



Land and Environment Court New South Wales

Medium Neutral Citation: *Save Little Beach Manly Foreshore Incorporated v Manly Council* [2013] NSWLEC 155

Hearing Dates: 23 September 2013

Decision Date: 23/09/2013

Jurisdiction: Class 4

Before: Biscoe J

Decision: Respondent's notice of motion for security for costs filed on 17 September 2013 is dismissed with costs.

Catchwords: COSTS - security for costs - respondent moves for security for costs on eve of hearing of judicial review proceedings - motion dismissed for three reasons - first, Court has no power to order security for costs in judicial review proceedings except in exceptional circumstances and there are no exceptional circumstances - secondly, the proceedings were brought in the public interest - thirdly and alternatively, costs should be refused in the general discretion of the Court, having regard in particular to the fact that the proceedings involve a matter of public importance, the timing of motion and whether an order for security would stifle the proceedings.

Legislation Cited: Corporations Act 2001 (Cth) s 1335(1)
Local Government Act 1993 ss 45(1), 54, 729
Land and Environment Court Rules 2007 r 4.2(1), 4.2(2)

Uniform Civil Procedure Rules 2005 rr 42.21, 42.21(1A), 59.11

Cases Cited: ACN 105 921 962 Pty Ltd v Wiggett [2012] NSWSC 1526
Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3) [2010] NSWLEC 59, (2010) 173 LGERA 280
Friends of King Edward Park Inc v Newcastle City Council [2012] NSWLEC 113, (2012) 194 LGERA 226
Hastings Point Progress Association Inc v Tweed Shire Council (No 3) [2010] NSWCA 39, (2010) 172 LGERA 157
Oshlack v Rous Water (No 3) [2012] NSWLEC 132
Wollongong City Council v Legal Business Centre Pty Ltd [2012] NSWCA 245

Category: Procedural and other rulings

Parties: Save Little Beach Manly Foreshore Incorporated (Applicant)
Manly Council (Respondent)

Representation: SOLICITORS:
Woolf Associates (Applicant)
Marsdens Law Group (Respondent)

COUNSEL:
I King with J Longworth (Applicant)
P McEwen SC (Respondent)

File Number(s): 40549/13

EX TEMPORE JUDGMENT

- 1 This is a motion by the respondent, Manly Council, in judicial review proceedings for orders that the applicant provide security for the Council's costs in the sum of \$103,410 by 4 pm today, failing which the proceedings be stayed. The orders are sought pursuant to r 42.21 of the *Uniform Civil Procedure Rules 2005 (UCPR)*. At the hearing of the motion this morning the Council indicated that if the Court were minded to order security for costs, it only presses for security in the sum of \$50,000. The motion is being heard on the eve of the trial, which commences tomorrow.

- 2 The Council has resolved to sell its land known as 34 and 36 Stuart Street, Manly, on the Little Manly Beach foreshore. The applicant, Save Little Beach Manly Foreshore Incorporated, is a community group concerned to preserve the foreshore for public use. The applicant brings the proceedings pursuant to a statutory open standing provision. It contends that the land is classified as "community land" under the *Local Government Act* 1993 and also is held on trust for public purposes. A council is prohibited from selling or disposing of land classified as community land under the *Local Government Act*. The applicant claims declarations and an injunction to restrain its sale so long as the land is classified as community land.

