Federal Court of Australia

Lawyers for Forests Inc. v Minister for Environment, Heritage and the Arts (No 2) [2009] FCA 466 (8 May 2009)

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FEDERAL COURT OF AUSTRALIA

Lawyers for Forests Inc. v Minister for Environment, Heritage and the Arts

(No 2) [2009] FCA 466

COSTS – discretion to award costs – whether appropriate to depart from general rule – public interest litigation

WORDS AND PHRASES – "the public interest"

Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 3(1)(d) and 487

Australian Conservation Foundation v Forestry Commission (1988) 81 ALR 166 *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 8; (2008) 165 FCR 211*Blue Wedges Inc v Minister for*

the Environment, Heritage and the Arts (No 2) [2008] FCA 1106*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534*Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72*Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 *Save The Ridge Inc v Commonwealth* [2006] FCAFC 51; (2006) 230 ALR 411*Scott v Secretary, Department of Social Security (No 2)* [2000] FCA 1450*South-West Forest Defence Foundation Inc v Executive Director of Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411*The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1863*Wilderness Society Inc v Turnbull and Another* [2007] FCAFC 175; (2007) 166 FCR 154 *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* [2008] FCAFC 19; (2008) 101 ALD 1*Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900

LAWYERS FOR FORESTS INC. v MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS and GUNNS LIMITEDVID 1112 of 2007

TRACEY J8 MAY 2009MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1112 of 2007**

BETWEEN:	**LAWYERS FOR FORESTS INC.** **Applicant**
AND:	**MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS** **First Respondent**
	GUNNS LIMITED **Second Respondent**
JUDGE:	**TRACEY J**
DATE OF ORDER:	**8 MAY 2009**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The applicant pay the respondents' costs of the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1112 of 2007**

BETWEEN:	**LAWYERS FOR FORESTS INC.** **Applicant**
AND:	**MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS** **First Respondent**
	GUNNS LIMITED **Second Respondent**
JUDGE:	**TRACEY J**
DATE:	**8 MAY 2009**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1. On 9 April 2009 the Court dismissed an application brought by Lawyers for Forests Inc. ("LFF") in which it sought to impugn a decision of the Minister for the Environment, Heritage and the Arts ("the Minister") to grant conditional approval for the construction of a pulp mill by Gunns Limited ("Gunns") at Bell Bay in Tasmania: see *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330. I ordered that, if LFF wished to contend that costs should not follow the event, it should file and serve written submissions and that, if it did so, the respondents

should file and serve answering submissions. LFF filed written submissions in which it contended that no order for costs should be made or, alternatively, that it should be ordered to pay no more than 70% of the Minister's costs and 40% of Gunns' costs. Both the Minister and Gunns filed submissions in which they sought orders that LFF pay their costs of the proceeding on the basis that they were successful in resisting the application.

2. The ordinary rule is that costs follow the event. The rationale for the "rule" was explained by McHugh J in *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at 97:

"67 The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party ... . If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

68 As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."

See also *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 542-3 (Mason CJ), 566-7 (McHugh J).

1. As the terms "ordinary rule" and "usual order" imply they constitute guidelines to inform the exercise of a broad and unfettered judicial discretion: see *Latoudis v Casey* at 541 (Mason CJ), 557 (Dawson J). A Court will not decline to award costs against a successful party unless justice so requires having regard to the "facts connected with or leading up to the litigation": *Latoudis* at 557 (Dawson J). See also

Ruddock v Vadarlis (No 2) (2001) 115 FCR 229 at 234 [9] (Black CJ and French J). There is no general exception to the ordinary "rule" in cases in which environmental issues are raised or, more generally, "public interest" issues are involved: see *Oshlack* at 75 (Brennan CJ); 84, 91 (Gaudron and Gummow JJ), 91-2, 98-100 (McHugh J); *South-West Forest Defence Foundation Inc v Executive Director of Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411 at 412 (Kirby J); *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 171 (Burchett J). That is not to say that public interest considerations may not, in a particular case, support a departure from the "ordinary rule": *Ruddock* at 236 [14]; *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 8; (2008) 165 FCR 211 at 227-8 (Heerey J).

2. LFF identifies four matters which it contends warrant a costs order which is more favourable to it than an order that costs follow the event. They are:

- The objects of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the Act") and the public interest aspects of the litigation.
- What are said to be "exceptional and special circumstances" including that the case concerned untested provisions of the Act.
- The fact that LFF is a non-profit organisation of long standing which has carried out activities which are useful to the community.
- That an order for costs may result in the winding up of LFF.

