HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

AL OSHLACK APPELLANT

AND

RICHMOND RIVER COUNCIL RESPONDENT

Oshlack v Richmond River Council (S208-1996) [1998] HCA 11
25 February 1998

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the New South Wales Court of Appeal and in lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

J Basten QC with N J Williams and M Thangaraj for the appellant (instructed by Bartier Perry & Purcell)

B R McClintock SC with G O'L Reynolds for the respondent (instructed by Hannigans)

CATCHWORDS

Oshlack v Richmond River Council

Costs – Statutory power under environmental planning and assessment legislation to award costs – Relevant considerations – "Public interest" – Arguable case – Significant issues of interpretation of that legislation – Whether discretion with respect to costs miscarried.

Environmental Planning and Assessment Act 1979 (NSW), s 123.

Land and Environment Court Act 1979 (NSW), s 69.

1 BRENNAN CJ. Costs are awarded to indemnify a successful party in litigation, not by way of punishment of an unsuccessful party. In *Latoudis v Casey*[1] Mason CJ said that "in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant". In that case, the litigation concerned the enforcement of the criminal law, a subject in which the public has a considerable interest. Yet costs were ordered in favour of a successful defendant against a police officer who, in the course of his duty, instituted a prosecution of the defendant in the Magistrates Court of Victoria.

2 The present case concerns the administration of the *Environmental Planning and Assessment Act* 1979 (NSW), a subject in which the public has a considerable interest. But the public interest in the administration of that Act is no greater than the public interest in the enforcement of the criminal law. My dissent in *Latoudis v Casey* acknowledged that the police officer was serving the public interest, not his own[2]. Just as the police officer's serving of the public interest did not lead the Court to refuse costs to the successful defendant in that case, the fact that the appellant brought the present proceedings in the public interest for the protection of endangered fauna does not provide a sufficient reason by itself for refusing the successful respondent its costs in the present case. To do so would be to depart from the principle laid down in *Latoudis v Casey*.

3 I am therefore in general agreement with the reasons for judgment of McHugh J. I would dismiss the appeal.

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1 (1990) 170 CLR 534 at 542.

2 (1990) 170 CLR 534 at 544-545.

GAUDRON AND GUMMOW JJ

The history of the litigation

4 This is an appeal against a decision of the New South Wales Court of Appeal[3] allowing an appeal against a costs order made in the Land and Environment Court of New South Wales ("the Court")[4]. The costs order was made in litigation in which the appellant, Mr Oshlack, unsuccessfully claimed certain relief in respect of consent granted on 16 March 1993 by the respondent, Richmond River Council ("the Council"), to a development application by Iron Gates Developments Pty Limited ("the developer") for a subdivision of land at Evans Head in New South Wales. The appellant had sought a declaration that the consent was "void and of no effect" and an injunction restraining the developer from carrying out any development on the subject land without a valid development consent from the Council. The developer was the second respondent in that proceeding but did not participate in the appeal to the Court of Appeal and is not a party in this Court.

5 The land at Evans Head was within the area of application of the Richmond River Local Environmental Plan 1992, a local environmental plan made by the Minister under powers conferred by s 70 of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"). Within the relevant zone under that Plan, development was permissible with consent. The Council was the "consent authority" for the purposes of the EPA Act (s 4(1)).

6 There had been earlier litigation with respect to development at Evans Head. In *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc*[5], the Court of Appeal had dismissed an appeal by the developer against orders by the Court restraining it from carrying on development work on the Evans Head site without a current consent of the Council authorising such work. These orders were consequent upon the holding that an earlier consent by the Council had lapsed. The Council had not been a party to the appeal.

7 Section 123(1) of the EPA Act provided that "[a]ny person" may bring proceedings in the Court for an order to remedy or restrain breaches of the EPA Act[6]. Section 20(1)(c) of the *Land and Environment Court Act* 1979 (NSW) ("the Court Act") conferred jurisdiction upon the Court to hear and dispose of

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3 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

4 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236.

5 (1992) 81 LGERA 132.

6 The expression "this Act" in s 123 included a reference to an environmental planning instrument (s 122(b)(i)), a term which included a local environmental plan (s 4(1)).

proceedings under s 123 of the EPA Act. As it stood at the relevant time, s 77(3)(d1)[7] of the EPA Act required a development application to be accompanied by a fauna impact statement prepared in accordance with s 92D of the *National Parks and Wildlife Act* 1974 (NSW) ("the Wildlife Act") if the application was in respect of a development that was likely to significantly affect the environment of endangered fauna.

8 One of the principal grounds upon which the appellant sought to impugn the consent granted by the Council was that it had failed to properly exercise its decision-making power in unreasonably concluding that the development was not likely to have that effect and had wrongly failed to require the provision of a fauna impact statement, with particular reference to the habitat of the koala at the development site. Section 90 of the EPA Act prescribed various matters for consideration by the Council. The appellant asserted a failure by the Council to discharge its obligation under s 90(1)(c2) of the EPA Act to consider whether there was likely to be a significant effect on the environment of endangered fauna. Finally, it was contended that the Council had failed to consider other effects upon protected or endangered fauna within the meaning of s 98 of the Wildlife Act. The latter consideration came within the term "any other prescribed matter" identified in s 90(1)(s) of the EPA Act.

9 In a reserved judgment[8], the primary judge (Stein J) dismissed the appellant's application. His Honour held that it had been open to the Council to determine that a fauna impact statement was not required under s 77(3)(d1) of the EPA Act. He also rejected the submission, based upon the other provisions of the EPA Act, that it had not reasonably been open to the Council to conclude that the development was unlikely to significantly affect the environment of endangered fauna[9].

10 The successful parties, the developer and the Council, then sought orders that the appellant pay their costs. Stein J reserved his decision upon those applications and determined that there should be no order as to costs. The Court of Appeal reversed his Honour's decision with respect to the costs of the Council. It ordered that the appellant pay the Council's costs, both at first instance and in the Court of Appeal.

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7 Since amended by Sched 5 of the *Threatened Species Conservation Act* 1995 (NSW).

8 *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222.

9 (1993) 82 LGERA 222 at 234-235.

11 In this Court, the appellant seeks to reinstate the decision of Stein J denying the Council its costs at first instance and seeks orders that his costs in the Court of Appeal and in this Court be borne by the Council. On the other hand, the Council relies upon what in this Court has been identified as "a general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary"[10] and submits that no good reason to the contrary was shown in this case.

12 The orders made by the Court of Appeal did not touch so much of the order of the primary judge as made no provision for costs in favour of the developer. The contestants in the Court of Appeal and in this Court have been the appellant and the Council. However, that circumstance should not obscure the tripartite nature of the trial. The appellant sought declaratory and injunctive relief to restrain the developer proceeding without a valid development consent. The Council is the authority which had granted the consent upon which the developer relied. In those circumstances, and also having regard to the earlier litigation, it might have been expected that the Council would submit to such order as the Court might make and that it would not become a protagonist, lest by doing so it endanger the impartiality it would be expected to maintain upon any subsequent applications to it which might ensue were relief granted to the appellant[11]. As it was, in his primary judgment[12], Stein J said that the evidence called by the parties was essentially that of two fauna experts, one called by the appellant and the other by the developer.

The legislation

13 The difference of opinion, as to the carriage of costs, between the primary judge and the Court of Appeal turned to a significant degree upon the construction placed upon and significance attached to certain provisions of the EPA Act and the Court Act. To these we now turn. We have indicated that the appellant founded his application to the Court upon s 123 of the EPA Act. Sub-sections (1), (2) and (3) thereof state:

> "(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
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> (2) Proceedings under this section may be brought by a person on his own behalf or on behalf of himself and on behalf of other persons (with their

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10 *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477.

11 See *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

12 (1993) 82 LGERA 222 at 233-234.

consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

(3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings."

14 In the consideration of the reach of s 123, there does not arise the question with respect to federal jurisdiction which was noted by Mason J in *Australian Conservation Foundation v The Commonwealth*[13]. His Honour said:

> "I say nothing on the question whether the Parliament can legislate so as to provide that a mere belief or concern is a sufficient locus standi in federal jurisdiction. I merely note that the decisions which accord to s 80(1)(c) of the *Trade Practices Act* 1974, as amended, a wide interpretation do not examine the constitutional aspects of locus standi".

As it stood at that time, s 80(1) of the federal law empowered the granting of injunctive relief on the application of the Minister, the Trade Practices Commission or "any other person".

15 On the other hand, we do not accept the proposition advanced by Street CJ in *F Hannan Pty Ltd v Electricity Commission of NSW [No 3]*[14] that the task of the Court in a proceeding under s 123 is "to administer social justice" and that this "travels far beyond administering justice inter partes".

16 What is of present significance is that s 123 relieved a person in the position of the appellant from any requirement to obtain the Attorney-General's fiat and, in the alternative to the obtaining of the fiat, from the need to satisfy the requirements of standing which were propounded in *Onus v Alcoa of Australia Ltd*[15] and recently applied in this Court in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*[16]. The appellant's application was instituted, apparently in reliance upon s 123(2) of the EPA Act, in his name "on behalf of Lismore Greens". However, as Clarke JA later noted[17], it appeared that at some

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13 (1980) 146 CLR 493 at 551.

14 (1985) 66 LGRA 306 at 313.

15 (1981) 149 CLR 27.

16 (1995) 183 CLR 552.

17 (1996) 39 NSWLR 622 at 624.

time later this body or association dropped out of the picture and the appellant continued the proceeding in his own rather than a representative capacity.

17 The Court is constituted as a superior court of record by s 5 of the Court Act and has the jurisdiction vested in it by or under that or any other Act (s 16(1)). Section 20(1) of the Court Act confers jurisdiction to hear and dispose of proceedings under provisions of various statutes, including s 123 of the EPA Act (s 20(1)(c)). With respect to the appellant's application under s 123 for an order to restrain breaches of the EPA Act, s 20(2) of the Court Act empowered the Court to make declarations of right in relation thereto (s 20(2)(c)). The effect of s 20(1)(e), s 20(2) and s 71 of the Court Act was to deny to the Supreme Court of New South Wales jurisdiction in respect of an application for injunctive and declaratory relief of the nature brought in the Court by the appellant. The jurisdiction of the Supreme Court was limited to the appellate jurisdiction conferred by ss 56, 57 and 58 of the Court Act.

18 In determining that there be no order for costs, the primary judge was exercising the powers conferred on the Court by pars (a) and (b) of s 69(2) of the Court Act. In sub-section (1) thereof, the term "costs" is defined so as to include costs of and incidental to proceedings in the Court. Sub-sections (3)-(7) deal with the provision of security for payment of costs. Sub-section (9) excludes from the operation of the section summary proceedings under s 21 and certain appeals under s 21A from convictions under the *Justices Act* 1902 (NSW). In respect of summary proceedings, s 52 of the Court Act prescribes its own costs regime. Section 52 has no operation in the present case.

19 Section 69(2) of the Court Act stated[18]:

> "Subject to the rules and subject to any other Act:
>
> (a) costs are in the discretion of the Court;
>
> (b) the Court may determine by whom and to what extent costs are to be paid; and
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> (c) the Court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis."

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18 Section 69(2) was in this form at the time Stein J made the order with respect to costs. It has since been amended by the *Legal Profession Reform Act* 1993 (NSW), Sched 6 which commenced on 1 July 1994.

Section 74(1)(e) authorises the making of rules with respect to the costs of proceedings in the Court. No rules made thereunder were relied upon in argument on this appeal.

The decision of the primary judge

20 In exercising the discretion conferred by s 69(2) of the Court Act by a determination that there be no order as to costs, despite the dismissal of the appellant's application for injunctive and declaratory relief, 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[19].

(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[20].

(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"[21].

(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[22].

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19 (1994) 82 LGERA 236 at 243-244.

20 (1994) 82 LGERA 236 at 243-244.

21 (1994) 82 LGERA 236 at 246.

22 (1994) 82 LGERA 236 at 246.

(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[23].

(vi) It followed that there were "sufficient special circumstances to justify a departure from the ordinary rule as to costs"[24].

In an examination of the reasons of the primary judge with respect to costs, it should be borne in mind that his Honour was dealing with an application for costs by both the developer and the Council, not the Council alone. The appeal to this Court is limited to the denial of costs to the Council.

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23 (1994) 82 LGERA 236 at 244-246.

24 (1994) 82 LGERA 236 at 246.

The construction of s 69 of the Court Act

21 The provisions of s 69 of the Court Act which confer upon the Court the discretion exercised by the primary judge attract the application of the general proposition that it is inappropriate to read a provision conferring jurisdiction or granting powers to a court by making conditions or imposing limitations which are not found in the words used[25]. The necessity for the exercise of the jurisdiction or power by a court favours a liberal construction. Considerations which might limit the construction of such a grant to some different body do not apply[26].

22 The terms of s 69(2) contain no positive indication of the considerations upon which the Court is to determine by whom and to what extent costs are to be paid. The power conferred by the section is to be exercised judicially, that is to say not arbitrarily, capriciously or so as to frustrate the legislative intent. However, subject to such considerations, the discretion conferred is, to adapt the words of Dixon J, unconfined except in so far as "the subject matter and the scope and purpose" of the legislation may enable an appellate court to pronounce the reasons given by the primary judge to be "definitely extraneous to any objects the legislature could have had in view"[27].

23 The Council has challenged the order of the primary judge, not for want of jurisdiction or power but for miscarriage of his Honour's discretion. Before the Court of Appeal, the Council referred to the well-known passage in *House v The King*[28]. It submitted that the primary judge had taken into account irrelevant matters, in particular the consideration that the litigation had been instituted by the appellant in what the primary judge regarded as the public interest. Reference was also made to the decision of this Court in *Latoudis v Casey*[29]. The Court of Appeal apparently was not referred to the other, and generally pertinent, decisions of this

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25 *Hyman v Rose* [1912] AC 623 at 631; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, 290; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313, 316; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 136-137.

26 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205.

27 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

28 (1936) 55 CLR 499 at 505.

29 (1990) 170 CLR 534.

Court in *Wentworth v Attorney-General (NSW)*[30], *Norbis v Norbis*[31] and *Knight v FP Special Assets Ltd*[32].

