



Land and Environment Court
of New South Wales

CITATION : Gray and Anor v Macquarie Generation (No 2) [2010] NSWLEC 82

PARTIES : FIRST APPLICANT
Peter Robert Gray
SECOND APPLICANT
Naomi Crystal Hodgson
RESPONDENT
Macquarie Generation

FILE NUMBER(S) : 40500 of 2009

CORAM: Pain J

KEY ISSUES: COSTS :- whether departure from usual costs rule justified - partially successful strike out application - whether litigation can be characterised as public interest litigation - whether there are any countervailing considerations

LEGISLATION CITED: Civil Procedure Act 2005 s 98
Land and Environment Court Rules 2007 r 4.2(1), r 4.2(2)
Protection of the Environment Operations Act 1997
Uniform Civil Procedure Rules 2005 r 42.1

CASES CITED: Caroon Coal Action Group Inc v Coal Mines Australia Pty Limited (No 3) [2010] NSWLEC 59
Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2) [2004] NSWLEC 434; (2004) 136 LGERA 365
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Gray and Anor v Macquarie Generation [2010] NSWLEC 34
Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72
Save the Ridge Inc v Commonwealth of Australia [2006] FCAFC 51; (2006) 230 ALR 411
Sharples v Minister for Local Government [2010] NSWCA 36
Van Son v Forestry Commission of New South Wales (1995) 86 LGERA 108

DATES OF HEARING: 24 May 2010

DATE OF JUDGMENT: 28 May 2010

LEGAL REPRESENTATIVES: APPLICANTS
Ms K Ruddock (solicitor)
SOLICITOR

Environmental Defenders Office
RESPONDENT
Mr R Lancaster SC
SOLICITOR
Clayton Utz

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Pain J

28 May 2010

**40500 of 2009 Gray and Anor v Macquarie Generation
(No 2)**

JUDGMENT

- 1 **Her Honour:** In *Gray and Anor v Macquarie Generation* [2010] NSWLEC 34 (*Gray No 1*) I made an order summarily dismissing part of the Applicants' amended points of claim (APOC) on the question of whether there was lawful authority to emit carbon dioxide from the Bayswater power station in the Hunter Valley under an environmental protection licence issued pursuant to the *Protection of the Environment Operations Act 1997* (the POEO Act). I did not dismiss another part of the Applicants' APOC which raised an alternative ground that if the Respondent had lawful authority to emit carbon dioxide under its licence that did not authorise the emission of carbon dioxide without reasonable regard for people and the environment which limitation is to be implied in the licence (cl 54A and cl 54B of the APOC). The relevant factual background for the determination of the issues was contained in the agreed facts set out at [6] of *Gray No 1*.

- 2 The Respondent seeks an order that its costs be paid by the Applicants as it argues it was largely successful in its Notice of Motion dated 11 September 2009 (the event) and the usual costs order made is that costs

follow the event. The Applicants argue that each party should pay its own costs on the basis that the proceedings are in the public interest.

- 3 Wide discretion to award costs in class 4 proceedings is provided in s 98 of the *Civil Procedure Act* 2005. Under Pt 42 r 42.1 of the *Uniform Civil Procedure Rules* 2005 (the UCPR) the usual order is that costs generally follow the event. The application of s 98 and Pt 42 r 42.1 is subject to the *Land and Environment Court Rules* 2007 (the Court Rules) as the section states and as provided in Pt 42 r 42.1. Rule 4.2(1) of the Court Rules states:

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.

- 4 The Applicants rely on an affidavit of Peter Robert Gray, the First Applicant, affirmed 30 April 2010, which states that he is a member of numerous community and environmental advocacy organisations. His personal capacity in these organisations is involvement in campaigning against policies, legislation and activities which contribute to climate change. Mr Gray identifies a personal history of environmental lobbying to government, and involvement in protests and direct action campaigns on the issues of climate change. He states his belief that the solution to climate change lies in increased energy efficiency, demand reduction, and large-scale uptake of renewable energy and not the expansion of the coal industry. He states that he commenced the current proceedings because of his concern about climate change and the major contribution of coal-fired power stations to climate change, and to restrain Macquarie Generation from what he believes to be unauthorised emission of carbon dioxide into the atmosphere, and to assist in slowing down climate change and its impact. Mr Gray states that he does not stand to gain anything personally from these proceedings, and has support from his member organisations and others including Greenpeace and the North Coast Environment Council.