BACKGROUND

- 3 The proceedings were commenced on 19 July 2013. On 5 August 2013 the Council undertook not to dispose of the Land pending final disposition of the proceedings; directions were made for pleadings, evidence and documents; and the matter was fixed for hearing for two days on 24 and 25 September 2013. Points of claim were filed on 23 August 2013. Points of Defence were filed on 11 September 2013. Earlier, on or about 9 August 2013, the Council served the applicant with a notice to produce. On 23 August 2013 the applicant produced documents in response to the notice including bank statements which showed a balance of about \$2,536. On 16 September 2013 the Council's solicitors wrote to the applicant's solicitors requesting the applicant to agree by noon next day to provide security for Council's estimated legal costs of \$127,000 and warning of an application for security for costs if agreement was not forthcoming. The applicant's solicitors replied by email dated 17 September, the factual contents of which appear to be correct:

We refer to your letter of 16 September 2013. We note that we wrote to the Council in relation to the subject of these proceedings on 12 July 2013. Not having received a reply that addressed the issues raised in our letter, nor dealing with the matter satisfactorily the proceedings were commenced on 19 July 2013.

The proceedings included interlocutory relief which was resolved by agreement between the parties on an undertaking given by the Council.

As part of that agreement the Council required that our client agree to the proceedings being heard expeditiously and our client has observed that agreement.

In accordance with directions hearings and directions made by the Court our client has filed and served its Statement of Issues and has filed and served several Affidavits.

We have also been discussing over several days the bundle of documents which has been prepared in joint cooperation and is all but finalised.

The Council has filed its Points of Defence.

The Council served a Notice to Produce dated 9 August 2013 seeking documents concerning the financial capacity and membership of the Applicant. Despite the fact that the documents sought did not go to any issue in the proceedings, the Applicant, as a cooperative measure, produced documents in response to the Notice on 23 August 2013. The documents produced confirm that the Applicant is impecunious.

The Applicant is a community body concerned to preserve the Little Manly Beach foreshore for public use, and the proceedings have been commenced in the public interest. In particular, we refer to the affidavit of Jacqueline French dated 17 July 2013 that has been served in these proceedings. If an application for security for costs is made the Applicant will rely on rule 4.2 of the *Land and Environment Court Rules 2007*.

The matter is set down for hearing on 24 and 25 September 2013.

As you would be well aware, applications for security must be made promptly.

Many of the issues raised by the Plaintiff in the Points of Claim have been conceded by the Defendant in the Points of Defence.

In all of the above circumstances our client does not agree to short service for an application for security for costs.

If an application is made our client will resist the application, and seek its costs of any such motion. On the matters raised, we invite Council to reconsider its position and not pursue the envisaged motion for security.

- 4 The notice of motion for security was filed on 17 September 2013, four working days ago, and was made returnable today. The motion is grounded on the applicant's admitted impecuniosity, and is therefore based on UCPR r 42.21(d).
- 5 UCPR r 42.21 provides:

42.21 Security for costs

(1) If, in any proceedings, it appears to the court on the application of a defendant:

...

(d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or

...

the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs,

for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

(1A) In determining whether it is appropriate to make an order that a plaintiff referred to in subrule (1) give security for costs, the court may have regard to the following matters and such other matters as it considers relevant:

- (a) the prospects of success or merits of the proceedings,
 - (b) the genuineness of the proceedings,
 - (c) the impecuniosity of the plaintiff,
 - (d) whether the plaintiff's impecuniosity is attributable to the defendant's conduct,
 - (e) whether the plaintiff is effectively in the position of a defendant,
 - (f) whether an order for security for costs would stifle the proceedings,
 - (g) whether the proceedings involves a matter of public importance,
 - (h) whether there has been an admission or payment in court,
 - (i) whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,
 - (j) the costs of the proceedings,
 - (k) whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,
 - (l) the timing of the application for security for costs,
 - (m) whether an order for costs made against the plaintiff would be enforceable within Australia,
 - (n) the ease and convenience or otherwise of enforcing a New South Wales court judgment or order in the country of a non-resident plaintiff.
- (1B) If the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
- (2) Security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
- (3) If the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
- (4) This rule does not affect the provisions of any Act under which the court may require security for costs to be given.