24 Clarke JA said[33] that, but for *Latoudis*, he would have found the question before the Court of Appeal to be a difficult one but that, although *Latoudis* was a decision concerning summary criminal proceedings, it seemed to him to lead inevitably to the conclusion that the appeal should be allowed. This was because, on his Honour's understanding of *Latoudis*, it was not open to the Court of Appeal to regard the "public interest purpose" of the appellant as a relevant consideration in the exercise of the discretion. Sheller JA[34] spoke to the same effect. Cole JA[35] also referred to the considerations, treated by Stein J as relevant to the exercise of the discretion, that the basis for the challenge was arguable, that the proceedings raised serious and significant issues concerning environmental law, and that the appellant had been moved to litigate by worthy motives. These considerations were irrelevant because they neglected "the compensatory nature of an order for costs" and because they had regard to circumstances which were not connected with the case.

25 Like the other members of the Court of Appeal, Cole JA[36] regarded *Latoudis* as authority for the proposition that the award of costs to a successful party in civil litigation is made not to punish the unsuccessful party but to compensate the successful party against the expense to which that party has been put by reason of the legal proceedings. In the present litigation, it followed that the motivation of the unsuccessful claimant, not being personal interest, gain or affectation, but the public interest, was an irrelevant factor.

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30 (1984) 154 CLR 518.

31 (1986) 161 CLR 513.

32 (1992) 174 CLR 178.

33 (1996) 39 NSWLR 622 at 626.

34 (1996) 39 NSWLR 622 at 636.

35 (1996) 39 NSWLR 622 at 638.

36 (1996) 39 NSWLR 622 at 637.

26 The reasoning in the judgments in the New South Wales Court of Appeal and their reliance upon *Latoudis* has been followed by the South Australian Full Court[37].

27 The issues in *Latoudis* turned upon the operation of s 97(b) of the *Magistrates (Summary Proceedings) Act* 1975 (Vic). This authorised the Magistrates' Court, when it dismissed an information, to order the informant to pay to the defendant such costs as the court thought just and reasonable. The magistrate in that case had held that the informant had acted reasonably in instituting proceedings involving the charging of the defendant with theft, receiving stolen goods and unlawful possession, and refused the defendant's application for costs. By majority (Mason CJ, Toohey and McHugh JJ; Brennan and Dawson JJ dissenting), this Court held that the magistrate's exercise of discretion had miscarried and that the defendant was entitled to his costs. Mason CJ commenced his judgment with the following statement[38]:

> "The question for decision in this appeal is what, if any, are the criteria to be applied by a court of summary jurisdiction in exercising a statutory discretion to award costs in criminal proceedings which have terminated in favour of a defendant."

The judgment of Toohey J was directed to the same issue. McHugh J also identified the issue in the appeal as whether, in summary criminal proceedings, a successful defendant should ordinarily be awarded his or her costs[39].

28 Dawson J (with whose reasons for judgment Brennan J agreed[40]) emphasised that in criminal proceedings different considerations arise to those in civil proceedings, the former being brought, not for private ends, but for public purposes[41]. His Honour concluded that, whilst the discretion conferred by s 97(b) of the Victorian statute was unfettered, a successful defendant in summary proceedings for an offence could have no expectation as a general rule, unlike a

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37 *District Council of Kingscote v Kangaroo Island Eco Action Inc (No 2)* (1996) 67 SASR 422 at 426.

38 (1990) 170 CLR 534 at 537.

39 (1990) 170 CLR 534 at 566.

40 (1990) 170 CLR 534 at 544.

41 (1990) 170 CLR 534 at 557.

successful party in civil proceedings, that costs will be awarded in the defendant's favour[42].

29 *Latoudis* turned upon the construction of s 97(b) against the historical background, identified by Mason CJ[43], Dawson J[44] and McHugh J[45], that in criminal proceedings the Crown neither received nor paid costs. The reasoning and decision in *Latoudis* are not determinative of the issue whether, in the present litigation, the primary judge erred in law in the exercise of the discretion conferred upon the Court by s 69(2) of the Court Act by taking irrelevant matters into account. As we have indicated, it is s 52 of the Court Act which deals with costs in the summary jurisdiction of the Court, and this litigation has no concern with that provision[46].

30 In its submissions to this Court, the Council stressed, as generally applicable, principles or rules upon which the Court of Appeal had relied in deciding that Stein J had taken irrelevant matters into account. On the other hand, the submissions for the appellant, in part, sought to establish a category of "public interest litigation" into which this case fell. That is a "nebulous concept"[47] unless given, as the primary judge did in the present case, further content of a legally normative nature. It also tends, in this litigation, to distract attention from the legal issue which is at stake.

31 The true issue here is not whether this was "public interest litigation". Rather, to adapt the terms used by Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning*[48], to which reference was made earlier in these reasons, the question is whether the subject-matter, the scope and purpose of s 69 are such as to enable the Court of Appeal to pronounce the reasons given by Stein J

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42 (1990) 170 CLR 534 at 561.

43 (1990) 170 CLR 534 at 538.

44 (1990) 170 CLR 534 at 557.

45 (1990) 170 CLR 534 at 567.

46 Section 52 empowers the Court to order the defendant, in the case of convictions and orders under s 556A(1) of the *Crimes Act* 1900 (NSW), and the prosecutor in respect of charges which are dismissed, to pay "such costs as to the Judge seem just and reasonable".

47 *South Melbourne City Council v Hallam [No 2]* (1994) 83 LGERA 307 at 311; cf *Mahar v Rogers Cablesystems Ltd* (1995) 25 OR (3d) 690 at 702-705.

48 (1947) 74 CLR 492 at 505.

to be "definitely extraneous to any objects the legislature could have had in view" in enacting s 69.

The antecedents of s 69

32 In that inquiry some assistance is provided by a consideration of the provenance of s 69. The jurisdiction exercised pursuant to the Court Act is of a specialised nature. In the Court of Appeal, Sheller JA properly compared the text of s 69(2)(a) and (b) with its immediate antecedent in s 76(1)(a) and (b) of the *Supreme Court Act* 1970 (NSW)[49]. This is applicable across the broad jurisdiction exercised by the Supreme Court. Section 76(1) states:

> "Subject to this Act and the rules and subject to any other Act:
>
> (a) costs shall be in the discretion of the Court;
>
> (b) the Court shall have full power to determine by whom and to what extent costs are to be paid".

This put in shorter form s 50 of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK) which provided:

> "(1) Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, *and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid*.
>
> (2) Nothing in this section shall alter the practice in any criminal cause or matter, in bankruptcy or in proceedings on the Crown side of the King's Bench Division." (emphasis added)

The portion of s 50(1) which we have emphasised had been introduced by s 5 of the *Supreme Court of Judicature Act* 1890 (UK) to ensure "that the court has, so far as possible, freedom of action"[50], and is now repeated in almost identical terms in par (b) of s 69(2) of the Court Act.

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49 (1996) 39 NSWLR 622 at 629.

50 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at 975.

33 These English provisions had their origin in r 47 of the Rules of Procedure in the Schedule to the *Supreme Court of Judicature Act* 1873 (UK). Rule 47 stated:

> "Subject to the provisions of this Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity."

Rule 47 implemented in the fused administration effected by that statute the following recommendation of the First Report of the Commissioners on the Judicature[51]:

> "In the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has at present full power over the costs. We think that the absence of this power in the Courts of Common Law often occasions injustice, and leads to unnecessary litigation. We therefore recommend that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court."

The jurisdiction of the Courts of Common Law to award costs had previously rested upon statutes giving no discretion in the matter[52]. On the other hand, as Fry LJ put it when giving the judgment of the English Court of Appeal in *Andrews v Barnes*[53]:

> "The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. 'The giving of costs in equity,' said Lord *Hardwicke* in *Jones v Coxeter*[54] 'is entirely discretionary, and is not at all conformable to the rule at law.' 'Courts of Equity,' said the same great Judge in another case, 'have in all cases done it' (*ie*, dealt with costs) 'not from any authority' (*ie*, as we understand, from any statutory or delegated authority) - 'but from conscience and *arbitrio boni viri*, as to the satisfaction

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51 *First Report of the Judicature Commissioners*, (1868-1869) [4130], vol 25 at 15 in *IUP Series of British Parliamentary Papers*, vol 13 at 23.

52 *Re Foster v Great Western Railway Co* (1882) 8 QBD 515 at 520; *Latoudis v Casey* (1990) 170 CLR 534 at 557; Betts and Louat, *The Practice of the Supreme Court of New South Wales at Common Law*, 2nd ed (1928) at 185-188.

53 (1888) 39 Ch D 133 at 138. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 193-194.

54 (1742) 2 Atk 400 [26 ER 642].

on one side or other on account of vexation:' *Corporation of Burford v Lenthall*[55]."

34 The introduction of r 47 by the 1873 legislation marked the prevalence of equity practice and procedure with respect to costs over the brutal simplicities which had attended such matters in the Courts of Common Law. In *Latoudis* Dawson J put it as follows[56]:

> "After the Judicature Acts, all costs were within the discretion of the court. ... Whilst the discretion was absolute and unfettered, it was to be exercised judicially, that is to say, not by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation."

35 In the administration of the discretion conferred by these provisions upon courts of general jurisdiction, practices or guidelines have developed. Observations by Brennan J in *Norbis v Norbis* are in point. His Honour said[57]:

> "It is one thing to say that principles may be expressed to guide the exercise of a discretion; it is another thing to say that the principles may harden into legal rules which would confine the discretion more narrowly than the Parliament intended. The width of a statutory discretion is determined by the statute; it cannot be narrowed by a legal rule devised by the court to control its exercise".

It is in that sense that there is to be understood the earlier statement in this Court as to the existence of "a general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary"[58].

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55 (1743) 2 Atk 551 at 552 [26 ER 731 at 732].

56 (1990) 170 CLR 534 at 557.

57 (1986) 161 CLR 513 at 537. See also at 533 per Wilson and Dawson JJ.

58 *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477.

The operation of s 69 of the Court Act

36 At bottom in the present case is the question whether rules of practice with respect to similarly expressed provisions in legislation applicable in other species of litigation have so hardened "that they look like rules of law"[59], which render irrelevant to the exercise of the discretion conferred by s 69 those considerations to which the Council successfully objected in the Court of Appeal.

37 Implicit in the submissions for the Council is the proposition that, so strongly determinative of a discretion conferred in broad terms by a provision such as s 69 of the Court Act are the considerations (i) that the court must determine the matter from the perspective of the successful party, (ii) that the successful party ordinarily should be compensated by the unsuccessful party for the expense of the litigation, and (iii) that the successful party will be deprived of costs only by disentitling conduct, that they are to be displaced only by specific legislative provision. Examples of such legislation would include that construed in *Gray v Lord Ashburton*[60] and *Tekmat Investments Pty Ltd v Ward*[61] so as to permit an order which burdened a successful party with the costs of others. The Council's proposition should not be accepted.

38 In this Court, other modern descendants of the Judicature provisions as to costs have escaped arterial hardening. In *Knight v FP Special Assets Ltd*[62], this Court construed a provision in the Rules of the Supreme Court of Queensland which conferred a power to award costs expressed in terms of a broad discretion. It was held that an order for costs might be made against receivers of companies which were unsuccessful parties in proceedings, the receivers themselves not having been party to those proceedings. In so deciding, the Court was assisted by the reasoning of Lord Goff of Chieveley in *Aiden Shipping Co Ltd v Interbulk Ltd*[63] with respect to s 51(1) of the *Supreme Court Act* 1981 (UK). Mason CJ and Deane J (with whom Gaudron J agreed) said[64]:

> "Having regard to the variety and the nature of the circumstances in which an order for costs was made against a person who was not a party according

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59 *McDermott v The King* (1948) 76 CLR 501 at 514.

60 [1917] AC 26.

61 (1988) 81 ALR 278.

62 (1992) 174 CLR 178.

63 [1986] AC 965.

64 (1992) 174 CLR 178 at 189-190.

> to the record, we cannot accept that there was before the *Judicature Acts* a general rule that there was no jurisdiction to order costs against a non-party in the strict sense. It is plain enough that the courts from time to time awarded costs against a person who, not being a party on the record, was considered to be the 'real party'. ... It is preferable to interpret the words of the rule according to their natural and ordinary meaning as conferring a grant of jurisdiction to order costs not limited to parties on the record and ensure that the jurisdiction is exercised responsibly."

The phrase in a provision such as par (b) of s 69(2) of the Court Act "determine by whom ... costs are to be paid" is not to be read as if it were "determine the party by whom ... costs are to be paid".

39 We have referred earlier in these reasons to the provisions of s 76(1) of the *Supreme Court Act* 1970 (NSW). Section 3(1) of that statute provided that the Crown was bound by the Act and the rules thereunder. In *Wentworth v Attorney-General (NSW)*[65], in the joint judgment of five members of this Court, it was said of s 76(1):

> "It would not be right to give that section a narrow interpretation and the argument submitted on behalf of the Attorney-General, that it does no more than change the rule that the costs follow the event, cannot be accepted. Section 76(1) confers a wide discretion on the Court to decide whether any and which party to proceedings shall pay costs to another party, and, if it binds the Crown, enables the Court to order the Crown, or the Attorney-General proceeding at the relation of a person or body, to pay the costs. ... [Section 3(1)] evinces an unmistakable intention that the Act shall bind the Crown. ... Section 76 gives power to the court to make an order for costs against the Attorney-General in a relator action if it is proper to do so. Such cases will no doubt be rare since the main purpose of having a relator is to make him or her answerable for the costs."

40 There is no absolute rule with respect to the exercise of the power conferred by a provision such as s 69 of the Court Act that, in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party[66].

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65 (1984) 154 CLR 518 at 527-528.

66 *Knight v Clifton* [1971] Ch 700 at 710, 713-714, 716, 724-725; *Tekmat Investments Pty Ltd v Ward* (1988) 81 ALR 278 at 280.