3. There were a number of strands to LFF's argument relating to the public interest aspects of the litigation. One of these strands focussed attention on the objects and standing provisions of the Act. An object of the legislation is "to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples": see s 3(1)(d). Section 487 of the Act extends standing to organisations with an active interest in the conservation of the environment which wish to challenge decisions made under the Act. If such organisations were to be required to pay costs in proceedings initiated by them in which they were unsuccessful this would, so it

was said, discourage or prevent them from initiating proceedings. This would, in turn, undermine a Parliamentary intention that such organisations should be involved in the administration of the Act and be able to participate in testing decisions made under it.

4. A second strand of LFF's public interest argument emphasised that the organisation did not stand to benefit financially from the litigation. This consideration was said to be of sufficient importance to the community "for costs generally not to be ordered." This consideration, it was suggested, weighed heavily where the community organisation confronted respondents who had greater financial and other resources which they are able to apply to litigation.

5. The third strand directed attention to the issues which were raised in the application which were said to be "of significant public interest and concern."

6. Even when wound together these "public interest" strands lack strength. As already noted, there is no general "public interest" exception to the operation of the ordinary "rule". It is necessary for an unsuccessful party who wishes to obtain a more beneficial costs order to point to particular aspects of the litigation which warrant the orders sought. The legislative provisions do not assist LFF's case. An object of promotion of a co-operative approach to the protection of the environment has no implications for the determination of costs questions when co-operation gives way to litigation. The expanded standing provisions in s 487 do not, as Heerey J held in *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900 at [8] "carry any particular significance on the issue of costs." The standing provision is not designed to encourage litigation and, in any event, the issue would not arise unless the unsuccessful applicant had standing in the first place.

7. LFF did not cite any authority for the proposition that a community organisation which prosecutes proceedings, in what it perceives to be the public interest and in which it does not stand to benefit financially, should not, generally, be ordered to pay costs, especially where there is a substantial "inequality of arms" between the contending parties. This is not surprising because, as the Full Court observed in *Save The Ridge Inc v Commonwealth* [2006] FCAFC 51; (2006) 230 ALR 411 at 415, "the "public interest" nature of an

association's objects and its consequent lack of potential financial gain from litigation has not, at least generally, been considered a reason to depart from the ordinary rule as to costs." See also *Ruddock* at 237; *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 171.

8. The third strand of LFF's "public interest" argument overlapped with its "exceptional and special circumstances" submission. It contended that its application "was a test case which raised difficult legal questions of general importance to the administration of Australia's primary environmental conservation legislation." The questions of construction which it raised were novel; the Act was lengthy and complex.

9. The concept of "the public interest" is notoriously difficult to define. There is, first, a distinction to be drawn between the public interest and a matter of interest to the public: see for example *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at 73-4. The relevant interest is the interest of the public generally as distinct from the interest of an individual or individuals: *Smith* ibid. Sometimes these distinct interests will coincide: see for example *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 8; (2008) 165 FCR 211 at 228. Often there will be competing public interests which must be brought into account. In a context, such as the present, there will often be a public interest in seeking to ensure the lawfulness of determinations made by the executive government and a public interest in giving effect to the principles, identified by McHugh J in *Oshlack* (above at [2]), especially where public funds are involved.

10. In *Oshlack* the trial judge had held that proceedings characterised as "public interest litigation" did not, merely by reason of that characterisation, constitute special circumstances warranting departure from the ordinary rule. He considered that "something more" was required. Among the additional considerations which led him to hold that there were sufficient special circumstances to justify the making of no order as to costs was that the application was "arguable" and had raised "significant issues" as to the interpretation and future administration of environmental legislation. The High Court majority held that the exercise of the trial judge's discretion had not miscarried. It must, then, be accepted that such

considerations are relevant when the judicial discretion to award costs is being exercised.

11. The case advanced by LFF was arguable. It was so held by Marshall J in the course of a preliminary hearing in which security for costs was sought: see *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588 at [14]. It was not, however, a test case; nor did it raise novel issues. The resolution of the various issues raised by the grounds relied on by LFF turned, in the main, on the application of well established judicial review principles to the written reasons of the Minister and the documentary material considered by him when he made his decision.

12. LFF is an incorporated association. Its objects include: the promotion of the conservation and better management of Australia's native forests and the stimulation and encouragement of public interest in the value and importance of protecting native forests and related environmental issues: see *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588 at [2]. It has determined that, in pursuit of its objects and, in what it perceives to be the public interest, that the Minister's approval of construction of the pulp mill should be challenged. It has a democratic and legal right to do so. These considerations do not, however, weigh strongly in favour of the making of the orders which it seeks.

13. In *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 171 Burchett J, in a passage quoted with approval by the Full Court in *Save The Ridge* at 415, said:

"If a body is set up to pursue causes, which its founders consider to be in the public interest, and which generally may be in the public interest, by means including court proceedings against others, it does not follow that those proceeded against should be deprived of the ordinary protection of a right to an order in respect of their costs in the event the claims made against them prove unfounded."

