to spend $20,000 of its resources should not be a relevant determination for the Court to decide to burden this Defendant in making a PCO.

39 A public interest argument for making a PCO needs to be considered in light of the public interest in the Defendant being able to fully defend its reputation and preserve its business as a state owned corporation. The Defendant is a large public authority carrying on a significant activity for the public benefit of supplying electricity. To pay costs with no recoupment regardless of the case conducted imposes a burden on part of the public.

40 These proceedings are not clearly in the public interest. The whole of the catchment is not affected, as it only raises issues about one discharge point. The area is governed by the *Sydney Water Catchment Management Act* 1998. The relevant public authorities being the Sydney Water Catchment Authority and the Department of Environment, Climate Change and Water (DECCW, formerly DECC) are aware of the issues raised by the Applicant. Anticipation of a finding that a matter is of public interest is not sufficient to displace

the rule that if a plaintiff is not successful, costs follow the event. Further, the Plaintiff can be characterised as having an interest in the outcome of the proceedings because the members of the society are mostly residents of the area where the offence is alleged to have been committed.

*Finding*41 Costs are generally considered at the end of a hearing when the result is known and a decision can be made as to whether public interest considerations apply to any costs order. An order under r 42.4 can be sought at any time in the litigation process. In this matter the Plaintiff seeks a PCO at an early stage in the proceedings before the Defendant has filed a defence or any evidence.

42 No case where this Court has made a PCO (also known as a maximum costs order) under rule 42.4 has been found by the parties or the Court. The parties' arguments raise for the first time in this Court the circumstances in which the Court would exercise its discretion to make such an order where the moving party claims to be undertaking public interest litigation but the outcome of the litigation is not yet known and the issues in dispute are not yet clear.

*Costs in public interest cases generally*43 The limiting effect of exposure to costs orders in the commencement of public interest cases has been recognised for some time. For example, this is referred to in the extract of Toohey J's address to the International Conference on Environmental Law in 1989 cited by Stein J in *Oshlack* at 238 and set out at par 19. The Australian Law Reform Commission (the ALRC) dealt with public interest cost orders in Chapter 13 of Australian Law Reform Commission, *Report No. 75: Costs Shifting – Who Pays For Litigation* (1995). The report referred to the Federal Court's decision in *Woodlands* stating that the public interest in that case was a significant factor in the making of the PCO of $12,500. The report noted however that such orders are relatively uncommon. In most cases the courts have tended to take the view that a party should not be deprived of his or her right to seek costs if successful or be required to pay indemnity costs if unsuccessful merely because the

litigation may be in the public interest. Further, costs orders will usually not be made until the matter is finished and the result, the conduct of the parties and the level of public interest can be considered. In response to these trends, the ALRC recommended that a court or tribunal be able on the application a party to make a public interest costs order (in the nature of a PCO) in cases of public interest if satisfied that:· The proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community· The proceedings will affect the development of the law generally and may reduce the need for further litigation· The proceedings otherwise have the character of public interest or test case proceedings

The recommendation stated that a personal interest in the proceedings of one or more of the parties should not prevent the making of such an order.

44 The history of public interest litigation in this Court through the utilisation of third party standing provisions in virtually all the major environmental and planning legislation in NSW is reasonably extensive and commenced early in the life of the Court. Broad standing provisions enable the legislation to be tested and enforced through proceedings in the Court. Numerous decisions have been made on procedural matters such as whether costs orders ought be made after the determination of proceedings and whether security for costs orders ought be made in public interest cases before the Court. Recognition of these practice and procedure issues affecting the conduct of public interest litigation in the Court is reflected in r 4.2 of the Land and Environment Court Rules 2007 headed "Proceedings brought in the public interest". The rule states that the Court may decide not to make an order for the payment of costs, an order for security for costs or give an undertaking for damages in an application for an interlocutory injunction in Class 4 public interest matters. This reflects the need to make appropriate costs orders and other procedural orders which do not unduly inhibit public interest cases being brought in this Court. It is important to recognise the impact

practice and procedure rules and judicial decisions about these can have on access to justice in this Court, as matters are often concerned with issues of importance to the wider community beyond the interests of the immediate parties to the litigation. With that context in mind I now turn to consider the making of PCOs in this Court.