41 If regard be had to the myriad circumstances presenting themselves in the institution and conduct of litigation, and to the varied nature of litigation, particularly in the equity jurisdiction, it will be seen that there is nothing remarkable in the above propositions. Several examples will suffice. In a suit for redemption, the successful mortgagor, being obliged to do equity, was required to bear the mortgagee's general costs of the suit, unless the mortgagee had forfeited them by some improper defence or other misconduct[67]. One of several joint promisees who refused to be joined as a plaintiff could, after an offer of indemnity against costs, be made a defendant[68]. Likewise an equitable assignor of a present legal chose in action could, on receiving a similar indemnity, be required to permit an assignee to sue in the name of the assignor[69]. However, if the recalcitrant joint promisee or assignor had not been offered the indemnity before joinder as a defendant, the promisor or assignee who had failed to take that step, although otherwise successful in the action, was obliged to bear the costs of that defendant[70].

42 As the practice in this Court testifies, an applicant for special leave to appeal may be required to undertake to bear, in any event, an order for the costs of the other party to the appeal[71]. Further, *Liversidge v Sir John Anderson*[72] is a celebrated example of "a matter of very general importance" in which it was not appropriate for the successful party to seek costs.

43 Nor, before or since the introduction of the Judicature system, has there been any absolute proposition that the sole purpose of a costs order is to compensate one party at the expense of another. As a general rule, wherever an estate or fund

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67 *Cotterell v Stratton* (1872) 8 Ch App 295; *Pearson v Dennett* (1911) 11 SR (NSW) 449 at 453-454.

68 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 493.

69 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 27; *Weddell v Pearce & Major* [1988] Ch 26 at 38-41.

70 See *Daniell's Chancery Practice*, 7th ed (1901), vol 1 at 980.

71 Such undertakings are given and accepted on the generally applicable footing that there cannot thereby be conferred upon the court a power to make orders which are otherwise beyond power: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163, 165.

72 [1942] AC 206 at 283.

is administered by the court, the costs of all necessary and proper parties to the proceedings should be defrayed out of the fund[73].

44 It may be true in a general sense that costs orders are not made to punish an unsuccessful party. However, in the particular circumstance of a case involving some relevant delinquency on the part of the unsuccessful party, an order is made not for party and party costs but for costs on a "solicitor and client" basis[74] or on an indemnity basis[75]. The result is more fully or adequately to compensate the successful party to the disadvantage of what otherwise would have been the position of the unsuccessful party in the absence of such delinquency on its part.

45 This background suggests that, in its operation upon litigation under s 123 of the EPA Act, s 69 of the Court Act is not to be narrowly construed. Further, it is applicable to new species of litigation and the discretion it confers is to be exercised so as to allow for the varied interests at stake in such litigation.

Conclusions

46 One submission by the Council may be discounted immediately. The Council urged that the imposition upon it and other councils of the costs "of successfully defending litigation brought against them in the [Court] might impose a very substantial financial burden" and result in expenditure or loss of public moneys, inevitably to be passed on to ratepayers through an increase in rates or by a reduction in services provided to ratepayers. We have referred earlier in these reasons to the constitution of the action tried by Stein J. In a significant number of such litigious disputes, it will, in accordance with the reasoning in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*[76], be entirely appropriate for, if not incumbent upon, the local government body not to assume the position

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73 *Daniell's Chancery Practice*, 7th ed (1901), vol 1 at 987. An example in this Court is the costs order made in *Attorney-General (Q); Ex rel Nye v Cathedral Church of Brisbane* (1977) 136 CLR 353 at 377.

74 eg *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177 at 178; 71 ALR 287 at 288. See also *Packer v Meagher* [1984] 3 NSWLR 486 at 500; *Australian Guarantee Corporation Ltd v De Jager* [1984] VR 483 at 502.

75 eg *Degmam Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354. See also *Re Smith; Ex parte Rundle (No 2)* (1991) 6 WAR 299 at 301.

76 (1980) 144 CLR 13 at 35-36. See also *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 171; *Kerr v Verran* (1989) 88 ALR 125 at 153; *Vidler v Secretary, Department of Social Security* (1995) 61 FCR 370 at 382-383; 135 ALR 323 at 335-336.

of a protagonist and to avoid incurring substantial costs. The position of protagonist will be filled by the party against which injunctive relief is sought and which is the real contradictor in respect of the application for declaratory relief.

47 Nor should the Court accept the further submission by the Council, with respect to the significance of s 123 of the EPA Act, that "[t]he extension of standing beyond the common law rules does not indicate any legislative intention to vary the ordinary costs rule." It is, as indicated earlier in these reasons, not a question of fixing upon any hardened "rule" derived from other descendants of the Judicature legislation and asking whether, in proceedings under s 123 of the EPA Act, the powers of the Court with respect to costs which are conferred by s 69 of the Court Act indicate a legislative intention to vary that "rule".

48 The present legislative regime apart, the Supreme Court, in its inherent equity jurisdiction, may, on the application of the Attorney-General for New South Wales, and without any relator, restrain infringement of prohibitions and restrictions imposed under various legislation, not for the benefit of particular individuals, but for the benefit of the public or a section of the public. In so taking proceedings to secure observance of the law, the Attorney-General represents the public generally[77]. If in a case initiated and actively conducted in this fashion the Attorney-General fails, any costs awarded against the Attorney-General will be borne by the public purse. To what degree, it may be asked, should the position be any different where statute has authorised any person, otherwise than as a relator, to institute and conduct such proceedings to secure the observance of legislation enacted for the benefit of the public or a section of the public? More precisely, is there a miscarriage in the exercise of the discretion as to costs conferred by s 69 of the Court Act to leave the costs to lie where they fall, after giving due weight to the countervailing interest of the successful litigant in obtaining an order for its costs and allowing for the other factors taken into consideration by Stein J in this case? The answer must be that, in the present case, there was no miscarriage.

49 The primary judge reasoned from a starting point which favoured costs orders against the appellant as the unsuccessful party. However, he correctly drew a distinction earlier expressed as follows by Menzies J, with the concurrence of Kitto, Taylor and Windeyer JJ[78]:

> "Prohibitions and restrictions such as those under consideration are directed towards public health and comfort and the orderly arrangement of municipal areas and are imposed, not for the benefit of particular individuals, but for

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77 *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582 at 605.

78 *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582 at 605.

the benefit of the public or at least a section of the public, *viz* those living in the municipal area."

Having characterised the nature of the litigation as concerned with public rather than private rights, Stein J stated that "something more" than the categorisation of proceedings as public interest litigation was needed before a successful defendant should be denied costs[79]. Stein J then isolated the factors identified in pars (iii), (iv) and (v) of the summary given earlier in these reasons as sufficient special circumstances. In proceeding to exercise in this fashion the discretion conferred by s 69, Stein J did not take into account considerations which can be said to have been definitely extraneous to any objects the legislature could have had in view in enacting s 69 and in relation to the operation of s 69 upon proceedings instituted under s 123 of the EPA Act. The contrary is the case.

Orders

50 The Court of Appeal erred in disturbing the decision of Stein J that there be no order as to costs. The appeal to this Court should be allowed with costs. The order of the Court of Appeal allowing, with costs, the Council's appeal to that Court should be set aside. In place thereof it should be ordered that the appeal to that Court be dismissed and the Council pay the costs of the appellant of that appeal.

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79 (1994) 82 LGERA 236 at 244.

51 McHUGH J. The question in this appeal is whether, in declining to make an order that an unsuccessful applicant in litigation pay the costs of the successful respondent, a court can properly rely, in whole or in part, on the fact that the relevant proceedings can be characterised as "public interest litigation". In my view, the fact that the proceedings can be characterised as public interest litigation is irrelevant to the question whether the court should depart from the usual order that costs follow the event.

Mr Oshlack challenges the Council's development consent for "Iron Gates"

52 The appellant ("Mr Oshlack") actively promotes environmental causes. He brought proceedings in the Land and Environment Court of New South Wales challenging the validity of a development consent granted by the respondent ("the Council") in respect of the subdivision into residential lots of land at Evans Head known as "Iron Gates". Some of the land in question was considered habitat for endangered fauna, in particular the koala. The Council had decided that the applicant for development was not required to produce a fauna impact statement because the development was not likely to affect significantly the environment of endangered fauna. Mr Oshlack's primary argument was that this decision was so unreasonable that no reasonable decision-maker could have made it.

53 Stein J heard the proceedings. On 22 December 1993 he dismissed Mr Oshlack's challenge to the development consent[80]. The Council sought an award of costs. By a separate judgment delivered on 25 February 1994[81], Stein J held that special circumstances existed which justified a departure from the usual order as to costs. Accordingly, he made no order as to the costs of the proceedings.

54 His Honour reviewed the case law on costs orders in what he described as "public interest litigation", although his Honour did not specifically define what is meant by that expression. He held that characterisation of the proceedings at issue as public interest litigation can be a factor in a finding that special circumstances exist to justify a departure from the ordinary rule as to costs. However, such a characterisation will not of itself be sufficient to constitute special circumstances. Rather, something more is required. After finding that the proceedings could properly be characterised as public interest litigation[82], his Honour appears to have

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80 *Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd* (1993) 82 LGERA 222.

81 *Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd* (1994) 82 LGERA 236.

82 *Oshlack* (1994) 82 LGERA 236 at 246.

held that that factor together with four other factors constituted special circumstances which justified making no order as to costs. His Honour said[83]:

> "In summary I find the litigation to be properly characterised as public interest litigation. The basis of the challenge was arguable, raising serious and significant issues resulting in important interpretation of new provisions relating to the protection of endangered fauna. The application concerned a publicly notorious site amidst continuing controversy. Mr Oshlack had nothing to gain from the litigation other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna. Important issues relevant to the ambit and future administration of the subject development consent were determined, including the developer's acceptance of the need for an FIS for stage 2. These issues have implications for the Council, the developer and the public.
>
> In my opinion there are sufficient special circumstances to justify a departure from the ordinary rule as to costs. As a result there will be no order as to costs."

55 The Council appealed to the Court of Appeal of New South Wales from Stein J's judgment on costs. The Court of Appeal (Clarke, Sheller and Cole JJA) unanimously allowed the appeal[84]. In separate judgments, their Honours held that the principles on which Stein J acted were in conflict with this Court's decision in *Latoudis v Casey*[85], which was not referred to by Stein J. Their Honours held that, in exercising his discretion to decline to award costs in favour of the Council, Stein J took into account an irrelevant consideration, namely the public interest nature of the litigation. The Court of Appeal held that none of the factors relied on by Stein J justified a departure from the usual order as to costs. The Court ordered that Stein J's ruling that there be no order as to costs should be set aside and that, in substitution, Mr Oshlack should be ordered to pay the Council's costs in the Land and Environment Court and in the Court of Appeal.

The statutory framework

56 Three statutory provisions are relevant to the present appeal. Section 123(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) gave Mr Oshlack

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83 *Oshlack* (1994) 82 LGERA 236 at 246.

84 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

85 (1990) 170 CLR 534.

standing to commence proceedings challenging the Council's decision. Section 123(1) provides:

> "Any person may bring proceedings in the [Land and Environment] Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach".

Section 20(1)(c) of the *Land and Environment Court Act* 1979 (NSW) provides that the Land and Environment Court has jurisdiction to hear and dispose of "proceedings under section 123 of the Environmental Planning and Assessment Act 1979".

57 Section 69(2) of the *Land and Environment Court Act* 1979 (NSW) relevantly provides that:

> "Subject to the rules and subject to any other Act[86]:
>
> (a) costs are in the discretion of the Court;
>
> (b) the Court may determine by whom and to what extent costs are to be paid".

The arguments supporting the ruling of Stein J

58 Mr Basten QC, for Mr Oshlack, advances two main arguments in support of Stein J's holding that the public interest nature of the litigation was relevant to a consideration of whether to depart from the usual order as to costs. First, he seeks to distinguish *Latoudis* by arguing that its holding does not necessarily apply in relation to different types of litigation arising in different statutory contexts. He also points to the wide standing provisions of the *Environmental Planning and Assessment Act* as impacting on the costs discretion by evidencing a legislative intention to encourage public involvement in environmental planning and assessment.

59 Second, he contends that a body of authority supports his view that the public interest nature of litigation is relevant to the question of costs[87]. He argues that it

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86 Mr Oshlack does not rely on any rules made under the Act or any other enactment to support Stein J's decision.

87 See, for example, *Kent v Cavanagh* (1973) 1 ACTR 43 at 55; *Arnold v Queensland* (1987) 73 ALR 607 at 622; *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 493-494; *Solomon Services Pty Ltd v Woongarra Shire Council* [1988] 2 Qd R 202 at

(Footnote continues on next page)

is not unfair to order the Council to bear its own costs in circumstances where the Council is a public authority which itself has an interest in the resolution of any legal uncertainty in respect of the powers it exercises.

60 Mr Basten also relies on a suggested analogy to this Court's occasional practice of granting an applicant special leave to appeal on condition that, regardless of the outcome of the appeal, the applicant pay the respondent's costs of the appeal and undertake not to disturb existing costs orders made below in the respondent's favour.

61 Mr McClintock SC, for the Council, relies on the reasoning of the Court of Appeal and contends that *Latoudis* directly governs the resolution of the present appeal. He further argues that policy considerations, including the financial burden which would be placed upon Councils (and hence ratepayers) who have nonetheless been successful in litigation, militate against any acceptance of the public interest character of litigation as being relevant to the costs discretion. Mr McClintock contends that the approach advocated by Stein J, and in some of the Land and Environment Court decisions on which his Honour relied, is inherently unfair. He points out that the approach protects an unsuccessful applicant from liability for an adverse costs order but it does not protect the Council from an adverse costs order when the applicant is successful. The Council is charged with the task of evaluating what the public interest requires and typically has no financial interest in the outcome of the litigation in the Land and Environment Court. What is the logic, Mr McClintock rhetorically asks, of treating one unsuccessful litigant differently from another?

62 Before dealing with Mr Basten's arguments, it is convenient to consider what is meant by both the "usual order as to costs" and the concept of public interest litigation.

207; *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214 at 216-217.

The source of the broad discretion as to costs

63 At common law, courts had no jurisdiction to award costs. The jurisdiction is statutory and has evolved gradually[88]. It was regarded as necessary in order to avoid injustice[89]. In modern times, the statutory language typically confers on the court a broad discretion to award costs, rather than declares that costs automatically follow the event. The origin of this broad statutory discretion is O 55 of the Rules of Court in the First Schedule to the *Supreme Court of Judicature Act* 1875 (UK) which commenced with the words[90]:

> "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court".