Respondent's submissions

- 5 The Respondent submits that it was largely successful on its Notice of Motion. Costs should follow that event applying the usual approach to costs orders in Class 4 proceedings under the UCPR Pt 42 r 42.1. Whether proceedings are in the public interest applies to the characterisation of the proceedings as a whole rather than particular issues raised in the proceedings, per *Sharpley v Minister for Local Government* [2010] NSWCA 36 at [123(a)] referring to *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* [2004] NSWLEC 434; (2004) 136 LGERA 365 at [15].
- 6 The Respondent accepts that at a broad level the issue of climate change and the impacts of carbon dioxide in the atmosphere are matters of public interest but disputes that in the circumstances of this case the matter can be considered a matter of public interest. It also accepts that the Applicant Mr Gray has a concern about climate change, considers that coal-fired power stations contribute to climate change and does not bring the litigation for his own financial gain.
7. The litigation should not be characterised as public interest as it did not raise a novel issue in the legal sense of raising an arguable question of general public importance. While the issue in the pleadings raised the issue of lawful authority to carry out an activity under the environment protection licence which has certain consequences, that was not novel in this legal sense. Nor can it be said that the litigation has contributed in a material way to the proper understanding, development or administration of the law. The resolution of the proceedings turned on the construction of the particular environment protection licence issued to the Respondent. It does not provide any precedent for any other licence.

Applicants' submissions

- 8 Each party should pay its own costs of the Respondent's Notice of Motion. The Applicants were partly successful in resisting the Respondent's Notice of Motion as that part of the case identified in cl 54A and 54B of the APOC was not struck out. The affidavit of Mr Gray demonstrates that the matter

is brought in the public interest, namely the protection of the environment from the effects of climate change resulting from the activities of humans. The proceedings are directed at the contribution of coal-fired power stations to climate change with a view to reducing these. The issue is of wide public interest in the community. The litigation is focussed on a public law obligation, being an alleged breach of the POEO Act.

- 9 The proceedings raise at least two novel issues of general importance:
- (a) whether or not it is possible to imply an authority in an environment protection licence; the motion has tested whether lawful authority can be implied in an environment protection licence, and
 - (b) as indicated in *Gray No 1* at [66] whether or not the principle of statutory limitation referred to in *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108 can be applied to an environment protection licence issued under the POEO Act.
- 10 The findings in *Gray No 1* have implications for other environment protection licences issued to other emitters of carbon dioxide. The Court's ruling on implied lawful authority in an environment protection licence has precedent value in relation to other environment protection licences.
- 11 None of the countervailing considerations identified in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited (No 3)* [2010] NSWLEC 59 apply.

Finding

- 12 Relevant principles in relation to the determination of costs in public interest litigation have recently been considered by Preston J in *Caroona* and both parties referred to that judgment. The principles concerning the identification of public interest litigation and whether the usual rule that costs follow the event should apply as articulated in *Caroona* are a useful guide to considering the parties' submissions in this matter. The task of characterisation of public interest litigation is considered in *Caroona* at [21]-[26] and the importance of doing so in the interests of upholding access to justice principles is considered at [27]-[36] and I adopt

Preston J's reasoning on these matters. At [13] Preston J summarised his conclusions in the judgment:

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?

- 13 Preston J stated at [15] that if litigation can be characterised as being brought in the public interest then it may be necessary to consider the nature, extent and other features of the public interest to decide whether departure from the usual rule on costs is appropriate. The principles identified in the numerous cases as discussed in *Caroona* are cases which have proceeded to finality so that an outcome against which to measure claims of public interest and the conduct of the litigation generally is known when costs are considered. In this matter the Applicants have not succeeded in resisting a preliminary application for summary dismissal of part of their case. There has not been a determination of the Court following a substantive hearing of contested issues of fact and law on which a court rules finally.
- 14 As identified in *Caroona* at [38]-[39] numerous cases have considered various factors in determining whether litigation is public interest in nature. In *Engadine* Lloyd J identified five considerations of whether the public interest is served by the litigation, is confined to a small or large number of people, involves enforcement of public law obligations, whether the parties' motivation is to uphold the public interest and the rule of law and whether an applicant has a pecuniary interest in the outcome of the litigation. As emphasised in *Caroona* at [41] these considerations are not definitive or closed. They are however useful to apply in this case to consideration of the subject matter of the litigation and the Applicants' motivation in bringing the action.