6 Sub-rule(1A), listing the matters to which the Court may have regard, was introduced very recently, in August 2013.

7 The *Corporations Act* 2001 (Cth) s 1335(1), applicable to corporate plaintiffs, is in substantially the same terms as r 42.21(d):

Costs

(1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

8 Principles relating to these sources of power include the following (*Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [28]-[30]):

- (a) The power involves the exercise of a discretionary judgment.
- (b) There is no predisposition to the making of the order.
- (c) The Court should adopt a practical commonsense approach to the examination of the financial affairs of the plaintiff corporation.
- (d) The threshold requirement is that the defendant bears the onus of establishing that there is reason to believe that the plaintiff will be unable to pay the plaintiff's costs if ordered to do so.
- (e) Once the defendant has discharged its onus, the onus shifts to the plaintiff to establish a reason why security should not be granted.
- (f) Factors governing the exercise of the discretion are now conveniently set out in r 42.21(1A) (which was inserted with effect from 9 August 2013).

9 The basis on which the Council makes the application for security is the applicant's impecuniosity. It is clear, and the applicant concedes, that it is impecunious. Accordingly, I am satisfied that the Council has discharged its onus of proving that there is reason to believe that the applicant will be unable to pay the Council's costs if ordered to do so.

10 However, in my opinion, the council's notice of motion should be dismissed for three reasons.

11 First, by a major exception to r 42.21, in judicial review proceedings the Court has no power to require a plaintiff to

provide security for costs except in exceptional circumstances. This is provided by the recently introduced r 59.11 of the UCPR:

59.11 Security for costs

(1) A plaintiff is not to be required to provide security for costs in respect of judicial review proceedings except in exceptional circumstances.

(2) Where a plaintiff:

(a) invokes an open standing provision, or

(b) commences representative proceedings,

the court is not to treat the plaintiff as bringing proceedings for the benefit of a third party for the purposes of considering whether exceptional circumstances exist.

(3) This rule has effect despite rule 42.21.

- 12 The Council initially conceded that there are no exceptional circumstances. When confronted with r 59.11, it suggested that there may be exceptional circumstances constituted by the fact that the persons behind the corporate applicant (ie its members) have not said that they will not pay any costs awarded against the applicant. This is a principle of scrutiny of members of a commercial corporation that applies in the different context of the general discretion under r 42.21. Even in that context I do not think that the principle is significant where, as here, the corporate plaintiff is not a commercial corporation and brings the proceedings in the public interest to enforce statutory obligations and its members will not benefit financially from the corporation's success: *Friends of King Edward Park Inc v Newcastle City Council* [2012] NSWLEC 113, (2012) 194 LGERA 226 at [40] per Biscoe J. In any event, in my opinion, it does not constitute exceptional circumstances and there are no exceptional circumstances in this case. Accordingly, the Council's motion for security for costs must be dismissed.
- 13 Secondly, in my opinion, the proceedings have been brought in the public interest and, pursuant to r 4.2(2) of the Land and Environment Court Rules 2007, security should not be ordered. That rule provides:
- The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
- 14 In the context of the same public interest rule relating to costs (as distinct from security for costs) in r 4.2(1), in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, (2010) 173 LGERA 280 at [13], Preston CJ of LEC said:
- What principles or guidelines have courts formulated for exercising the costs discretion in public interest litigation which has been unsuccessful? A review of the decisions on costs reveals that courts have used, in effect, a three step approach in determining whether to depart from the usual costs rule: first, can the litigation be characterised as having been brought in the public interest?; secondly, if so, is there "something more" than the mere characterisation of the litigation as being brought in the public interest?; and thirdly, are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?
- 15 As for the second principle, the need to establish "something more" was confirmed by the Court of Appeal in *Hastings Point Progress Association Inc v Tweed Shire Council (No 3)* [2010] NSWCA 39, (2010) 172 LGERA 157. Circumstances that may constitute "something more" were summarised in *Oshlack v Rous Water (No 3)* [2012] NSWLEC 132 at [12] per Pepper J:
- The "something more" may, for example, be found in the magnitude of the public interest itself (*Caroona* at [59]). There are, in addition, at least five categories of circumstances that have been identified as constituting "something more" for the purpose of step two (*Caroona* at [60]):
- (a) the litigation raises one or more novel issues of general importance;
 - (b) the litigation has contributed, in a material way, to the proper understanding, development or administration of the law;
 - (c) the litigation was brought to protect the environment, or some component of it, and the environment, or particular component of it, is of significant value and importance;
 - (d) the litigation affects a significant section of the public; and
 - (e) there was no financial gain to the applicant in bringing the proceedings.
- 16 The evidence establishes that the public interest in the subject of this case is substantial as reflected in the media attention that it has received, a public meeting that was full to overflowing, and a petition with some 1,000 signatures. Many members of the applicant do not reside close to the subject land. Arguments raised by the Council in relation to the proposed interpretation of ss 54 and 729 of the *Local Government Act 1993* appear to be novel and of general importance. The litigation was brought to protect a particular component of the environment, namely, open space on the harbour foreshore, which is a valuable and scarce resource. The litigation affects a significant section of the public