64 The discretion was later encased, in amended form[91], in s 5 of the *Supreme Court of Judicature Act* 1890 (UK)[92] which provided that, subject to the Judicature Acts, the rules of court made thereunder and any express statutory provision, the awarding of costs "shall be in the discretion of the court" which shall have full

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88 Holdsworth, *A History of English Law*, 3rd ed (1945), vol IV, 536-537.

89 In their first report, the Judicature Commissioners stated:

> "In the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has at present full power over the costs. We think that the absence of this power in the Courts of Common Law often occasions injustice, and leads to unnecessary litigation. We therefore recommend that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court." (*First Report of the Judicature Commissioners*, (1868-69) [4130] vol 25 at 15 in *IUP Series of British Parliamentary Papers*, vol 13 at 23).

90 Rule 47 of the Rules of Procedure in the Schedule to the *Supreme Court of Judicature Act* 1873 (UK) dealt also with costs and commenced with substantially the same wording. However, the commencement of the 1873 Act was delayed until 1 November 1875: *Supreme Court of Judicature (Commencement) Act* 1874 (UK), s 2; and commenced operation in conjunction with the *Supreme Court of Judicature Act* 1875 (UK). The 1875 Act was intended to amend and extend the 1873 Act. The Rules of Court in the First Schedule to the 1875 Act, which included O 55 dealing with costs, applied in place of the 1873 Rules when covering the same subject matter: see s 16 and the "Note" to the First Schedule to the 1875 Act.

91 To combat the restrictive interpretation given to the rule in *In re Mills' Estate* (1886) 34 Ch D 24.

92 See Kell, "The Liability of Represented Persons for Party-Party Costs in Representative Actions", (1994) 13 *Civil Justice Quarterly* 233 at 234.

power to determine by whom and to what extent such costs are to be paid. The statutory provision at issue in the present case is s 69(2) of the *Land and Environment Court Act* which similarly provides that costs are in the discretion of the Court and that the Court may determine by whom and to what extent costs are to be paid. This wording is substantially the same as that contained in s 76(1)(a) and (b) of the *Supreme Court Act* 1970 (NSW). Historically, both s 69(2) of the *Land and Environment Court Act* and s 76(1)(a) and (b) of the *Supreme Court Act* owe their origins to the traditional formula derived from O 55.

The discretion must be exercised judicially

65 Although the statutory discretion is broadly stated, it is not unqualified. It clearly cannot be exercised capriciously. Importantly, the discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation[93]. In this manner, the law has gradually developed principles to guide the proper exercise of the discretion and, in some cases, to highlight extraneous considerations which, if taken into account, will cause the exercise of the discretion to miscarry. Consistent with the aim of justice, the law could not have developed otherwise. As Mason CJ said in *Latoudis*[94]:

> "it does not follow that any attempt to formulate a principle or a guideline according to which the discretion should be exercised would constitute a fetter upon the discretion not intended by the legislature. Indeed, a refusal to formulate a principle or guideline can only lead to exercises of discretion which are seen to be inconsistent, a result which would not have been contemplated by the legislature with any degree of equanimity."

66 By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. A successful litigant is generally entitled to an award of costs. As Devlin J said in *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No 2)*[95], when setting aside an arbitrator's costs award:

> "the arbitrator is not directing his mind to one of the most, if not the most, important of the elements which ought to affect his discretion, namely the result of the case. Prima facie, a successful party is entitled to his costs. To

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93 *In re Elgindata Ltd (No 2)* [1992] 1 WLR 1207; [1993] 1 All ER 232.

94 (1990) 170 CLR 534 at 541; see also Dawson J at 558.

95 [1953] 1 WLR 1481 at 1484; [1953] 2 All ER 1588 at 1590.

> deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure".

The combined force of the sentiments recognised above by Mason CJ, regarding the need for consistency in order to avoid injustice, and by Devlin J, regarding the most significant factor affecting the costs discretion, provides the jurisprudential basis for the important principle commonly referred to as the "usual order as to costs".

The usual order as to costs

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[96]. 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.

69 The traditional exceptions to the usual order as to costs focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*[97], Devlin J formulated the relevant principle as follows:

> "No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct."

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96 *Latoudis* (1990) 170 CLR 534 at 543 per Mason CJ, at 562-563 per Toohey J, at 566-567 per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

97 [1951] 1 All ER 873 at 874.

"Misconduct" in this context means misconduct relating to the litigation[98], or the circumstances leading up to the litigation[99]. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation[100]; unnecessarily protracts the proceedings[101]; succeeds on a point not argued before a lower court[102]; prosecutes the matter solely for the purpose of increasing the costs recoverable[103]; or obtains relief which the unsuccessful party had already offered in settlement of the dispute[104].

70 Apart from anomalous examples in the equity jurisdiction[105], there are very few, if any, exceptions to the usual order as to costs outside the area of disentitling conduct. The Court may award costs in favour of a defendant where the plaintiff has obtained only nominal damages[106]. However, this practice can be justified on the basis that, in reality, the successful party lost the litigation and the unsuccessful party won[107]. For present purposes it is not necessary to attempt to list any further exceptions to the principle of the usual order as to costs. The question at issue in this appeal concerns only the suggested public interest nature of the litigation. This

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98 *King & Co v Gillard & Co* [1905] 2 Ch 7; *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 812.

99 *Bostock v Ramsey Urban District Council* [1900] 2 QB 616.

100 *Jones v McKie* [1964] 1 WLR 960; [1964] 2 All ER 842; *Bostock* [1900] 2 QB 616 at 622, 625, 627.

101 *Forbes v Samuel* [1913] 3 KB 706.

102 *Armstrong v Boulton* [1990] VR 215 at 223.

103 *Hobbs v Marlowe* [1978] AC 16.

104 *Jenkins v Hope* [1896] 1 Ch 278.

105 These anomalies typically feature a trust fund or property which will readily satisfy benevolent costs orders. Such examples were recognised by O 55 of the 1875 Rules which, after stating that costs shall be in the discretion of the Court, declared that "nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity".

106 *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394; [1984] 1 All ER 685; *Anglo-Cyprian Trade Agencies* [1951] 1 All ER 873.

107 *Alltrans Express* [1984] 1 WLR 394 at 401, 403-404; [1984] 1 All ER 685 at 691, 693; *Anglo-Cyprian Trade Agencies* [1951] 1 All ER 873 at 874.

factor may often be alternatively expressed in terms of the plaintiff's motives in commencing the litigation being grounded in the public interest rather than self interest. Does this factor, however expressed, constitute or provide partial support for a further exception to the principle of the usual order as to costs? In my view, both authority (in the form of *Latoudis*) and principle compel the conclusion that the public interest nature of the litigation is irrelevant to the exercise of the costs discretion.

The concept of "public interest litigation"

71 One significant difficulty facing Mr Basten in the present appeal is the inherent imprecision in the suggested concept of "public interest litigation" or what for present purposes is the same thing - the complex of factors involving or arising out of the public interest that justifies a court departing from the usual order as to costs. Much litigation concerns the public interest. Prosecutions and most constitutional and administrative law matters almost invariably affect or involve the public interest. So do many ordinary civil actions concerning private rights and duties. Many defamation actions, for example, involve the defence of fair comment on a matter of public interest or the truth of an imputation that "relates to a matter of public interest"[108]. If the present case is "public interest litigation", it is difficult to see how prosecutions, most administrative and constitutional matters and many ordinary civil matters are not also "public interest litigation" entitling a court to depart from the usual order as to costs. At all events, it seems difficult - probably impossible - to formulate a principle that would indicate a rational basis for determining that the present litigation is public interest litigation without being compelled to hold that most cases involving criminal prosecutions and constitutional and administrative law are also "public interest litigation" for the purpose of costs orders.

72 If discretions concerning costs are to be exercised consistently and rationally, it is essential that the courts formulate principles and guidelines that can be applied with precision in most cases. If characterisation as "public interest litigation" is a factor to be considered when making costs orders, courts must be able to define the term with precision. They must eschew any notion of the "I know it when I see it"[109] type of reasoning. If courts are to retain the confidence of litigants and the wider community, they must continually reaffirm and demonstrate that their

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108 *Defamation Act* 1974 (NSW), s 15.

109 *Jacobellis v Ohio* 378 US 184 at 197 (1964) per Stewart J concurring.

decisions are based on objective reasons that are articulated and can be defended. As Professor Paul Gewirtz has recently written[110]:

> "Judicial power involves coercion over other people, and that coercion must be justified and have a legitimate basis. The central justification for that coercion is that it is compelled, or at least constrained, by pre-existing legal texts and legal rules, and by legal reasoning set forth in a written opinion. From this perspective, the exercise of judicial power is not legitimate if it is based on a judge's personal preferences rather than law that precedes the case, on subjective will rather than objective analysis, on emotion rather than reasoned reflection."

73 The difficulty of distinguishing "public interest litigation" from other litigation where the usual order for costs applies is strikingly illustrated by reference to the factors that Stein J relied on to categorise the present case as "public interest litigation". In support of this finding, his Honour appears to have relied on the following factors[111]:

1. the case involved a challenge to the legal validity of a development consent in respect of land partly covered by littoral rainforest and designated wet land;

2. the land was a habitat for koalas, listed as an endangered species in Sched 12 of the *National Parks and Wildlife Act* 1974 (NSW);

3. the case involved claims that the Council gave insufficient consideration to endangered fauna and that its conclusion that there was unlikely to be a significant effect on the environment of endangered fauna was one that was not reasonably open;

4. the case involved the construction and meaning of the consent itself and its legal certainty;

5. the submissions made on behalf of Mr Oshlack were arguable and respectable;

6. the proceedings involved an analysis of statutory provisions which should prove helpful in future cases;

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110 "On 'I Know It When I See It'", (1996) 105 *Yale Law Journal* 1023 at 1025.

111 *Oshlack* (1994) 82 LGERA 236 at 245-246.

7. the case was one of the first Class 4 challenges to examine the endangered fauna provisions inserted into the *Environmental Planning and Assessment Act*;

8. his Honour had held that the body of law developed under Pt 5 of the *Environmental Planning and Assessment Act* relating to the meaning of "likely" and "significantly" in s 112 could be imported into the endangered fauna provisions of the Act;

9. the subject matter of the litigation was a matter of public controversy; and

10. there was a public interest in the outcome of the litigation.

74 Factors 1 to 4, 7 and 8 are relatively specific to the present litigation. Mr Basten does not suggest, however, nor could he, that these factors must be present in any proceedings, whether in the Land and Environment Court or another court, before they can properly be classified as "public interest litigation". This would clearly be at odds with a number of the cases relied on by Stein J. Factors 5, 6, 9 and 10, on the other hand, may be present in many actions between private citizens which on any view would not be characterised as "public interest litigation" - for example, litigation under the *Trade Practices Act* 1974 (Cth) between two large corporations involving claims of false or misleading advertising.

75 His Honour's judgment does not refer to any principle or criterion which would enable other courts to determine why the matters that he mentioned made the case "public interest litigation". Nor does he refer to any principle or criterion that would enable other courts to distinguish this case from prosecutions, and constitutional and administrative law matters that are matters of public controversy in which there is a public interest in the outcome of the litigation or which involve an analysis of statutory provisions which should prove helpful in other cases. Without an organising principle to apply or a set of criteria to guide, there is a real danger that, by invoking the "public interest litigation" factor in cases that affect the public interest or involve a public authority, an award of costs will depend on nothing more than the social preferences of the judge, a dependence that will be masked by reliance on the protean concept of public interest litigation.

The decision in *Latoudis*

76 In *Latoudis* the defendant, Mr Latoudis, appeared before the Magistrates' Court in Oakleigh, Victoria charged with three offences relating to the theft of a motor vehicle and receiving stolen car accessories. The Magistrate dismissed all three offences. Section 97(b) of the *Magistrates (Summary Proceedings) Act* 1975 (Vic) authorised the Court, when dismissing an information or complaint, to "order the informant or the complainant to pay to the defendant such costs as the Court thinks just and reasonable." The defendant applied for an award of costs against the informant police officer. The Magistrate refused the application stating that the informant had acted reasonably in instituting the proceedings and that the defendant had caused suspicion to fall upon himself by failing to seek proof of ownership of the goods when he purchased them. The defendant obtained an order nisi to review the Magistrate's decision on costs. Kaye J discharged the order nisi and the defendant appealed by special leave to the High Court.

77 The principal question at issue was whether in summary criminal proceedings a successful defendant should ordinarily be awarded his or her costs. Counsel for the informant police officer argued that costs should not be awarded if the informant acted reasonably in instituting the proceedings in the public interest. By majority, the Court held that the magistrate's exercise of discretion had miscarried and the defendant was entitled to his costs.

78 For present purposes, the case is particularly relevant because of the Court's treatment of arguments that costs should not be awarded in favour of a successful defendant because of (i) the reasonableness of the prosecutor's conduct in commencing the proceedings; and (ii) the public purpose or public interest nature of the proceedings. A majority of the Court (Mason CJ, Toohey J and myself) rejected these arguments.

79 The reasonableness of the prosecutor's conduct was viewed as clearly irrelevant to the proper exercise of the costs discretion. Toohey J said that the Magistrate had refused the defendant an award of costs because, for one reason, "[i]t was reasonable for the Informant to have sworn the information, given that she had a reasonable suspicion that the Defendant was in possession of stolen goods"[112]. Toohey J then firmly declared[113] :

> "The first of these considerations [ie the argument cited] is, in the light of the authorities, irrelevant."

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112 (1990) 170 CLR 534 at 563.

113 (1990) 170 CLR 534 at 564.

His Honour later emphasised the point when stating[114]:

> "Once the reasonableness of the prosecution and the risk of deterring police officers from launching prosecutions are put to one side, the way is open to expressing in more positive terms what shall guide the magistrate in his or her decision."

I said[115]:

> "The learned magistrate erred in taking into account that it was reasonable for the informant to have sworn the information. That is not a ground for depriving the appellant of his costs."

80 Mason CJ, Toohey J and I were all of the view that one starts with the proposition that a successful party to litigation (the defendant in *Latoudis*) can usually expect to receive a costs award in its favour unless its own conduct disentitles it from the benefit of the discretion. It is the conduct of the successful party, and not the conduct or motives of the unsuccessful party, which is relevant to the exercise of the costs discretion[116]. Thus Mason CJ said[117]:

> "in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. 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".

