

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

Matter Nos P31 of 1997 and P 32 of 1997

SOUTH-WEST FOREST DEFENCE
FOUNDATION INC

APPLICANT

AND

EXECUTIVE DIRECTOR OF THE
DEPARTMENT OF CONSERVATION
AND LAND MANAGEMENT & ANOR

RESPONDENTS

Matter No P33 of 1997

BRIDGETOWN-GREENBUSHES
FRIENDS OF THE FOREST INC

APPLICANT

AND

EXECUTIVE DIRECTOR OF THE
DEPARTMENT OF CONSERVATION
AND LAND MANAGEMENT & ORS

RESPONDENTS

*South-West Forest Defence Foundation v Department of Conservation and
Land Management; Bridgetown-Greenbushes Friends of the Forest v
Department of Conservation & Land Management (No 2)
(P31-1997, P32-1997 and P33-1997) [1998] HCA 35
20 May 1998*

ORDER

*In each application, the applicant pay the respondents' costs of the
application.*

On appeal from the Supreme Court of Western Australia

Representation:

Matter Nos P31 of 1997 and P32 of 1997

J T Schoombee for the applicant (instructed by Environmental Defender's Office of Western Australia)

R J Meadows QC and R M Mitchell for the respondents (instructed by Crown Solicitor for Western Australia)

Matter No P33 of 1997

G M G McIntyre for the applicant (instructed by Environmental Defender's Office of Western Australia)

R J Meadows QC and R M Mitchell for the respondents (instructed by Crown Solicitor for Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

South-West Forest Defence Foundation Inc v Executive Director of the Department of Conservation and Land Management and Anor

Bridgetown-Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management & Ors

Costs – Public interest litigation.

- 1 GAUDRON, McHUGH, HAYNE AND CALLINAN JJ. Pursuant to leave reserved at the end of the hearing, the applicants filed written submissions contending that notwithstanding the dismissal of their applications for special leave, the respondents should not have a general order for costs. Rather, so the applicants submitted, the Court should order the applicants to pay the respondents' costs of the special leave hearing on 8 December 1997 but that otherwise each party should bear its own costs. It was submitted that such an order should be made because the proceedings are "of a public interest character, in that they seek to enforce environmental laws for the benefit of the general public and for the benefit of the endangered species of flora and fauna in the forest areas in question" and because if the Court had refused leave when the matter first came on for hearing on 8 December 1997 no further costs would have been incurred.
- 2 Notwithstanding these considerations, the costs of these applications should follow the event. Accordingly, in each case the applicant should pay the respondents' costs.

3 KIRBY J. For the reasons which I gave at the conclusion of the hearing I was of the opinion that the applicants' summonses for special leave should have continued to completion and the respondents' arguments heard in full. But I was the only member of the Court of that view. Special leave to appeal was refused. At the request of the applicants, costs were reserved. Both sides have now submitted written arguments. The respondents seek their costs, having succeeded. The applicants ask for special orders as to costs.

4 In disposing of the costs, it is necessary to begin with the orders which the Court made and to frame costs orders upon the assumptions inherent in the refusal of special leave to appeal. Ordinarily, as the applicants concede, that would oblige them to pay the respondents' costs.

5 It may be accepted that this Court has a broad discretion in such matters which cannot be shackled by immutable rules. However, that discretion must be exercised judicially and in accordance with conventional, although not inflexible, practice. Nothing in the recent decision in *Oshlack v Richmond River Council*¹ requires that every time an individual or body brings proceedings asserting a defence of the public interest and protection of the environment, a new costs regime is to apply exempting that individual or body from the conventional rule. To suggest that would be to misread what the Court decided in *Oshlack*. It would require legislation to afford litigants such a special and privileged position so far as costs are concerned. No such general legislation has been enacted.

6 One of the particular considerations in *Oshlack* which led to confirmation of Stein J's order in the Land and Environment Court of New South Wales, to the effect that a successful local government body not have its costs against an individual seeking to enforce environmental legislation, was the existence in that case of special legislation in New South Wales facilitating an "increased opportunity for public involvement and participation in environmental planning and assessment"² and enlarging the standing rules to permit that to be done³. No similar legislation existed in the present case. To the contrary, the respondents always contested the standing of the applicants and mounted a major challenge in this Court against the decisions below on that question. I see no basis in the first argument of the applicants for a departure from the ordinary rule.

7 The second argument was that, if the Court had refused special leave when the matter was heard by Brennan CJ, Toohey and Hayne JJ by video-link from Perth on 8 December 1997, the applicants would not have been put to the costs

1 (1998) 72 ALJR 578; 152 ALR 83; [1998] HCA 11.

2 *Land and Environment Court Act* 1979 (NSW), s 5(c).

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

3.

(considerable as I would surmise) of proceeding to Hobart where more than two days were set aside for the hearing of their applications as on a full appeal. The difficulty with this argument is that the proceedings from Perth could indeed have concluded in the ordinary way. However, it was with the consent of the applicants that the exceptional course was taken of affording them the opportunity to advance the many elements of their application as on a full appeal. It must be assumed that they accepted that opportunity, despite the costs and inconvenience of a hearing venue in Hobart. Presumably they did so in the hope that the larger facility to persuade the Court would bear fruit. Although it did not, this was a risk which the applicants ran. They were doubtless advised of the cost implications. There is no basis in the second reason advanced for a departure from the ordinary rule as to costs.

8 The applicants then ask that they not be rendered liable for the respondents' costs of the application for special leave to cross-appeal which was not considered by the Court in the way in which the hearing in Hobart concluded. However, the respondents were entitled to defend themselves in answer to the applicants' claims. The cross-appeal sought to raise the question of standing which I have mentioned. It was properly raised as a matter of counter-argument. Accordingly, upon conventional principles, the costs so incurred are part of the respondents' costs. To the extent that they are reasonable they must therefore be paid by the applicants.

9 Finally, the applicants asked that they be relieved of the costs of their application for orders that the respondents provide 14 days notice of any proposed logging operations in the relevant forest areas of Western Australia pending the conclusion of the special leave applications before this Court. Applications to that effect were heard in Perth on 19 January 1998 by Toohey J. An arrangement was made between the parties which was recorded. His Honour reserved the costs of the applications. It is possible that the undertakings sought, and eventually given, could and should reasonably have been dealt with by agreement between the parties without troubling the Court. Such a question, if still in contest, should be resolved on taxation of costs according to established principles. It does not affect the general orders which the Court makes.

10 I therefore agree with the costs order proposed.