*In what type of cases should a PCO be made?*45 The Defendant has argued that the making of a PCO is related solely to the need to manage cases efficiently as required by s 60 of the CP Act and to ensure that legal costs are proportionate to the matters in issue between the parties. That approach is reflected in the three decisions outlined in the Defendant's submissions at par 29-31 which concerned Family Provision Act claims. Judges of the Supreme Court recognised the need to make orders so that the costs incurred in those matters were proportionate to the matters in dispute. The need for orders in small commercial disputes is also recognised in *Corcoran* at [53]. The CP Act also identifies in s 58(1)(iii) that the Court must act in accordance with the dictates of justice when making any procedural order. Relevant factors to take into account are identified in s 58(2). The circumstances in which a PCO can be made in r 42.4 are not restricted in the rule itself which is broadly drafted and provides that an order specifying maximum costs can be recovered by one party from another can be made at any time. The rule does not in terms refer only to matters arising in light of s 60 of the CP Act. There is no basis in the CP Act and rules to restrict the application of the power to make costs order in r 42.4 in the way the Defendant submits. Public interest cases are another category of cases in which PCOs can be made if appropriate under r 42.4.

*Case law on PCOs in public interest cases*46 Cases such as *Corner House*, *Woodlands* and *Corcoran* consider the making of a PCO in the context of public interest cases in the United Kingdom and by single judges in the Federal Court under a similar provision of the Federal Court Rules. In *Corner House* the United Kingdom's High Court of Justice undertook an extensive review of the law concerning granting of a PCO. The Court considered distinctive features relating

to costs in public interest litigation at [24] – [27] and the historical context of the making of PCOs at [28] – [45] (including reference to par 13.1 and 13.8, Ch 13 of the ALRC report referred to above). At [41] the Court observed after consideration of UK cases in the High Court and the Court of Appeal that some authorities have recognised a trend towards protecting litigants who bring public law proceedings in the public interest, and that PCOs are a substantial further step in the same direction.

47 The Court considered contemporaneous developments in Iceland, Canada and Australia at [58] – [63]. At [69] – [81] the governing principles of PCOs were summarised at [74]. The Court recognised at [69] the differences between private law litigation and public law litigation referring to *R v Secretary of State for the Home Department ex parte Salem* [1999] UKHL 8; [1999] 2 All ER 42 in which Lord Slynn of Hadley stated that the court had a discretion to hear an appeal concerned with an issue involving a public authority as a question of public law even if the parties' appeal concerned an issue involving a public authority on a question of public law.

48 The statutory regime relevant to the application in *Corner House* was set out at [64]-[66]. Section 51 of the Supreme Court Act 1981 (UK) states that costs are in the discretion of the court and that the court has full power to determine by whom and to what extent the costs are to be paid. Rule 44.3 of the Civil Procedure Rules 1998 (UK) (the CPR) provides that the court has discretion as to whether costs are payable by one party to another, the amount of any costs and when costs are to be paid. The rule requires the court to have regard to all the circumstances in deciding what order to make about costs if any. Rule 3.1(2)(m) of the CPR also gives the court an unqualified power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. That overriding objective is specified in r 1.1 as the objective of enabling the court to deal with cases justly.

49 At [74] the governing principles relevant to the making of PCOs

were set out as follows:

*(1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO. (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.*

50 At [75] – [76] the broad discretion of the judge in making a PCO and applicable principles were identified:

*A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimants' lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (the Refugee Legal Centre case); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost* (R (on the application of Campaign for Nuclear Disarmament) v Prime Minister *[2003] CP Rep 28); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*Ex p CPAG*); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).*

*There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost-capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in* King Telegraph Group Ltd *[2004] EWCA Civ 613; [2004] EMLR 429 at [101]- [102] will always be applicable. We would re-phrase that guidance in these terms in the present context:(i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability.(ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.(iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.*

51 These principles were confirmed in *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 in the Court of Appeal at [14].