Toohey J stated[118]:

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114 (1990) 170 CLR 534 at 564.

115 (1990) 170 CLR 534 at 570.

116 Similarly, the fact that an unsuccessful plaintiff is funded by legal aid is irrelevant to the exercise of the costs discretion. See *Re Minister for Immigration and Ethnic Affairs; Ex parte Qin* (1997) 71 ALJR 533 at 537; 143 ALR 1 at 6; *Latoudis* (1990) 170 CLR 534 at 543 per Mason CJ.

117 (1990) 170 CLR 534 at 542-543.

118 (1990) 170 CLR 534 at 565.

> "If a prosecution has failed, it would ordinarily be just and reasonable to award the defendant costs, because the defendant has incurred expense, perhaps very considerable expense, in defending the charge."

His Honour affirmed the point as follows[119]:

> "It is unnecessary to speak in terms of a presumption; it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket."

His Honour noted that in a particular case[120]:

> "there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that the successful defendant should bear his or her own costs or, at any rate, a proportion of them."

His Honour then lists two examples of such "good reasons". Both examples are of disentitling conduct by the defendant (failing to explain conduct before charge laid and unreasonably prolonging proceedings). Toohey J then declared[121]:

> "These illustrations are in no way exhaustive but what they point up is that a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her."

81 I also held that attention should focus on the conduct of the successful defendant. I said[122]:

> "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. Speaking generally, before a court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informant to establish that the defendant unreasonably induced the informant to think that a charge could be successfully brought against the defendant or that the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings ... A successful defendant cannot be deprived of his or her

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119 (1990) 170 CLR 534 at 565.

120 (1990) 170 CLR 534 at 565.

121 (1990) 170 CLR 534 at 565-566.

122 (1990) 170 CLR 534 at 569-570.

> costs, however, because the charge is brought in the public interest ... or because the informant acted reasonably in instituting the proceedings".

82 Mr Basten argues that *Latoudis* can be distinguished from the present case because *Latoudis* concerned summary criminal proceedings. But I cannot accept this argument. As the Court ultimately recognised in *Latoudis* the principles at issue in that case derived from, or were analogous to, those supporting the exercise of the costs discretion in civil cases[123]. Indeed, to a significant extent, much of the discussion in *Latoudis* can fairly be viewed as testing whether the principles governing the exercise of the costs discretion in summary criminal proceedings in some manner departed from those governing its exercise in civil cases. In this sense, the argument that *Latoudis* directly applies to the present case is even stronger, given the Court's acceptance in *Latoudis* of the relevant principles governing civil cases. The significance of *Latoudis* was well stated by Gleeson CJ in *Ohn v Walton*[124] when he said:

> "What is of importance, however, is the fundamental proposition on which that decision rests. It concerns the nature of an order for costs. The proposition is of equal validity in the context of civil litigation, summary proceedings, and disciplinary proceedings ... The point of *Latoudis v Casey* is that the purpose of an order for costs is to indemnify or compensate the person in whose favour it is made, not to punish the person against whom it is made."

83 In my view, *Latoudis* provides a direct obstacle to any acceptance of Mr Basten's submissions. If the prosecutor in *Latoudis* could not avoid an order for costs notwithstanding the public interest involved in the prosecution, how can the present appellant possibly succeed? Unless Mr Basten can demonstrate that the particular statutory provisions at issue, namely the costs discretion encased in s 69(2) of the *Land and Environment Court Act* and the wide standing provisions of s 123(1) of the *Environmental Planning and Assessment Act*, displace or alter the established principle of and exceptions to the usual order as to costs, this appeal must fail. To these provisions I now turn.

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123 (1990) 170 CLR 534 at 542-543 per Mason CJ; at 567-570 per McHugh J; while at 566 Toohey J accepted that the considerations he identified as relevant and irrelevant to the exercise of the costs discretion in summary criminal proceedings could prompt an analogy with civil actions. See also at 561 per Dawson J.

124 (1995) 36 NSWLR 77 at 79.

The legislature has not departed from the traditional costs formula

84 In each case the application of the costs discretion must be examined in its precise statutory context. In the present case, s 69(2) of the *Land and Environment Court Act* provides that costs are in the discretion of the Court and that the Court may determine by whom and to what extent costs are to be paid. As I have already noted, this follows the traditional formula with its origin in O 55 of the Rules of Court contained in the First Schedule to the *Supreme Court of Judicature Act* 1875 (UK). It is upon this statutory basis that much of the jurisprudence has evolved supporting the usual order as to costs.

85 In many instances, legislatures have found reason to depart from the traditional formula by enacting specific legislation varying the incidence and reach of costs orders. For example, s 116(3) of the *Workers Compensation Act* 1987 (NSW) precludes the Workers Compensation Court from ordering costs against a person who is unsuccessful in his or her claim for compensation unless satisfied that the application was frivolous, vexatious, fraudulent or made without proper justification[125]; s 114(1) of the *Anti-Discrimination Act* 1977 (NSW) provides that parties to a complaint before the Equal Opportunity Tribunal should generally bear their own costs; s 47(1) of the *Legal Aid Commission Act* 1979 (NSW) exempts a legally aided person from being liable to pay an adverse costs order in certain circumstances[126]. Similarly, legislatures have acted to ensure that represented persons in representative actions are generally not liable for party-party costs if their representative loses at trial[127]. In the context of s 69(2), however, it is clear that the New South Wales Parliament has not seen fit to depart from the traditional formula in circumstances where it could readily have done so. Accordingly, apart from the question of the relevance of the open standing provision in s 123(1) of the *Environmental Planning and Assessment Act* (which I consider below) the precise statutory context of the proceedings at issue does not, of itself, provide any support for a departure from the usual order as to costs.

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125 See also *Compensation Court Act* 1984 (NSW), s 18.

126 See also s 171E(2) of the *Legal Profession Act* 1987 (NSW) which provides that a successful respondent to proceedings before the Legal Services Tribunal can be awarded costs only if the Tribunal considers that special circumstances warrant the making of the order.

127 See *Federal Court of Australia Act* 1976 (Cth) s 43(1A); *Class Proceedings Act* 1992 (Ontario) s 31(2); Kell, "The Liability of Represented Persons for Party-Party Costs in Representative Actions", (1994) 13 *Civil Justice Quarterly* 233.

The relevance of wide standing provisions to the question of costs

86 Section 123(1) of the *Environmental Planning and Assessment Act* permits "any person" to bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act. Wide standing provisions are by no means a new feature in Australian law[128]. However, their increasing use in many areas of modern administrative law typically evidences a legislative intention to remove one perceived barrier to the challenging of administrative decisions. Section 123(1) evidences such an intention and has been construed accordingly[129].

87 But it does not logically follow that the introduction of wider standing provisions means that courts should construe the traditional costs discretion so as to undermine the principle of the usual order as to costs. Two reasons tell against using the bare enactment of open standing provisions to change the principles concerning the awarding of costs.

88 First, the legislature has expressly acted to widen standing requirements but has stopped short of taking the separate and further step of expressly altering the traditional costs discretion. It could readily have done so, and its omission may properly be viewed as deliberate. Indeed, it is likely that, given the primacy of the principle that costs ordinarily follow the event, the legislature saw that principle as ensuring that successful respondents would suffer no additional financial burden by extending standing to those with no "interest" in the litigation in the traditional sense.

89 Second, and perhaps more important, open standing provisions cause no relevant prejudice to respondents, whether they be public authorities or private persons, but undermining the traditional costs discretion may cause significant prejudice to parties who are successful in litigation. Under wide standing provisions such as s 123(1), applicants are simply given enhanced access to restrain or remedy breaches of the law by respondents. Since the respondent is already expected to comply with the law, giving a member of the public a right to

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128 cf *Patents Act* 1903 (Cth), ss 56 and 84(2) allowing "any person" to oppose the granting of a patent on specified grounds and the extension of a patent, respectively; *Trade Marks Act* 1905 (Cth), s 38 permitting "any person" to oppose the registration of a trade mark within a specified time period; *Commonwealth Electoral Act* 1902 (Cth), s 41 allowing "any person" to object to the inclusion of any name on the lists of persons entitled to be placed on the electoral roll. Section 80 of the *Trade Practices Act* permits "any ... person" to apply to a court for injunctive relief against contraventions of Pts IV, IVA or V of the Act.

129 *Sydney City Council v Building Owners and Managers Association of Australia Ltd* (1985) 2 NSWLR 383.

ensure that the respondent has so complied causes no relevant prejudice to the respondent. But construing the traditional costs discretion in a manner which departs from and undermines the principle of the usual order as to costs when the proceedings can be characterised as "public interest litigation" can cause serious prejudice to a successful party in litigation. Such a party, whose rights have been vindicated by a court of law, cannot then be compensated for the expense incurred in having to commence or defend the litigation successfully.

90 The possibility of adverse costs orders may well inhibit some individuals and groups from bringing cases to court which involve challenges to aspects of public law. Express recognition of this fact does not, however, mean that the courts should remove this inhibition by adopting a practice of declining to follow the usual order as to costs in cases of "public interest litigation". Whether or not one regards a particular applicant's actions as well-intentioned and striving, albeit unsuccessfully, to serve some perceived public interest, the respondent still faces real costs from having to defend the proceedings successfully. The applicant had a choice as to whether or not to be a party to the relevant litigation. The respondent typically had no such choice. The legislature has chosen not to protect such applicants from the affects of adverse costs orders, whether by an express statutory exemption or the creation of some form of applicants' costs fund[130]. In such circumstances, one may well feel some sympathy for the plight of the unsuccessful applicant. But sympathy is not a legitimate basis to deprive a successful party of his or her costs.

91 Nor can I accept Mr Basten's argument that the fact that the successful respondent is a public authority with a significant interest in the resolution of any legal uncertainty in respect of the powers it exercises is relevant to the exercise of the costs discretion. A degree of legal uncertainty, preceding court adjudication, may affect the operations of many persons besides public authorities. Corporations, traders, taxpayers and many citizens frequently have an interest in the interpretation of a law that goes beyond the outcome of a particular case. The fact that a party is naturally interested in the outcome of litigation, particularly when it has been sued, cannot be a factor affecting the exercise of the costs discretion.

92 Nor is the status of the respondent as a public authority presently relevant. The law judges persons by their conduct not their identity. In the exercise of the costs discretion, all persons are entitled to be treated equally and in accordance with traditional principle. The fact that a successful respondent is a public authority should not make a court less inclined to award costs in its favour. Gone are the days when one could sensibly speak of a public authority having "available

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130 cf Australian Law Reform Commission, *Costs shifting - who pays for litigation*, Report No 75, 1995, ch 18.

to them almost unlimited public funds."[131] Moreover, if costs awards are not made in favour of successful respondents such as the Council, the public services which those authorities provide must be adversely affected. Every irrecoverable dollar spent on litigation is one dollar less to spend on the services that public authorities do and ought to provide. Often enough the services that will be reduced will be those that favour the politically weak - children, the unemployed, the disabled and the aged. Such results cannot be in the public interest.

93 Furthermore, a private citizen or corporation is frequently on the same side of the record as the public authority. That was the case in the present litigation. It is unjust to deprive the successful private litigant of his or her costs simply because the co-respondent is a public authority. It is unjustifiably discriminatory to award costs to the private litigant but to refuse to make an order for costs in favour of the public authority.

94 No doubt the fact that the successful party is a public authority may occasionally mean that a court will see the case as falling within one of the traditional exceptions to the usual order for costs. Public authorities have many obligations that have no counterpart in private relationships. A suspected or apparent breach of one or more of them may fairly have invited litigation with the result that a court will refuse to make a costs order in its favour[132]. However, it is one thing to apply an established principle to the unique situation of public authorities. It is another matter to make a special rule for public authorities.

95 The traditional principles give the courts scope for refusing to award costs in favour of a public authority whose conduct has invited litigation. To uphold the argument of Mr Basten in this case, however, would be to uphold a "principle" that involves a departure from the authority of *Latoudis* and from the basic principles that, with a handful of anomalous exceptions, have informed the exercise of the costs discretion for more than a century.

96 One further notion should be dispelled. The reason for the irrelevance of the "public interest" factor is not primarily the fear of a floodgate of claims by applicants who no longer face the disincentive of a potential liability in costs[133]. Nor is the reason some misconception of the court's wide jurisdiction to award costs in circumstances where justice demands that they be awarded in favour of or

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131 *Kent* (1973) 1 ACTR 43 at 55.

132 *Jones* [1964] 1 WLR 960; [1964] 2 All ER 842; *Bostock* [1900] 2 QB 616 at 622, 625, 627.

133 cf *Oshlack* (1994) 82 LGERA 236 at 245.

against a particular person[134]. Rather, it is because any departure from the usual order as to costs by reference to the motives or conduct of the unsuccessful party would typically, if not invariably, work injustice on the successful party. This fundamental principle informs the content and application of the court's discretion to award costs. By any reckoning, the cost of litigation in this country is high. I can see no justification in legal principle or social justice for depriving a successful private litigant of his or her costs simply because that person was unlucky enough to get caught up in "public interest litigation". Nor does it make any difference to that conclusion that the unsuccessful party had arguable submissions or that the proceedings involved an analysis of statutory provisions that should prove helpful in future cases or that the subject matter of the litigation was a matter of public controversy. And what applies to private litigants applies to public authorities, when they are litigants, unless the legislature has enacted law to the contrary.

97 Nor can it make any difference to the existence or application of a "public interest litigation" principle that it is inappropriate in some cases for a public authority to litigate the issue[135]. If the principle exists, it must be applicable in cases where a private person is the contradictor as well as cases where a public authority alone or with a private litigant is successful in the litigation. In the present case, both the Council and the successful private litigant were refused orders for costs. The point is that, if characterisation as "public interest litigation" becomes the foundation of an exception to the usual order as to costs, injustice must result to public authorities or private litigants and sometimes, as in this case, to both. That injustice is aggravated if, as Mr Basten contends, a successful applicant is nevertheless entitled to his or her costs even though the proceedings are characterised as "public interest litigation".

Special leave to appeal to the High Court

98 During argument of the present appeal, Mr Basten also relied on an analogy with this Court's occasional practice of granting an applicant special leave to appeal under s 35 of the *Judiciary Act* 1903 (Cth) on condition that it pays the costs of the respondent to the appeal and undertakes not to disturb the existing costs orders in the lower courts.