- 15 Although necessarily being assessed early in these proceedings, in light of the extensive argument heard in *Gray No 1* on the basis of the lengthy APOC and a statement of agreed facts, together with the affidavit of Mr Gray, it is possible to state that this litigation is focussed on upholding public law obligations, has the support of a large number of people, and the Applicants' motivation is to uphold the public interest and the rule of law, the First Applicant. I do not have any evidence from the Second Applicant but presume she shares the views of Mr Gray as she has chosen to also be an applicant. Mr Gray has no pecuniary interest in the outcome of the litigation. The litigation is broadly concerned with the impact of emissions of carbon dioxide from coal-fired power stations on climate change and the Applicants' motivation in pursuing the litigation is based on their concerns about the environmental impacts of climate change. The litigation should be characterised as public interest litigation in relation to the first step identified in *Caroona*.
- 16 To the extent that it is appropriate or necessary to consider additional factors referred to in the second step in *Caroona*, five considerations identified in various cases are referred to at [60] as follows:
- (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) where the litigation is brought to protect the environment or some component of it, the environment or component is of significant value and importance;
 - (d) the litigation affects a significant section of the public; and
 - (e) there was no financial gain for the applicant in bringing the proceedings.
- 17 These considerations are also not definitive or closed but are useful to consider here. The Applicants' action satisfies at least (c), (d) and (e). Whether the litigation raises novel issues of general importance I will discuss further below. I do not accept the Respondent's submission that

the focus of the litigation being the construction of a single environment protection licence which has no application to any other licence (accepting that statement for the present) means this cannot be considered public interest litigation. On the basis of the agreed facts in the summary dismissal application, the Respondent is a substantial emitter of carbon dioxide which is an essential part of its electricity generating functions as a coal-fired power station. The Applicants' case is directed to addressing those substantial emissions which focus of concern is reflective of local, national and international concern about the adverse impacts of climate change resulting from carbon dioxide emissions from development such as coal-fired power stations. That the focus of the litigation has (almost inevitably) a limited legal issue at its core, here the construction of the Respondent's environmental protection licence, does not negate that broader objective of the litigation. As submitted by the Respondent, characterisation of the litigation as public interest applies to the proceedings as a whole per Tobias JA (Beasley and McColl JJA agreeing) in *Sharpley* at [123] referring to *Engadine*.

18. *Caroona* refers to a three step process in which the third step involves assessment of any countervailing considerations which suggest that the usual costs rule ought apply where the litigation is public interest. The Respondent's submissions can be considered as raising countervailing considerations which suggest the usual costs rule ought apply. The Respondent's arguments are directed to the converse of the considerations identified in *Caroona* at [60(a)] (novelty) and [60(b)] (contribution to understanding of the law) (see par 15) because it submits that the Applicants failed to establish they had an arguable cause of action on a substantial part of their case. They cannot therefore be said to have raised a novel issue of general importance as that ground was found to have no reasonable prospects of success. Nor has the litigation contributed in a material way to the proper understanding or development of the law.

- 19 *Caroona* sets out cases which have identified countervailing considerations. The circumstance which most reflects the Respondent's submissions although not specifically relied on is at [61(d)], if a narrow issue without broad ramifications is raised per *Save the Ridge Inc v Commonwealth of Australia* [2006] FCAFC 51; (2006) 230 ALR 411 at [13], inter alia.
- 20 In relation to whether the issue summarily dismissed is novel and has wider legal implication, I do not agree with the submission of the Applicants' solicitor that the summary dismissal proceedings were a test of whether there can be implied authority in an environment protection licence. I do not consider that correctly characterises what I held in the strike out application. I held the Applicants' case on lawful authority as framed in the APOC did not meet the necessary legal threshold to continue. The Notice of Motion was a preliminary determination in the proceedings. Of necessity in such an application the Court must consider what the parties submit before it, applying the test identified in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.
- 21 Nor do I agree with the Respondent's submission that the ground summarily dismissed raised a narrow point which affected only the parties. The Applicants' ground in the APOC which was dismissed was novel. No other similar case has been before the Court so far as I am aware. It did raise a potentially significant legal issue (not necessarily framed as an issue of implied authority under an environment protection licence) if the matter had proceeded to final hearing. There was no disintitling conduct in relation to the conduct of the litigation by the Applicants at that point.
- 22 The Applicants were unsuccessful in part only in resisting the summary dismissal application. I accept the Applicants' submission that a novel and potentially significant issue is raised by that part of the claim that I have held can continue (cl 54A and cl 54B in the APOC) (see my observations in *Gray No 1* at [66]). On balance I do not consider there are countervailing

circumstances which suggest that the usual order for costs ought apply in the Respondent's favour. The appropriate costs order is that each party pay its own costs of the Respondent's Notice of Motion.

Orders

23 The Court makes the following order:

1. Each party should pay its own costs of the Respondent's Notice of Motion dated 11 September 2009.

THE 8 I CERTIFY THAT THIS AND
PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
JUDGMENT HEREIN
OF THE HONOURABLE JUSTICE
N. H. M. PAIN

A Westcott
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Associate

Date.....28/5/10.....