52 Order 62A r 1 of the Federal Court Rules states that the Court may specify the maximum costs that may be recovered on a party and party basis. I have been referred to two decisions of single judges of

the Federal Court made under that provision, namely *Woodlands* and *Corcoran*. In *Woodlands* proceedings were commenced in relation to home loans issued as part of a state government loans program. The applicants had obtained a grant of legal aid under the *Legal Aid Commission Act* 1979 (NSW) which protected them from any costs order and made the Legal Aid Commission liable to pay costs of up to $12,500 in the event that the applicant was unsuccessful in a state court. An application was made by the applicants to cap costs recoverable at an early stage in the Federal Court proceedings. Wilcox J considered the undesirability of a course that would require the abandonment of proceedings which, if successful, had the potential to benefit thousand of people who had entered into the loans. This public interest element was considered at 148 to be a "factor of some significance". His Honour considered fairness to the respondents was relevant in stating that they should not be worse off than if the proceedings had been commenced in a state court. His Honour made an order that the costs recoverable by either party be capped at $12,500.

53 In *Corcoran* Bennett J stated at [53] that the rule concerning PCOs had been introduced primarily with the intention of being applied to keep costs proportionate in low value litigation but her Honour identified that this purpose is not to be read as a limitation on the making of such an order. In that case the two applicants were both legally aided on the basis that each grant provided for payment of costs up to $15,000. They sought an order that any costs order against them be limited to $15,000. The applicants were seeking orders that Virgin Blue Airlines (Virgin) had discriminated against them in breach of the *Disability Discrimination Act* 1952 (Cth). Virgin required a passenger who could not comply with certain actions to travel with a carer. The Court held at [6]:

***Factors relevant to the exercise of discretion in making an order under rule 1***

*The parties agree on many of the factors to be taken into account in*

*the exercise of the Court's discretion to make an order under rule 1. As discussed in the authorities which consider O 62A r 1 and the equivalent provision in the Federal Magistrates Court Rules, the factors include:*

• *the timing of the application (*Sacks v Permanent Trustee Australia Ltd *[1993] FCA 502; (1993) 45 FCR 509 at 511 per Beazley J;* Flew v Mirvac Parking Pty Ltd *[2006] FMCA 1818 at [48] per* Barnes FM; Minns v State of NSW (No. 2) *[2002] FMCA 197 at [9] per Raphael FM]);*

• *the complexity of the factual or legal issues raised in the proceedings (*Hanisch *at 387 per Drummond J*; Dibb v Avco Financial Services Limited *[2000] FCA 1785 at [15] per Sackville J);*

• *the amount of damages that the applicant seeks to recover (*Hanisch *at 387) and the extent of any other remedies sought (*Flew *at [48]);* (not relevant in this case)

• *whether the applicant's claims are arguable and not frivolous or vexatious (*Flew *at [15]);*

• *the undesirability of forcing the applicant to abandon the proceedings (*Woodlands v Permanent Trustee Company Limited *(1995) 58 FCR 139 at 148 per Wilcox J;* Flew *at [9]); and*

• *whether there is a public interest element to the case (*Woodlands *at 146;* Flew *at [23], [47]).*