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134 For example against a non-party: *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 or, it seems, a representative party in circumstances where such costs orders are not precluded by statute: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203.

135 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

99 This Court is charged with the task of declaring the law for the whole of Australia[136]. At the stage when it grants special leave to appeal in civil matters, the Court necessarily looks beyond the immediate motives and concerns of the parties involved to the wider interests of the community in the establishment and maintenance of sound legal principle and to the proper administration of justice[137]. The mere fact that the judgment below may be wrong is not, of itself, sufficient reason to grant special leave to appeal. There must be some additional quality, almost invariably raising a question of law of public importance, which justifies a grant of special leave. These factors make the grant of special leave quite different from the exercise of a discretion to award costs following the conclusion of litigation.

100 Furthermore, in cases where the court grants special leave on condition that the applicant pay the respondent's costs the applicant is typically a person, such as the Commonwealth, the Commissioner of Taxation or a large insurance company, which itself has a direct interest in ascertaining the legal principle at issue in order to provide itself with guidance in respect of its future dealings, whether in actual legal proceedings or not, with numerous other persons[138]. In such cases, the applicant readily offers an undertaking to pay the respondent's costs on the appeal and not to disturb existing adverse costs orders because it has an immediate, personal interest in the determination of the legal principle at issue. The offering or requiring of such an undertaking as a condition for the grant of special leave is far removed from the conduct of a court which, at the conclusion of litigation, fails to follow the usual order as to costs because of some suggested public interest element associated with the litigation. The analogy suggested by Mr Basten cannot be maintained. Indeed, if anything the example of special costs orders in special leave applications tends to support the Council's position. The practice of requiring the applicant to pay the costs of the appeal, irrespective of the outcome is to protect *the respondent* from the costs of further litigation by the applicant. In this case, Mr Basten's argument seeks to protect *the applicant* from the costs that it has brought on the respondent.

The appropriate order

101 The characterisation of Mr Oshlack's proceedings against the Council as public interest litigation was irrelevant to the question of costs. And in my view

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136 *Pfennig v The Queen* (1995) 182 CLR 461 at 519.

137 See s 35A of the *Judiciary Act* 1903 (Cth); *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218.

138 See, for example, *Chappel v Hart*, special leave granted 4 August 1997; *Commissioner of Taxation v Rowe*, special leave granted 16 April 1996.

so were all the additional factors that Stein J relied on to hold that "special circumstances" existed to justify a departure from the usual order as to costs. In so far as various decisions[139] to which his Honour referred hold or suggest that the characterisation of the proceedings as "public interest litigation" provides a basis for departing from the usual order as to costs, they are wrong in principle and must be overruled. It follows that the learned judge erred in relying on the public interest factor as a reason to depart from the usual order as to costs. The Court of Appeal was right to allow an appeal from Stein J's decision. Mr Oshlack's appeal to this Court should be dismissed.

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139 See, for example, *Kent* (1973) 1 ACTR 43 at 55; *Arnold* (1987) 73 ALR 607 at 622; *Darlinghurst Residents' Association* (1992) 75 LGRA 214 at 216-217.

102 KIRBY J. This appeal from the Court of Appeal of the Supreme Court of New South Wales[140] concerns the law governing the exercise of an unqualified statutory discretion to award costs in civil proceedings.

103 At the conclusion of a hearing in the Land and Environment Court of New South Wales, Stein J determined that it was appropriate to make no order as to costs[141]. The Court of Appeal held that, in coming to this decision, his Honour's discretion had miscarried. He had taken into account irrelevant considerations, principally his finding that the proceedings had been properly brought in the public interest. He had also (so it was held) failed to take into account a relevant consideration, namely that the purpose of costs is compensatory, being designed to provide a (partial) indemnity to the successful party for the financial inconvenience to which it had been put by the litigation[142].

104 Each of the judges in the Court of Appeal concluded that the flaw in Stein J's reasoning was a failure to conform to the holding of this Court in *Latoudis v Casey*[143]. The point of general importance is, therefore, whether that holding forbade Stein J from giving weight to the public interest character of the proceedings. In my view, it did not and the appeal must succeed.

Proceedings in the Land and Environment Court

105 The dispute between Mr Al Oshlack and those of like mind in the Lismore Greens engendered a course of litigation which involved two trials in the Land and Environment Court[144] and two appeals to the Court of Appeal[145]. It arose out of a plan to develop a portion of Crown land at Evans Head in New South Wales. The land was to be developed by way of subdivision, with the provision of an access road through a littoral rain forest and designated wetland. The land affected was within the local government area of the Richmond River Council ("the Council"). The developer was Iron Gates Developments Pty Ltd, a party to the proceedings

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140 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

141 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 246.

142 Relying on *Latoudis v Casey* (1990) 170 CLR 534.

143 (1990) 170 CLR 534.

144 *Richmond-Evans Environmental Society Inc v Iron Gates Developments Pty Ltd* unreported, Land and Environment Court of NSW, 20 December 1991; *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222; (1994) 82 LGERA 236.

145 *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc* (1992) 81 LGERA 132; *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

below. It dropped out of the present appeals both to the Court of Appeal and to this Court.

106 It was common ground that the development site constituted a habitat of koala, a species of endangered fauna within the *National Parks and Wildlife Act* 1974 (NSW)[146]. In the second trial, which gave rise to the costs order in contention, the appellant argued that the Council had erred, in a way authorising judicial review, by its failure to require the preparation of a fauna impact statement[147] as a pre-condition to the consideration of the application for development. It was submitted that it had erred in a reviewable way in concluding that it was unlikely that the development would have a significant effect on the environment of the endangered fauna.

107 The strength of the appellant's case at trial was a letter from the National Parks and Wildlife Service of New South Wales contesting certain aspects of the evidence of the developer's expert and strongly recommending that a fauna impact statement be first obtained by the Council[148]. This evidence notwithstanding, Stein J dismissed the challenge to the Council's decision to approve the development. The Council and the developer, by motion, sought an order that the appellant pay their costs. It was the refusal of that order, and his Honour's determination that there should be no order as to the costs of the proceedings, that led to the appeal to the Court of Appeal and the orders which now bring the appellant and the Council before this Court.

Particularities of the environmental legislation

108 Before turning to the reasoning in the courts below it is useful to notice certain provisions of the relevant legislation.

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146 Then listed in Schedule 12 (since amended by the *Threatened Species Conservation Act* 1995 (NSW), Sch 4 (134)).

147 *Environmental Planning and Assessment Act* 1979 (NSW), s 77(3)(d1) (since amended by the *Threatened Species Conservation Act* 1995 (NSW), Sch 5 (12)). The fauna impact statement was provided for in the *National Parks and Wildlife Act* 1974 (NSW), s 92D (since repealed by the *Threatened Species Conservation Act* 1995 (NSW), Sch 4 (59)).

148 See Stein J in *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222 at 235 referring to a letter dated 19 January 1993 from the National Parks and Wildlife Service to the Council which suggested that there was a need for a fauna impact statement pursuant to s 120 of the *National Parks and Wildlife Act* 1974 (NSW).

109 The statutory basis for the ordering of costs in proceedings of the class of which these proceedings were an example[149] could not be in more unremarkable or ample terms. The *Land and Environment Court Act* 1979 (NSW) provides in s 69(2) that, subject to the rules and subject to any other Act[150]:

> "(a) costs are in the discretion of the Court;
>
> (b) the Court may determine by whom and to what extent costs are to be paid".

110 Such statutory provisions are sometimes described as affording "absolute and unfettered"[151] discretions. Sometimes they are described as allowing an "uncontrolled"[152] or "unqualified"[153] discretion. Otherwise, the discretion is commonly described as "unconfined"[154]. The point is that Parliament has not sought to control or limit in any way the exercise of the discretion. It has simply left that exercise to the judicial officer who is the donee of the statutory power. In this respect, such provisions are to be contrasted with those which, for example, forbid cost orders either generally or in particular cases[155] or forbid cost orders against particular classes of litigant unless special conditions are fulfilled[156].

111 The terms of par (b) of the provisions applicable in this case make it clear that not only is a general discretion conferred on the Land and Environment Court but that Court is expressly empowered to determine "by whom and to what extent" such costs are to be paid. It must be assumed that par (b) was intended to enlarge even the generality of the discretion conferred by par (a). It enhances the power

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149 Class 4. See *Land and Environment Court Act* 1979 (NSW), s 20(1)(c).

150 cf *Supreme Court Act* 1970 (NSW), ss 76(1)(a) and (b). The provenance of this provision is discussed in the reasons of Gummow J.

151 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811 per Viscount Cave LC.

152 *Latoudis v Casey* (1990) 170 CLR 534 at 568 per McHugh J.

153 *Latoudis v Casey* (1990) 170 CLR 534 at 558 per Dawson J.

154 *Latoudis v Casey* (1990) 170 CLR 534 at 540 per Mason CJ.

155 See *Industrial Relations Act* 1988 (Cth), s 347(1) (now repealed) considered in *Re Jarman; Ex parte Cook [No 2]* (1996) 70 ALJR 550 at 553, 556; 136 ALR 233 at 238, 242. A similar provision now appears in the *Workplace Relations Act* 1996 (Cth), s 347(1).

156 For example *Workers Compensation Act* 1987 (NSW), s 116.

of the Court to assign the costs, in the appropriate quantum, to such persons before the Court as the justice of the case requires[157].

112 However, such statutory provisions as to costs must be understood in the context in which (and for the purposes for which) they are enacted. The Land and Environment Court is a specialised court. It enjoys a wide range of powers conferred upon it by a large body of legislation that might be described, generally, as concerned with environmental and planning matters. By s 20(1)(c) of the *Land and Environment Court Act,* the Court is empowered to hear and dispose of proceedings under s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW). By the lastmentioned section, it is provided that "[a]ny person" may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act[158] "whether or not any right of that person has been or may be infringed by or as a consequence of that breach". Many other statutory provisions afford jurisdiction to the Court. But this is the provision which the appellant invoked in these proceedings. The power to award costs was clearly intended to extend to such cases.

113 But for s 123, it is unlikely that the appellant would have had the standing required by law to bring his claim for determination before a court of law[159]. However that may be, the purpose of that section was to afford "open standing" to any person to enforce the provisions of the Act affecting the environment in a relevant way. The section is one of a number of like provisions designed to increase the rights of access to the law and the courts of persons having a particular interest in, and commitment to, environmental concerns[160]. Such provisions, enacted in New South Wales by successive parliaments and under successive governments, portray an apparently consistent view that the legal barriers which formerly prevented environmental activists from engaging the jurisdiction of the

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157 cf *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 185-192.

158 Except where that breach relates to specified Olympic development work: *Environmental Planning and Assessment Act* 1979 (NSW), s 123(4).

159 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526-527; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 557-558; *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 at 771-772; 144 ALR 677 at 682-683.

160 See for example *Heritage Act* 1977 (NSW), s 153(1); *National Parks and Wildlife Act* 1974 (NSW), s 176A(1); *Wilderness Act* 1987 (NSW), s 27(1); *Uranium Mining and Nuclear Facilities (Prohibitions) Act* 1986 (NSW), s 10(1); *Environmentally Hazardous Chemicals Act* 1985 (NSW), s 57(1); *Local Government Act* 1993 (NSW), s 674(1).

courts should, in the specified cases and in the Land and Environment Court, be lifted.

114 Inherent in the foregoing legislative innovation is a parliamentary conclusion that it is in the public interest that such individuals and groups should be able to engage the jurisdiction of the Land and Environment Court, although they have no personal, financial or like interest to do so. It can be assumed that Parliament would know that, sometimes, such applications would succeed and, sometimes, they would fail. The removal of the barrier to standing might amount to an empty gesture if the public character of an applicant's proceedings could in no circumstances be taken into account in disposing of the costs of such proceedings, either where they succeeded or (as here) where they failed[161].

115 The power to hear and dispose of proceedings under s 123 of the *Environmental Planning and Assessment Act* is expressly conferred on the Land and Environment Court[162]. That power is expressed in the broadest of terms, and presumably extends to the enforcement of rights and duties, the review of the exercise of powers and the making of declarations of right, as appropriate. The power conferred is exclusive to the Land and Environment Court.

116 In exercising its powers under s 123 of the *Environmental Planning and Assessment Act*, the Land and Environment Court is obliged to take into account the objects of that Act stated in s 5. Those objects include the encouragement of the proper management, development and conservation of the environment and protection thereof[163] and also[164]:

> "[T]o provide increased opportunity for public involvement and participation in environmental planning and assessment."

117 When this background of special, and in some ways peculiar, legislation is recognised, it will be appreciated that the provision in the *Land and Environment Court Act* as to costs appears in a statutory context which alters, to some extent, the assumptions upon which civil litigation in this country has hitherto, ordinarily, taken place. Instead of a purely adversarial contest between two parties having individual, and typically financial, interests to advance, Parliament has envisaged

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161 The importance of costs orders in this context was noted by Toohey J in an address to an international conference on environmental law: cited in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 238.

162 *Land and Environment Court Act* 1979 (NSW), s 20(1)(c).

163 Sections 5(a)(i) and (vi).

164 Section 5(c).

that, in some cases at least, the contestants will be ranged as they were in these proceedings: on the one side an individual or representative body seeking to uphold one perception of the public interest and the requirements of environmental law; on the other side, a local government authority seeking to uphold another.

118 Commenting on the approach to be taken to s 123 of the *Environmental Planning and Assessment Act,* Street CJ, in *Hannan v Electricity Commission of New South Wales [No 3]*[165], remarked on the need to adapt the decisions of the courts so as not to frustrate the achievement of the purposes of Parliament:

> "This provision read in the context of the objects of the Act as set down in s 5 makes it apparent that 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. Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having a sufficient interest in the matters sought to be litigated. It is open to *any person* to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court. The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all of the factors falling within the purview of the dispute."

119 A similar approach must be taken to the meaning and application of s 69(2) of the *Land and Environment Court Act* at least where that Court is exercising jurisdiction under s 123. If the narrow view which found favour in the Court of Appeal were adopted, it would have the effect, in some cases at least, of impeding or frustrating the achievement of the object which the widening of standing rights was designed to secure.