which enjoys the land in its present state. There is no financial gain to the applicant in bringing the proceedings. The Council argues that the applicant is a group seeking to preserve the amenity of their area and that, according to Young JA in *Hastings Points Progress Association Inc v Tweed Shire Council (No 3)* at [34], this type of group would have difficulty avoiding a costs order on the public interest ground. That view was obiter and it is unnecessary to consider whether the weight of authority supports it because, in my opinion, it is inapplicable in the present case given that the membership of the applicant appears to largely comprise persons who do not reside in the area of the subject land. In my view, the proceedings should be characterised as having been brought in the public interest and there is more, such that it is appropriate to exercise the discretion under r 4.2(2) of the Land and Environment Court Rules to decline to order security.

- 17 Thirdly, if I am in error thus far, then in my view the general discretion under UCPR r 42.21(1) should be exercised by declining to order security for costs. Three of the factors listed in r 42.21(1A) are of particular significance. They are: whether the proceedings involve a matter of public importance, the timing of the motion of security for costs, and whether an order for security for costs would stifle the proceedings. As to the first factor, in my opinion the proceedings do involve a matter of public importance because of the circumstances to which I have earlier referred. As to the second and third factors, a motion for security should be brought promptly. Delay in bringing a security for costs application will have particular significance where a plaintiff has spent substantial monies on the conduct of the litigation, which would be wasted if the proceedings are brought to an end because security cannot be provided. The significance of delay is reduced, although it may still be given some weight, where it is not suggested that the plaintiff or those standing behind it would be unable to provide the required security from its or their own resources, so there is no likelihood that the proceedings would be stifled by an order for security: *ACN 105 921 962 Pty Ltd v Wiggett* [2012] NSWSC 1526 at [19] per Black J. In the present case the applicant delayed filing the motion for security for costs between 23 August when the Council received the applicant's bank statements and 17 September when its motion for security was filed and made returnable on 23 September (today). By this time the applicant had virtually completed its pre-trial preparation. Given that on 5 August the proceedings were fixed for hearing on 24 and 25 September, the motion should have been brought more promptly. The significance of delay is increased where the proceedings will be stifled if security for costs is ordered because the applicant is impecunious. The Council suggests that is not this case because it has not been indicated that the members of the applicant would not be prepared to provide the required security. I do not accept the suggestion. Canvassing the numerous members of the applicant within the time available to see if they would do so would be a formidable, indeed impracticable, task given that this motion is brought on the eve of the hearing and that it seeks a stay of the proceedings if security if it is not provided by 4 pm today. In the circumstances, if the matter had to be determined on the basis of the exercise of the general discretion under r 42.21, I would decline to order security for costs.

- 18 The order of the Court is that the respondent's notice of motion filed on 17 September 2013 is dismissed with costs.

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