54 Bennett J also referred to the Canadian cases of *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71 at 2003 SCC 71; 313 N.R. 84 (at [40]–[41] per LeBel J) and *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Review Agency)* 2007 SCC 2, J.E 2007–211 (at [36]–[41] per Barstarache and LeBel JJ). In *Okanagan Indian Band* a group of native Indians began logging on Crown land without authorisation

under the relevant forestry legislation. Proceedings were commenced by the Minister of Forests to enforce a stop-work order. The Indian band commenced proceedings claiming that they had aboriginal title to the lands in question and that the forestry legislation was unconstitutional. They made an application for an interim costs order on the grounds of their extremely difficult financial situation. The order sought required the Minister to pay the group's costs of the litigation in advance (also known as a pre-emptive costs order per Finkelstein J in *Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) (No 4)* [2008] FCA 858). On appeal to the Supreme Court of Canada, the highest court of appeal, LeBel J (with whom a majority of the court agreed) identified at [40] criteria required to be satisfied in order to justify an award of interim costs, being that the party could not genuinely afford to pay for the litigation, that the claim was prima facie meritorious and that the issues were of public importance and had not previously been resolved. At [41] her Honour stated that a court should also be mindful of the position of the defendant and ensure that an order would not impose an unfair burden upon them. LeBel J was satisfied that the conditions were made and dismissed the appeal against the making of an order in the British Columbia Court of Appeal. I note for completeness that the PCO sought in this case is not a pre-emptive costs order.

55 Whether a PCO ought be made is for the Court to consider in its discretion, in light of the need in s 58 of the CP Act to act in accordance with the dictates of justice. The factors referred to in *Corner House* at [74], in a generally similar statutory context to the CP Act and UCPR, and *Corcoran* at [6] provide a useful guide to the relevant criteria to consider in this case.

*Timing of application*56 The Notice of Motion seeking a PCO has been filed early in the proceedings. One difficulty with this approach is that in the absence of a defence and any evidence from the Defendant the scope of issues is difficult to determine.

*Whether claim appears arguable* 57 The Defendant has not put in issue for this motion that the Plaintiff has an arguable case. The Plaintiff's counsel has urged on me that I should find that there is a prima facie case based on the pleadings and the detailed evidence that has been filed. The detailed evidence filed by the Plaintiff in relation to Mr Jonkers and Dr Wright is identified above at par 10 and 11.

58 Given that this is, I surmise, the first case under the POEO Act using the open standing provisions in s 252 of that Act to enforce in a civil case s 120 of the POEO Act where the Defendant is the holder of an environment protection licence, it is difficult in the absence of any knowledge of the Defendant's case to fully understand the complexity of the issues likely to be raised. My best guess at this stage is that the legal matters raised will be complex and novel in terms of the operation of the POEO Act and civil enforcement of a provision of that Act, a breach of which also gives rise to a criminal offence. The only case of civil enforcement of the POEO Act the parties referred me to was *Environment Protection Authority v Leaway Pty Ltd* [2006] NSWLEC 44 in which the Environment Protection Authority brought proceedings for money owed by virtue of s 88 of the POEO Act against the Defendant, the holder of an environment protection licence issued under the POEO Act and occupier of a licensed waste facility. This matter if it proceeds will be a test case as it is likely that novel questions in relation to the operation of the POEO Act will be raised and considered by this Court for the first time.

*Whether public interest litigation*59 I have identified above the proceedings are in the nature of a test case. I accept the Plaintiff's submissions at par 25 that there are special factors which identify this matter as likely to be in the public interest. The Plaintiff relied on the decision of Stein J in *Oshlack* at first instance and the factors his Honour considered as giving rise to a finding that the proceedings were in the public interest in submitting that this litigation is also public interest in nature. The decision of Stein J was made at the end of the proceedings when all relevant matters were known to the judge. There must be some caution in determining so early in a matter

whether it is public interest litigation. On the evidence presented concerning the objects and activities of BMCS and the environmental protection issues the litigation seeks to address I can conclude that it appears this matter is one of public interest.

60 The Defendant has submitted that the commencement of the litigation is not within the objects of the BMCS and there is no evidence that the members support the commencement of proceedings. On one view such a submission is irrelevant. As identified in the evidence of Ms Cameron (par 7), the BMCS is an incorporated body established in 1996 which operates with a management committee, as is required for such an incorporated body. It took over the activities of two existing conservation societies. BMCS is not required to present evidence that its members support the litigation in addition to the decisions made on their behalf by the properly constituted management committee. The BMCS has been established with the objects and purposes of protection of the environment in the Blue Mountains including opposing human activities which degrade or destroy it. It does not have to have an object that includes the conduct of litigation to establish that the litigation is within its objects and purposes. The litigation is directed to enforcing the POEO Act within an area of the Blue Mountains. That is sufficient to come within the objects and purposes of the BMCS.