The costs order of the primary judge

120 Stein J described the way in which the Land and Environment Court, over the years, had given effect to s 123 of the *Environmental Planning and Assessment Act* in its costs orders. Whilst not, without more, authorising departure from the ordinary rule that a successful party should have an order for its costs, the Court had held that the enlargement of standing rights might, in "special circumstances"[166], warrant particular adjustment of the costs of a litigant who

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165 (1985) 66 LGRA 306 at 313; cf *Phelps v Western Mining* (1978) 20 ALR 183 at 189-190.

166 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 238.

could "legitimately claim to represent the public interest"[167]. Stein J looked at the development of costs orders in "public interest litigation" in Australia which he felt to be in some ways analogous. He referred to the decision of Fox J in *Kent v Cavanagh*[168] (a case involving an unsuccessful challenge to the erection of the communications tower on Black Mountain in Canberra), to *AFCO v Tobacco Institute*[169] (a case concerning tobacco advertising) and to *Re Smith; Ex parte Rundle (No 2)*[170] (where the public interest litigant succeeded and unsuccessfully sought an order for indemnity costs). In all of these cases, as Stein J pointed out, the public interest purpose of the litigation was accepted as a factor which the judges could take into account in ordering costs[171].

121 Stein J rejected the Council's argument that, if persons such as the appellant were able to bring test cases without a costs penalty where they failed, the "floodgates would be opened"[172]. He remarked[173]:

> "[T]he fact is that fourteen years experience of open standing provisions in the Land and Environment Court has produced little more than a modest flow barely wetting the wellies."

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167 *Campbell v Minister for Environment and Planning* unreported, Land and Environment Court of NSW, 24 June 1988 per Cripps J, cited in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 240. See also *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402; *Fuller v Bellingen Shire Council* unreported, Land and Environment Court of NSW, 13 July 1988 per Hemmings J; *Nettheim v The Minister [No 2]* unreported, Land and Environment Court of NSW, 28 September 1988 per Cripps J; *Rundle v Tweed Shire Council [No 2]* (1989) 69 LGRA 21; *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214.

168 (1973) 1 ACTR 43.

169 (1991) 100 ALR 568. See now *Tobacco Institute (Aust) v AFCO (No 2)* (1993) 41 FCR 89.

170 (1991) 6 WAR 299 at 303.

171 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 239-240.

172 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 245.

173 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 245.

His Honour then proceeded to findings, clearly open to him, about the nature of the substantive proceedings[174]:

> "An examination of the judgment reveals that a significant issue in the case involved the question of the construction and meaning of the consent itself and its legal certainty. ... The submissions made ... were respectable and in no way unarguable. ... [Those] on the other major aspects of the challenge were eminently arguable although unsuccessful. The case was also one of the first class 4 challenges to examine the endangered fauna provisions inserted into the *Environmental Planning and Assessment Act* by the *Endangered Fauna (Interim Protection) Act*. The analysis of the application of these provisions will be helpful to the future administration of the provisions and enforcement."

Having regard to these features, Stein J expressed "no doubt" that the proceedings could be properly characterised as "public interest litigation". In his concluding summary[175] he referred to the serious and significant issues resulting in important interpretation of new provisions of the legislation; the controversy surrounding the site, the subject of the development; the appellant's lack of any objective other than to "uphold environmental law and the preservation of endangered fauna"; and the clarification of the law with implications "for the Council, the developer and the public".

122 It was for these reasons that Stein J considered that "a departure from the ordinary rule as to costs"[176] was justified. He therefore made the order which the Council has contested.

Decision of the Court of Appeal

123 The Court of Appeal was unanimous in setting Stein J's order aside. All three judges explained, as the foundation of their approaches, that they considered that his Honour's reasoning was vitiated by his failure to take into account various propositions drawn from *Latoudis*.

124 Clarke JA made it clear that were it not for his understanding of the requirements of that decision he might have come to a different view[177]. Indeed,

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174 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 245. The substantive proceedings are reported at (1993) 82 LGERA 222.

175 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 246.

176 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 246.

177 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 626.

he suggested that this Court would "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"[178]. Sheller JA similarly concluded that the practice which had developed in the Land and Environment Court, of which Stein J's order in this case was an example, was in conflict with the principle in *Latoudis* that "costs must be treated as compensation for a successful party"[179]. Cole JA stated that the motivation of the unsuccessful party, whether for private interest or the public interest, was "an irrelevant factor"[180]. This was because the award of costs was "compensatory"[181] and the motive or purpose of the unsuccessful party was therefore beside the point. Similarly, the arguability of the issues and their significance for environmental law constituted "an irrelevant consideration having regard to the compensatory nature of costs"[182].

125 Having found, on this basis, that the exercise of discretion of Stein J had miscarried, the Court of Appeal proceeded to exercise that discretion in the only way it considered lawful, having regard to its understanding of *Latoudis*. It ordered the appellant to compensate the Council for its costs. From that order, by special leave, the appellant appeals to this Court.

<u>*Latoudis* did not oblige the refusal of costs</u>

126 Stein J did not refer to *Latoudis*. Nor did several appellate courts in post-*Latoudis* "public interest" cases where costs have been considered[183]. This does not necessarily betoken oversight. It is simply a recognition of the comparatively narrow and special point which *Latoudis* decides. The decision in that case does not, and could not, lay down a general rule that the only consideration to be taken into account in the exercise of a statutory costs discretion is the compensation of the successful party for the recoverable expense to which it has been put by the litigation. With respect to the learned judges of the Court of Appeal, this reads too

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178 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 627.

179 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 636.

180 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 637.

181 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 637.

182 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 638.

183 Such as *Re Smith; Ex parte Rundle (No 2)* (1991) 6 WAR 299; *Tobacco Institute (Aust) v AFCO (No 2)* (1993) 41 FCR 89 at 103-104, 114-115; *Pareroultja v Tickner* (1993) 42 FCR 32 at 48-49; *Attrill v Richmond River SC* (1995) 38 NSWLR 545 at 556; *Qantas Airways v Cameron (No 3)* (1996) 68 FCR 387.

much into *Latoudis*. Such a rule was required neither by the matter which was before this Court for decision in that case nor by the majority's reasons.

127 *Latoudis* resolved a conflict of legal authority which had arisen in several Australian jurisdictions concerning the approach to be taken to a discretion conferred by legislation upon courts of summary jurisdiction to award costs in criminal proceedings terminated in favour of the defendant[184]. The *Magistrates (Summary Proceedings) Act* 1975 (Vic)[185] authorised the Magistrates' Court in Victoria, in dismissing a criminal information, to order the informant to pay such of the costs of the successful defendant as it "thinks just and reasonable". Mr Latoudis had been charged with three offences. Upon the first, no evidence was led. Upon the second, it was held that there was no case to answer. Upon the third, the charge was dismissed at the conclusion of his case. However, the magistrate had refused costs on the ground that the informant had acted reasonably in instituting the proceedings and that Mr Latoudis had engendered suspicion by failing to obtain proof of ownership when he acquired the goods, the subject of the charges.

128 It emerged during argument in *Latoudis* that, notwithstanding the amendment of the Victorian legislation to permit orders for costs, the approach of magistrates had remained resistant to such orders. Such resistance was thought to arise from the nature of criminal proceedings "which are brought, not for private ends, but for public purposes"[186]. An "important justification" for the Victorian practice was considered to be "that a police informant is performing a public duty"[187]. Emphasis was commonly laid on significant differences between criminal proceedings and civil litigation, which differences warranted adhering to a different general rule, notwithstanding the legislative discretion expressed in uncontrolled terms.

129 This Court divided in *Latoudis*. A minority[188] considered that the "particular approach" taken to the exercise of the statutory discretion was warranted in the special circumstances of criminal proceedings[189]. However, the majority concluded that the exercise of discretion had miscarried and that Mr Latoudis was

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184 The two approaches are explained by Mason CJ in *Latoudis v Casey* (1990) 170 CLR 534 at 538-541.

185 Section 97(b). See now *Magistrates' Court Act* 1989 (Vic), s 131.

186 (1990) 170 CLR 534 at 557 per Dawson J.

187 (1990) 170 CLR 534 at 560 per Dawson J.

188 Brennan J and Dawson J.

189 (1990) 170 CLR 534 at 545 per Brennan J, at 561 per Dawson J.

entitled to his costs. There was a difference in the reasoning of the Justices in the majority. Mason CJ and Toohey J were content to confine their opinion to a holding that, in ordinary circumstances, costs should be made in favour of a defendant against whom criminal proceedings had failed[190]. Each acknowledged that there would, nonetheless, be exceptions which would justify the refusal of costs. McHugh J stated a stricter test. It was this which attracted the attention of the Court of Appeal in the present case. It was that a successful defendant, in summary proceedings[191]:

> "has a reasonable expectation of obtaining an order for costs against the informant and that the discretion to refuse to make the order should not be exercised against him or her except for a reason directly connected with the charge or the conduct of the proceedings".

130 It was McHugh J's emphasis in *Latoudis* upon the compensatory function of cost orders in litigation which all of the judges in the Court of Appeal latched onto. However, as I have explained, the rule in that case was concerned with a particular problem which had arisen against the background of the special principle previously applicable to criminal proceedings. That principle was that the Crown neither received nor paid costs[192], notably in criminal proceedings[193]. That rule was displaced by legislation of which the Victorian provisions, under examination in *Latoudis,* were but one example. However, the old practice had survived the passage of that legislation. It had wrongly continued to govern the exercise, by some courts of summary jurisdiction, of the discretion to award costs expressed in the statute in unconfined or unqualified terms.

131 Apart from the obvious fact that *Latoudis* was therefore concerned with a special difficulty, several members of this Court, both in the majority and dissenting, took pains to emphasise the importance of paying close attention to the purposes of the particular legislation in question[194]. The significant differences between criminal and civil proceedings were stressed. They rendered an exact

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190 (1990) 170 CLR 534 at 542 per Mason CJ, at 565 per Toohey J.

191 (1990) 170 CLR 534 at 566.

192 *Attorney-General of Queensland v Holland* (1912) 15 CLR 46 at 49; *Ex parte Hivis; Re Michaelis* (1933) 50 WN (NSW) 90 at 92; *Latoudis v Casey* (1990) 170 CLR 534 at 538 per Mason CJ.

193 (1990) 170 CLR 534 at 542 per Mason CJ, at 567, 571 per McHugh J.

194 (1990) 170 CLR 534 at 542 per Mason CJ, at 557 per Dawson J, at 566 per Toohey J, at 568 per McHugh J.

analogy between the approaches to costs in both proceedings unnecessary or inappropriate.

132 Therefore, having regard to the context in which *Latoudis* fell to be decided, stated most clearly in the opening words of the judgment of Mason CJ[195], it was erroneous to derive from that decision a general rule governing the exercise of all unqualified statutory cost discretions, whatever the terms in which they were stated, whatever the context concerning the court and the purpose for which they were provided and whatever the peculiarities of the jurisdiction in which costs orders would play a part.

133 In concluding that the holding in *Latoudis* demonstrated error in the approach of Stein J in this case the Court of Appeal erred. As Stein J's order was a discretionary one which (as the Court of Appeal itself recognised) could only be disturbed for an established error of principle, the foregoing conclusion warrants setting aside the order of the Court of Appeal. The Council did not seek to support the Court of Appeal's orders upon some other ground. Accordingly, the order of Stein J should be restored. However, because an issue of general principle has been argued, it is appropriate to say something further about the approach which it is proper to take to the exercise of the discretion in s 69(2) of the *Land and Environment Court Act.* In my view, a proper understanding of that sub-section sustains both the order of Stein J and the reasoning which his Honour offered to support that order.

Statutory costs discretions - general approach

134 A number of general remarks may be made about s 69(2) and provisions like it:

1. The common law did not provide for costs although equity from an early date asserted "the fullest power to order a defeated party to pay costs"[196]. It was by statute that English law afforded to the common law courts the power to award costs, culminating in the *Judicature Acts* which reposed a general discretion in the courts of England to so provide[197]. A point of distinction was drawn between civil jury trials and non-jury trials. In the former, costs would follow the event, unless the court for good cause ordered otherwise. In the latter, costs were left to the discretion of the court but under a power

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195 (1990) 170 CLR 534 at 537.

196 *Latoudis v Casey* (1990) 170 CLR 534 at 557 per Dawson J.

197 *Latoudis v Casey* (1990) 170 CLR 534 at 557 per Dawson J.

to be exercised judicially by reference only to facts pertinent to the litigation[198].

2. Notwithstanding the width of the statutory language by which the discretion was conferred on the trial court, it came to be said in civil non-jury trials that a successful party, in the absence of special circumstances, had a reasonable expectation of obtaining an order for costs in its favour unless "for some reason connected with the case" a different order was specially warranted[199]. Any departure from this expectation would require that there should be material upon which the adverse discretion could be properly exercised[200]. It could not be exercised by reference to idiosyncratic notions or to facts and circumstances irrelevant to the case. Yet, until the discretion had been exercised and a costs order made in favour of a successful party, that party had no *right* to the order of costs, notwithstanding its success in the litigation[201].

3. Against this background, judicial descriptions of a statutory discretion to award costs as "absolute and unfettered"[202], "unqualified"[203], "uncontrolled"[204] or "unconfined"[205] cannot be taken at face value. Because the discretion is typically conferred upon a court or tribunal obliged to act judicially, fetters, confinement and controls of a sort are provided by the law. Although appellate courts should avoid the imposition of rigid requirements which would gloss the statute and narrow the discretion afforded to the donees of the statutory power, they retain a function to guide those who are obliged to exercise cost discretions. Such guidance may be afforded by referring in general terms to the considerations which the decision-maker can take into account. Such considerations may be listed for the avoidance of

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198 *Latoudis v Casey* (1990) 170 CLR 534 at 557.

199 *Donald Campbell & Co v Pollak* [1927] AC 732 at 812 cited by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534 at 569; see also at 557 per Dawson J.

200 *Ritter v Godfrey* [1920] 2 KB 47 at 60 per Atkin LJ.

201 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811.

202 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811 per Viscount Cave LC.

203 *Latoudis v Casey* (1990) 170 CLR 534 at 558 per Dawson J.

204 *Latoudis v Casey* (1990) 170 CLR 534 at 568 per McHugh J.

