Recent costs orders in the land and environment court

By Phillipa Alexander

APPORTIONMENT OF COSTS

Section 98(1)(b) of the *Civil Procedure Act* 2005 (NSW) gives the court full power to determine by whom, to whom and to what extent costs are to be paid. It is not unusual for an applicant to the Land and Environment Court NSW to be wholly successful in obtaining an order sought in the summons commencing the proceeding, even if they have not succeeded on each one of the grounds relied upon to support the claim. This situation can give rise to a respondent seeking to reduce the amount of the party/party costs to which the applicant would otherwise be entitled.

In *Friends of Turramurra Inc v Minister for Planning (No. 2)*,[1] the applicant succeeded in obtaining an order that a Local Environmental Plan (LEP) had been made contrary to the provisions of the *Environmental Planning and Assessment Act* 1979 (NSW). The applicant had challenged the validity of the LEP on six grounds and was successful on only two of those grounds. The remaining four grounds on which the applicant was unsuccessful were discrete from the grounds on which the applicant succeeded. The respondent argued that each party should pay its own costs, submitting that the unsuccessful issues were addressed in affidavit evidence and detailed written submissions and were the *most time consuming and resource-intensive issues* debated.

In supporting its claim, the applicant relied on its entitlement to costs in accordance with Part 42 r 42.1 of the *Civil Procedure Rules* 2005, which states that: '*Subject to this part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.*'

Arguments raised by the applicant in opposing the making of an order for costs on an apportioned basis included that:

(i) there were no separate claims for different relief from that upon which it succeeded;
(ii) the grounds upon which it succeeded were those that occupied 'the majority' of time both in pleadings and in the hearing of the case;
(iii) a party should not be dissuaded by the risk of costs from canvassing all issues that might be material to the decision made;
(iv) there was some overlap between or among grounds of challenge with the result that if any apportionment is to be made, it should not be undertaken on a grounds won and lost basis;
(v) in determining whether to apportion costs, it is relevant to notice that the present proceedings were brought in the public interest; and
(vi) any apportionment 'is a matter of judgment or impression; it is not susceptible to precise calculation' (*Wilderness Society Inc v Minister for Environment and Water Sources*[2]).

Craig J held that the fact that the applicant was successful in obtaining the relief sought was significant but acknowledged that the qualification of UCPR 42.1 *allows for the displacement of its prima facie effect*. His Honour agreed with the observation of Young JA (McColl JA agreeing) in *Hastings Point Progress Association v Tweed Shire Council*[3] that a person seeking to displace the *prima facie* effect of the rule must show something out of the ordinary in the case to justify the departure.

The court considered circumstances to be regarded as 'out of the ordinary' exist where multiple issues are involved and the successful party fails on an issue or group of issues that are separable from those upon which it succeeded. In this situation, the unsuccessful party may be ordered to pay a reduced proportion of the costs to which the successful party would otherwise be entitled.

DISCRETE ISSUES

Craig J referred to the summary of principles laid down in *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No. 5)*[4], and in particular to the distinction between cases which required determination of clearly discrete issues, and those in which all issues are inseparable or sufficiently linked with regard to the overall outcome of the matter. The court noted, however, that while claims for separate relief are most likely to involve discrete issues, any disputed question of fact or law on which a party fails can be a discrete issue.

In making a costs order for the minister to pay only 50 per cent of the applicant's costs of the proceedings, Craig J took into account that all the issues were not inseparable and a significant proportion of the documentary evidence and written and oral submissions were directed to the unsuccessful issues. The issues on which the applicant succeeded were not regarded as the predominant *focus* of the evidence or submissions made by the parties. The minister's submission that each party should pay its own costs was rejected as being inappropriate, with Craig J considering that the qualification in UCPR 42.1 did not extend to deny the applicant all of its costs. His Honour acknowledged that there was no precise method of calculating an appropriate percentage and that the exercise of his discretion depended on matters of impression and evaluation.

This issue was also considered by Pepper J in *McCallum v Sandercock (No. 2)*.[5] The court had held that the operation of a hard rock quarry by Raymond and Wendy Sandercock which adjoined a property owned by Beryl McCallum caused water, air and noise pollution. However, it was only in respect of the water pollution that the court found that there had been a breach of the *Protection of the Environment Operations Act* 1997. The applicant had also abandoned a fourth claim based on land pollution shortly before the commencement of the hearing. While the applicant submitted that the issues were not discrete, Pepper J disagreed and found evidence was prepared and submissions made that specifically addressed each type of pollution. As the majority of the evidence and hearing time related to the

water pollution, the respondent was ordered to pay 60 per cent of the applicant's costs.