61 That there is also a government department, the DECCW, responsible for regulating the environmental legislation in question is not suggestive that they are the holders of the public interest, contrary to the Defendant's submission. Broad standing provisions provide a means whereby cases which seek to enforce environmental legislation can be brought before the Court by anyone.

62 It is also relevant to note the correspondence between the solicitors for the Plaintiff and the DECC and the Sydney Catchment Authority in evidence. This demonstrates that the Plaintiff has sought to draw the issues the subject of these proceedings to the attention of the

relevant regulatory authorities and has not acted precipitately in commencing proceedings.

*Whether plaintiff has private interest*63 The Plaintiff will derive no financial benefit from the proceedings.

*Continuation of proceedings* 64 The evidence of the BMCS's President is that the proceedings will not continue if a PCO is not made in the amount of $20,000.

*Counsel acting pro bono*65 The Plaintiff's counsel has indicated that he is acting *pro bono* in this matter, a relevant factor according to *Corner House* at [74].

66 Given the submissions made in argument additional matters can be considered in this case.

*Parties' financial means*67 According to *Corner House*, a relevant factor to consider in the making of a PCO is the financial resources of an applicant or a respondent and the likely amount of costs that could be involved. Another way to consider this is whether an order could cause financial hardship to the party against whom it is made, in this case Delta. The costs estimate provided in the evidence relied on by Delta appears generally a reasonable estimate of the amount of costs likely to be incurred in the range of $232,000 to $285,000. Delta does have substantial resources as a large state government corporation. While the PCO, if made, will mean that it will not recover most of its legal costs and disbursements if it is successful in the litigation, it will not suffer financial hardship as a result of the making of the order.

*Whether rewarding inefficient litigation*68 One of the arguments of the Defendant is that the making of a PCO gives rise to the potential for inefficient litigation as there will be no incentive for the Plaintiff to run its case efficiently. That submission overlooks r 42.2(4) which enables a court to vary any order made under this rule if special circumstances arise. Special circumstances could include in my view

the conduct of litigation in a frivolous or vexatious manner. At this stage the Plaintiff has largely prepared its case and filed its evidence so that there appears to be little likelihood of inefficient conduct of the proceedings on the Plaintiff's part. In any event, the PCO sought limits cost recovery by both parties so that both have an incentive to act efficiently in the litigation.

*Conclusion*69 A PCO should not be lightly made at an early stage in proceedings given that it is occurring before all the issues are known and the result determined and in this case will prevent the Defendant, if successful, from recovering all its costs and disbursements. Taking into account the relevant factors outlined above in detail and in the interests of justice I consider that an order in similar terms to that sought by the Plaintiff ought be made. The issue to then consider is whether it ought be made in the amount of the $10,000 as contained in the order in the motion or a greater sum. The evidence of Ms Cameron is that the management committee of the BMCS is likely to agree to a limit of $20,000 before the proceedings will not proceed. An order limiting the payment of costs in the amount of $20,000 ought be made. Contrary to the submission of the Defendant (par 34) it appears likely that the BMCS will be able to raise that amount if necessary.

70 Prayer 3 in the Notice of Motion is an order that the maximum amount recoverable in relation to the motion is $5,000. I will need to clarify with the parties whether this order is still sought given that the plaintiff has been successful in obtaining an order under prayer 1 in an amended amount.

**Orders**71 The Court makes the following order: 1. Pursuant to the Uniform Civil Procedure Rules 2005 rule 42.4 the maximum costs that may be recovered by one party from another in these proceedings is the sum of twenty thousand dollars ($20,000).2. Costs of the Plaintiff's Notice of Motion are reserved.