205 *Latoudis v Casey* (1990) 170 CLR 534 at 540 per Mason CJ.

arbitrariness and inconsistency in such decisions[206]. They are not intended to confine the decision-maker to a rigidly mechanical approach[207]. Arbitrariness and inconsistency would be potentially unjust and therefore undesirable. Mechanical rigidity would amount to an abdication of the discretion afforded to the decision-maker in large terms.

4. It is because the general purpose of an order for costs in favour of a successful party is to provide compensation in the form of a partial indemnity for the costs incurred that the ordinary principle observed in civil litigation under the "English rule" (as contrasted to the "American rule"[208]) is that legal costs will usually be ordered in favour of the successful party. Absent special statutory provisions, Australian law has followed this English rule. But the compensatory principle cannot be treated as an absolute rule. Otherwise, the discretion conferred in unqualified terms would indeed be shackled and confined. To permit this would be incompatible with statutory language expressed in such terms[209]. Therefore, although there are "rules"[210] or ordinary principles[211] which will guide the donee of power in the exercise of the discretion, they cannot extinguish the element of discretion. They must not be allowed to harden into rigid or inflexible requirements.

5. The proper approach to the exercise of a statutory discretion may be illuminated by the particular language in which it is expressed and the purpose for which it has been provided[212]. Thus the purpose in *Latoudis* clearly enough, was to substitute a new and different rule in criminal proceedings for the old rule governing the payment and receipt of costs by the Crown. In the present case, when determining the considerations that might be relevant to the exercise of the discretion in question, it would be a mistake, equivalent to that exposed in *Latoudis,* to ignore the functions,

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206 *Latoudis v Casey* (1990) 170 CLR 534 at 562 per Toohey J.

207 *Latoudis v Casey* (1990) 170 CLR 534 at 558 per Dawson J.

208 *Alyeska Pipeline Co v Wilderness Society* 421 US 240 at 247 (1975); *Ruckelshaus v Sierra Club* 463 US 680 (1983).

209 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811-812.

210 *Ritter v Godfrey* [1920] 2 KB 47 at 61-62 per Atkin LJ.

211 *Latoudis v Casey* (1990) 170 CLR 534 at 567 per McHugh J.

212 *Latoudis v Casey* (1990) 170 CLR 534 at 542 per Mason CJ, at 567 per McHugh J.

powers and peculiar procedural provisions governing the Land and Environment Court in the jurisdiction which it had exercised.

6. Given that statutory context and the clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in the enforcement of environmental law before the Land and Environment Court, a rigid application of the compensatory principle in costs orders would be completely impermissible. It would discourage, frustrate or even prevent the achievement of Parliament's particular purposes. The compensatory principle is adequately reflected by the adoption of a general practice by which, ordinarily (including in a case brought by a party under the "open standing" rule and purportedly in the public interest), costs are ordered in favour of the successful party. However, the general objects of the legislation must also find reflection in orders providing for costs. Regard may therefore be had to any public interest served by the party which has initiated the litigation, although it is ultimately unsuccessful. It has often been said that costs are not awarded against such a party as a punishment[213]. Nor are they awarded to express disapproval of the public or private inconvenience which that party has caused. If the party unreasonably pursues, or persists with, points which have no merit, such conduct will constitute a consideration relevant to the ordering of costs, even in circumstances where that party is generally successful[214]. A particular approach to a party which has ventured upon litigation ostensibly in the public interest is not adopted to reward that party's subjective motivation at the cost of another public or private person. As Cole JA pointed out in the Court of Appeal, litigation necessarily engenders cost. The purpose of the jurisdiction conferred to award costs is to permit the fair allocation of the costs which the parties have necessarily incurred[215]. Courts, whilst sometimes taking the legitimate pursuit of public interest into account, have also emphasised, rightly in my view, that litigants espousing the public interest are not thereby granted an immunity from costs or a "free kick" in litigation[216]. At least this is so unless such an immunity is conferred by

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213 *Cilli v Abbott* (1981) 53 FLR 108 at 111; *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ.

214 *Latoudis v Casey* (1990) 170 CLR 534 at 544 per Mason CJ.

215 *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 636-637 per Cole JA; cf Walpin, "America's Failing Civil Justice System: Can We Learn From Other Countries?" (1997) 41 *New York Law School Law Review* 647 at 657.

216 *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 170-171; *Botany Municipal Council v Secretary, Department of the Arts* (1992) 34 FCR 412 per Gummow J.

Parliament. Law reform bodies have lately made recommendations for legislation specially providing for public interest cost orders[217]. No such special orders are expressly provided either under the *Land and Environment Court Act*, or as an adjunct to s 123 of the *Environmental Planning and Assessment Act* or under rules made by the Land and Environment Court (assuming such a rule to be possible). Consideration of the factors relevant to the conduct of the appellant must therefore be sustained, if at all, within the general language of s 69(2) of the *Land and Environment Court Act* read in its context. No other special statutory provision exists.

Arguments of the Council rejected

135 The Council supported the reasoning of the Court of Appeal. It urged the application of the compensatory principle explained in *Latoudis*. It submitted that it would be ironic if the police officer in that case were denied her costs for bringing criminal proceedings "in the public interest" but the appellant were relieved of costs here for purportedly doing the same thing. However, the principle in *Latoudis* was not established as a universal, exclusive or inflexible rule. Compensation to the successful party was adequately taken into account in this case by Stein J's acknowledgment that the basic rule governing him, in the provision of costs, was that the Council, as the successful party, should recover its costs unless the appellant could establish "special circumstances" to warrant a different outcome[218].

136 The Council argued that the cost discretion had miscarried because of the reference to an indeterminate class of "public interest" litigation. It was submitted that this concept introduced a nebulous consideration of a social, economic or political kind. It was unhelpful as a criterion authorising departure from the ordinary compensatory principle. I agree that it is difficult to define with precision what is meant by "public interest" litigation. Stein J acknowledged this. However, the series of cases to which his Honour referred illustrates, clearly enough, that in

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217 Australian Law Reform Commission, *Costs shifting - who pays for litigation. Report No 75* (1995) at 147-150, 201-204. For a discussion of the overseas position, see Law Commission (England and Wales) *Administrative Law: Judicial Review and Statutory Appeals. Report No 226* (1994) at par 10.5.

218 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 244, 246.

this country, as well as in England[219], New Zealand[220], Canada[221] and elsewhere[222] a discrete approach has been taken to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain. In such cases the costs incurred have occasionally been described as incidental to the proper exercise of public administration[223]. Upon that basis it has been considered that they ought not to be wholly a burden on the particular litigant.

137 The approach just described is not entirely dissimilar to that long taken in courts of equity in cases in which trustees and other litigants in a special position, who have properly brought a matter before a court, are spared costs orders against themselves personally[224]. Nor is this approach dissimilar to the special orders which this Court quite frequently makes providing special leave to appeal upon condition that the appellant will pay the costs of a respondent whatever the outcome of the appeal[225]. Nor is it different from the principle long applied to that type of case recognised by the courts as a "test case"[226]. Such orders could not be supported if the *sole* criterion for the exercise of the costs discretion were compensation to the successful party and if that were necessary to the word "costs" itself.

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219 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811-812.

220 *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746; *Auckland Bulk Gas Users Group v Commerce Commission* [1990] 1 NZLR 448 at 472-473.

221 *Mahar v Rogers Cablesystems Ltd* (1995) 25 OR (3d) 690 at 703-704; *Reese v Alberta* [1993] 1 WWR 450.

222 *Southeast Alaska Conservation Council, Inc v State of Alaska* 665 P 2d 544 at 553-554 (1983).

223 *R v Archbishop of Canterbury* [1902] 2 KB 503 at 572; *Latoudis v Casey* (1990) 170 CLR 534 at 550, citing *Ex parte Hivis; Re Michaelis* (1933) 50 WN (NSW) 90 at 92.

224 Nevill and Ashe, *Equity Proceedings with Precedents (New South Wales)* (1981) at par [1412]. See also Dale et al, *The Practice of the Chancery Division ("Daniell's Chancery Practice")*, 7th ed (1982), vol 1 at 953.

225 See for example the offer of the appellant in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 417.

226 *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 556.

138 The Council next urged that the endorsement of a special approach in the case of so-called public interest litigation would needlessly embroil the courts in what were, effectively, political campaigns. These were properly to be waged in other public forums by public advocacy, letter writing campaigns, media interviews and the like. Courts should not encourage their processes to be used for such purposes. Thus in this case, it was submitted that Council meetings and committees were the proper venue for the appellant to give voice to his concerns about the proposed development and its impact on koalas. Court proceedings were inappropriate, expensive and time consuming, involving high public as well as private costs[227]. In one sense, all litigation, in so far as it elucidates the law, is in the public interest - at least when compared to resort to non-peaceful or unlawful means of resolving disputes. So classifying some cases as "public interest" litigation was artificial and potentially unfair.

139 There are several answers to these arguments. Parliament has itself expressly facilitated litigation of the kind of issues raised in these proceedings. It has done so by adopting a special standing rule which could have no purpose other than to permit challenges by persons such as the appellant which would otherwise have been difficult or legally impossible. If a court considers that the litigant, whoever it may be, has wasted the court's time, had no legal merits or should have prosecuted its objections elsewhere, the ordinary compensatory rule would prevail. I would also invoke the words of Curtis J in the Supreme Court of British Columbia[228] when ordering each party to environmental proceedings to bear their own costs:

> " Disputes involving environmental issues, such as this one, are all too liable to provoke confrontations outside of the law. In my opinion it would not be conducive to the proper and legal resolution of this case which is one of significant public interest, to penalize the petitioners who have acted responsibly by attempting to resolve the issues according to law, through awarding costs against them."

140 The Council then submitted that, effectively, it was placed in a no-win situation if an applicant to the Land and Environment Court invoked the "public interest". Exploration of the complex motivations of individuals in

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227 *Queensland v J L Holdings Pty Ltd* (1997) 71 ALJR 294 at 303-304; 141 ALR 353 at 365-366.

228 *Sierra Club of Western Canada v British Columbia (Attorney-General)* (1991) 83 DLR (4th) 708 at 716; cf McCool, "Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article, 'When the "Public Interest" Loses: The Liability of Public Interest Litigants for Adverse Cost Awards'" (1996) 30 *University of British Columbia Law Review* 309.

bringing proceedings could be time-consuming and require evidence. It would be incompatible with the peremptory way in which costs orders must typically be made. I cannot agree. The Land and Environment Court, as any court, is well able to distinguish the spurious from the arguable claim. The issue is not the subjective *motivation* of the litigant but the public or private *character* of the litigation. If there is an element of inequality in the approach to the costs of a person such as the appellant, it is simply one designed to redress, in the appropriate case, the serious inequality in resources which typically (but not always) applies in the case of litigation commenced in the public interest between an objector and the public or private body resisting the objector's demands.

141 Furthermore, in many cases it will be unnecessary, and would be inappropriate, for councils to incur significant legal costs in defending "public interest" litigation in the Land and Environment Court. It is true that sometimes, as a planning authority with perspectives that may go beyond those of the protagonists, councils may have a legitimate interest to defend which justifies their participation in the litigation. However, it would often be appropriate for them to submit to the orders of the court. The dispute would then go forward as one between an applicant invoking the "public interest" and the body against which relief is sought.

142 The Council relied upon the absence of an express rule as to the costs of public interest litigation in the legislation governing the Land and Environment Court. The change in the standing rule did not necessitate a novel costs rule, particularly as Parliament, having enacted the former, held back from enacting the latter. There is some merit in this point. However, the mere fact that law reform bodies have investigated, and recommended, special orders as to costs in public interest litigation does not mean that, in appropriate cases, the general discretion will not suffice. The Australian Law Reform Commission in its report on the subject has acknowledged that special orders are sometimes made under the general discretion. Its explanation for the recommendation of express provisions is that special orders are "relatively uncommon", that courts generally uphold the compensatory principle and sometimes order indemnity costs against an unsuccessful public interest litigant, despite the public purposes of the litigation[229].

143 The Council complained that endorsement of the approach adopted by Stein J would, effectively, mark a retreat by the Court from the compensatory principle endorsed in *Latoudis*. This argument also rests upon a misreading of that decision. Once it is appreciated that compensation to the successful party is the reason why that party will ordinarily have a reasonable expectation of recovering its proper costs, the limits of the principle are clear. It says nothing about exceptional or

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229 Australian Law Reform Commission, *Costs shifting - who pays for litigation. Report No 75* (1995) at 144.

special circumstances which warrant a departure from the general rule. Such departures have quite often arisen in the past, as I have demonstrated. Public interest litigation is just one category into which may be grouped particular kinds of cases that will sometimes warrant departure from the general rule. The possibility of such departure cannot be denied, given the breadth of the statutory language in which the discretion is expressed. In particular, the possibility, contemplated by s 69(2)(b) of the *Land and Environment Court Act* that the Court "may determine by whom and to what extent costs are to be paid" envisages that, in particular circumstances, an order might be made in favour of a losing party and even to the full extent of that party's costs. Whilst such orders would be extremely rare, they must be possible given the statutory grant of power. On the face of par (b), there is an express denial of a parliamentary intention that the only applicable rule should be one of compensating the litigious victor with its costs.

144 Finally, although not strictly raised by the pleadings, the Council was heard to argue that Stein J had erred in the way in which he characterised the litigation, its public interest purpose, its arguability, the seriousness and the significance of the issues raised and the appellant's objectives in pursuing it. In my view, no challenge is open to such findings. Stein J was entitled to make them having regard to the advantages which he enjoyed as the primary judge. Even if this Court were to form a different view (which I would not) it would not be open to it to substitute its opinions upon such matters for those which Stein J recorded. Within those opinions, it was unsurprising that his Honour should have classified these proceedings as having been brought in the public interest. More precisely, that public interest was of the kind which s 123 of the *Environmental Planning and Assessment Act* permitted and facilitated. As such, it was open to Stein J to conclude that a departure from the ordinary compensatory rule was appropriate in the circumstances. The Court of Appeal erred in disturbing the order which he made.

Orders: restore the order of the primary judge

145 The appeal should be allowed with costs. This Court should set aside the orders of the Court of Appeal of the Supreme Court of New South Wales. In lieu thereof, it should be ordered that the appeal to that Court be dismissed with costs.

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