NO APPORTIONMENT FOR UNSUCCESSFUL DEFENCES

In contrast, no apportionment of costs was made in the recent decision of *Wollondilly Shire Council v 820 Cawdor Road Pty Ltd & Anor (No. 2)*[6] where the Council had sought declarations and orders relating to the unlawful use and occupancy of a building used by Richard Garton as a dwelling. Although Lloyd AJ found Mr Garton's use of the building as a dwelling was unlawful, the proceedings were ultimately dismissed in the exercise of the court's discretion, permitting Mr Garton to remain in the building. A number of unsuccessful defences were raised in the proceedings and the council sought orders for costs. Lloyd AJ considered whether the defences raised were reasonable and whether in raising the defences that were unsuccessful, the issues were multiplied unreasonably. The court held that the primary unsuccessful defence was reasonable and refused to undertake a minutely precise exercise to separate out for costs purposes minor discrete issues which were not dominant and did not occupy a great deal of the court's time. The Council was ordered to pay the entirety of Mr Garton's costs of the proceedings.

PROCEEDINGS BROUGHT IN THE PUBLIC INTEREST

Where proceedings are brought in the public interest, Rule 4.2(1) of the *Land and Environment Court Rules* 2007 (LECR) may also be relevant. To the extent of any inconsistency, the LECR prevail over UCPR 42.1. Rule 4.2(1) LECR states:

> *'4.2 Proceedings brought in the public interest*
>
> *(1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.'*

Exercise of this discretion is a three-step process as summarised by Preston CJ in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No. 3)*.[7] First, the litigation must properly be characterised as having been brought in the public interest. Secondly, there must be 'something more' than the mere characterisation and, thirdly, there must be consideration of whether there are any counterveiling circumstances that would prevent the proceedings be characterised as having been brought in the public interest.

In *Friends of Turramurra,*[8] the applicant argued that as the proceedings had been brought in the public interest, it was entitled to special consideration where it may otherwise have been appropriate to make an order for reduced costs in view of the unsuccessful issues. Craig J accepted, for the purpose of the argument, that reverse logic could be applied to the rule so as to benefit a successful applicant otherwise not entitled to recover all its costs, and held that the litigation could be characterised as having been brought in the public interest. However, His Honour could not find the 'something more' that was required to exercise his discretion in favour of the applicant.

Pepper J also accepted in *McCallum*[9] that the rule could apply to a successful party who would otherwise receive a reduced costs order, but found that those proceedings had not been brought in the public interest.

In the recent decision of *Oshlack v Rous Water (No. 3),*[10] Pepper J again considered the rule with respect to proceedings brought by Alan Oshlack challenging the decision of Rous Water to increase the level of fluoride in its public drinking water. The proceedings were dismissed and Rous Water sought an order for costs. Mr Oshlack submitted that there should be no order as to costs or, alternately, that a reduced costs order against him should apply. The court applied a broad interpretation of 'public interest', holding that although the proceedings were brought on behalf of Mr Oshlack himself, the public interest was served insofar as the proceedings generally affected the public in the relevant local government areas and the litigation indirectly concerned the lawfulness of the local government authorities. In considering whether 'something more' was present, Pepper J held that the determination of preliminary questions by Biscoe J in *Oshlack v Rous Water*[11] raised significant issues of general importance, while the decision of Pepper J in *Oshlack v Rous Water (No. 2)* turned on the particular factual circumstances and could not be regarded as satisfying the factor. On the basis that the issues argued before Biscoe J were dominant, discrete and wholly severable for the purposes of both the costs application and a consideration of whether the proceedings were brought in the public interest, an order was made apportioning the costs payable by Mr Oshlack to Rous Water to 75 per cent.

SUMMARY

Given the recent trend of the court in making apportioned costs orders, legal representatives may need to consider the costs consequences of including certain discrete issues in applications to the Land and Environment Court or in raising separable defences to a claim. Where such issues have lower prospects of success and may not be essential to the overall outcome of the application, it could leave a successful client substantially out of pocket in his or her recovery of party/party costs. Practitioners may also need to consider this issue for the purposes of disclosure of an estimate under s309(1)(f) of the *Legal Profession Act* 2004 in respect of the range of costs that may be recovered if the client is successful in the litigation. ■

Notes: **1** *Friends of Turramurra Inc v Minister for Planning (No. 2)* [2011] NSWLEC 170. **2** *Wilderness Society Inc v Minister for Environment and Water Sources* [2008] FCAFC 19; (2008) 157 LGERA 413 at [13]. **3** *Hastings Point Progress Association v Tweed Shire Council (No. 3)* [2010] NSWCA 39; (2010) 172 LGERA 157 at [18]. **4** *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No. 5)* [2008] NSWLEC 235 at [34]. **5** *McCallum v Sandercock (No. 2)* (10 November 2011) [2011] NSWLEC 203. **6** *Wollondilly Shire Council v 820 Cawdor Road Pty Ltd & Anor (No. 2)* (27 August 2012) [2012] NSWLEC 183. **7** *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No. 3)* [2010] NSWLEC 59; (2010) 173 LGERA 280. **8** *Friends of Turramurra Inc v Minister for Planning (No. 2)* [2011] NSWLEC 170. **9** *McCallum v Sandercock (No. 2)* [2011] NSWLEC 203. **10** *Oshlack v Rous Water (No. 3)* [2012] NSWLEC 132. **11** *Oshlack v Rous Water* [2011] NSWLEC 73; (2011) 184 LGERA 365.

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