1. The final matter relied on by LFF was that its financial circumstances were such that, if it were required to pay the respondents' costs it may be wound up. There was no evidence before the Court as to LFF's present financial position or as to its capacity to raise funds to meet any costs order which the Court might be minded to make.

2. In any event LFF's capacity to meet a costs order is not a relevant

consideration in determining whether an order should be made: see *Scott v Secretary, Department of Social Security (No 2)* [2000] FCA 1450 at [4] (French and Beaumont JJ); *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1106 at [14] (North J).

3. For the foregoing reasons I consider that the respondents, subject to the outcome of a further submission by LFF, should have the benefit of the usual order as to costs.

4. In the alternative LFF submits that it should be ordered to pay no more than 70% of the Minister's costs and 40% of Gunns' costs. As it happens these were the respective percentages fixed by the Full Court as "a matter of judgment or impression" in an unsuccessful appeal involving the same respondents in *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* [2008] FCAFC 19; (2008) 101 ALD 1. In that case the appellant had appealed from a trial judge's decision dismissing its challenges to decisions which the Minister had made, under s 75 of the Act, that the proposal to construct and operate the pulp mill was a controlled action and as to the identification of the relevant controlling provisions of Part 3 of the Act. One issue on the appeal was whether or not s 42(c) of the Act applied so as to render it unnecessary for the Minister to have regard to certain forestry operations when making decisions under s 75. It was common ground that the Minister had not had regard to such forestry operations when making his decision. This question was dealt with "somewhat summarily" by the trial judge. The Full Court considered that the question was one "of general importance both to the Minister and to the public" and proceeded to deal with it on appeal. In the event there was a division of opinion in the Full Court on the issue of the construction of s 42(c).

5. In determining that the Minister was only entitled to 70% of his costs of the appeal the Court emphasised that it was important that the proper construction of the relevant provisions of the Act should be clarified; that the appellant was concerned to avoid harm to the Australian environment; that it was not seeking financial gain from the litigation; and that it had taken appropriate steps to resolve a dispute by resort to the Court "rather than elsewhere"; see at [10].

6. In determining that Gunns should only recover 40% of its costs of

the appeal, the Full Court acknowledged that Gunns was a proper party to the proceeding. It noted, however, that no conduct of Gunns was challenged by the appellant; that Gunns did not have any reason to conclude that the Minister would not deploy appropriate legal resources to defend the appeal and had done so; that Gunns' legal representatives did not confine their role to supplementing submissions already made on behalf of the Minister; and that Gunns has sought to participate "on equal terms with the minister" in defending the appeal.

7. LFF contended that all of the factors which influenced the Full Court in making its costs orders in the *Wilderness Society* case were present in the present proceeding.

8. Even if LFF were correct in this assertion it would not compel a similar apportionment in the present case. In any event the two proceedings are not comparable in all respects.

9. Self-evidently the present proceeding was a trial not an appeal. In *Wilderness Society* the trial judge had ordered that the applicant pay the respondents' costs of the application: see [2007] FCA 1863. This order was not disturbed on appeal. The appeal was, initially, dismissed with costs: see [2007] FCAFC 175; (2007) 166 FCR 154 at 178 [93]. On the application of the appellant the costs order was recalled. Having considered the parties' submissions on costs the apportionment order was made.

10. There is no suggestion in the present case that a construction point of any significance arose or, having arisen, was not resolved by the Court. As already noted the present proceeding was a conventional challenge, by way of judicial review, to the Minister's ultimate decision. Although some construction points were argued and determined, they did not assume the significance of the s 42(c)/s 75 point which occupied the Full Court in *Wilderness Society*.

11. Furthermore, Gunns played a different role at the trial of the present proceeding than it appears to have done on the appeal in *Wilderness Society*. It is accepted, as it should be, that Gunns was a proper party to the proceeding. Its legal rights to take "controlled action", as defined in the Act, were called into question by LFF's application. Gunns played a complementary (or supplementary) role to that of the Minister in defending the proceeding. Its written submissions and its oral submissions did not duplicate those of the Minister. For the most

part, Gunns adopted the Minister's submissions and advanced additional grounds for refusing LFF's application. Gunns participation did not add significantly to the length of the hearing.

12. In my view, there is no justification for a departure from the usual order as to either the Minister's or Gunns' costs. LFF will be ordered to pay the respondents' costs of the application.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 8 May 2009

Counsel for the Applicant:	Dr K P Hanscombe SC
Solicitor for the Applicant:	Bleyer Lawyers
Counsel for the First Respondent:	Dr M A Perry QC and Mr A Hill
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr T J Walker
Solicitor for the Second Respondent:	Freehills
Written Submissions:	17 and 23 April 2009
Date of Judgment:	8 May 2009