SUPREME COURT OF QUEENSLAND

CITATION:	*Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor (No 2)* [2017] QSC 159
PARTIES:	**WHITSUNDAY RESIDENTS AGAINST DUMPING LTD** (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (first respondent) **ADANI AUSTRALIA COAL TERMINAL PTY LTD** (second respondent)
FILE NO:	5508 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	2 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Daubney J
ORDER:	**The applicant shall pay the second respondent's costs of and incidental to the proceeding.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – DEPRIVING SUCCESSFUL PARTY OF COSTS – NATURE OF PROCEEDING – PUBLIC INTEREST OR DUTY – where the applicant is a community-based environmental organisation – where no application was made under s 49 *Judicial Review Act* 1991 (Qld) for discretionary costs powers – whether the application was a test case or determined principles of general application – whether an element of public interest is sufficient to warrant a departure from the general rules as to costs *Environmental Protection Act* 1994 (Qld) *Judicial Review Act* 1991 (Qld) s 49 *Oshlack v Richmond River Council* (1998) 193 CLR 72 *Sharples v Council of the Queensland Law Society Incorporated* [2000] QSC 392 *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage*

Protection and Anor [2017] QSC 121

COUNSEL:	S J Keim SC and D C Fahl for the applicant R M Derrington QC for the first respondent D G Clothier QC and S J Webster for the second respondent
SOLICITORS:	Environmental Defenders Office (Qld) Inc for the applicant Crown Law for the first respondent Ashurst for the second respondent

[1] The background to this matter and my reasons for refusing the application for judicial review are set out at length in the principal judgment.[1] It is now necessary to deal with the question of costs.

[2] The first respondent has not sought an order for costs.

[3] The second respondent seeks its costs, arguing that there is no reason why costs ought not follow the event.

[4] The applicant, however, submits that:

(a) the Court ought exercise its discretion to order that each party bear its own costs;

(b) alternatively, the applicant should be ordered to pay only 50 per cent of the second respondent's costs.

[5] No application had been made by the applicant for the Court to exercise the discretionary costs powers conferred by s 49 of the *Judicial Review Act* 1991 (Qld) ('JRA'). Somewhat by analogy, however, the applicant sought to invoke considerations similar to those considered under s 49 in its argument for the Court to exercise the general costs discretion in a way which would relieve the applicant of the usual costs outcome *vis a vis* the second respondent.

[6] In particular, the applicant pointed to:

(a) the subject matter of the proceeding, i.e. a challenge to a decision effectively approving an "intended coal loading terminal [which] has potential impacts upon environmental values, significantly, those of the Great Barrier Reef".[2] It was said that this involved a matter which had, for some considerable period

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1 *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection and Anor* [2017] QSC 121.

2 Applicant's submissions, para 10.

of time, been a matter of widespread public interest, and it is "in the public interest that all proper and appropriate measures are taken to minimise impacts upon the [environmental] values in question".[3] Moreover, it was said, this case involved consideration of "detailed and complex decisional rules" relating to environmental protection, and the subject matter was "serious and of general public importance".[4]

(b) The fact that the applicant is a community-based organisation which has a genuine interest in the proper exercise of decision-making powers that involved the health of the Great Barrier Reef, and had no commercial interest in the outcome.

(c) The arguments run by the applicant. The first, which raised questions about the timing of the relevant report and the making of the relevant decision, was not pursued when further material was put on by the first respondent explaining the sequence of events.[5] The other arguments advanced by the applicant were "properly arguable and well reasoned".[6]

(d) Whilst the second respondent was joined to the proceeding, in fact it was the first respondent which was the proper contradictor. The second respondent, it was argued, did not "add materially to the arguments advanced by the first respondent, but essentially echoed" the first respondent's arguments.[7]

[7] Despite these arguments, I am not persuaded that there ought be a departure in the present case from the usual order as to costs.

[8] It is not enough for the applicant to seek to characterise this as having been "public interest litigation" in order to avoid the operation of the usual order as to costs. In *Sharples v Council of the Queensland Law Society Incorporated*, Mullins J said[8]:

> "There is always a public interest in seeing that statutory obligations of a statutory body are fulfilled and that the personal rights of any party affected by the performance of that statutory obligation are observed. By the very nature of what is a decision to which the Act applies, every review application will involve an element of public interest. It is apparent from the observations made in the judgments in the Court of Appeal to which I have referred relating to s 49

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3 Applicant's submissions, para 10.
4 Applicant's submissions, paras 13 and 14.
5 See principal reasons at [46] – [52].
6 Applicant's submissions, para 20.
7 Applicant's submissions, para 23.
8 [2000] QSC 392 at [30].

> of the [*JRA*] that there will usually be some broader public interest involved in the particular application to justify a special costs order than the usual public interest which must be present in every application from the mere fact that the Act applies to the decision under review."

[9] The present was not a test case. Nor was it a case which determined principles of general application. Rather, it was a case which, while concerning the operations of a proposed coal terminal, turned on a plain reading of the environmental objective assessment. So much is apparent from the principal reasons for judgment. I accept that there is a public interest in the due administration of the *Environmental Protection Act* 1994, and its application to the operation of infrastructure such as ports. But that fact alone does not warrant a departure from the general rule as to costs. As Brennan CJ observed in a similar case[9]:

> "… the fact that the appellant brought the present proceedings in the public interest for the protection of endangered fauna does not provide sufficient reason by itself for refusing the successful respondent its costs in the present case."

[10] The present case involved an element of public interest in the sense of seeing that the first respondent had fulfilled its statutory obligations. As is clear from the authorities to which I have referred, however, that alone is not sufficient to warrant a departure from the general rules as to costs.

[11] The applicant's standing, as a community-based organisation with a special interest in the health of the Great Barrier Reef, was not challenged. It was the applicant which joined both the first and second respondents to the present proceeding. Notably, however, the applicant did not, and did not seek to, make application under s 49 of the *JRA*. Rather, it instituted the proceeding and prosecuted the judicial review application with expedition against both respondents. The applicant's status as a community-based organisation interested in the health of the Great Barrier Reef does not confer immunity on it from an adverse costs order. There is no evidence before me to suggest that the applicant lacks capacity to satisfy a costs order. Nor is there anything to suggest that the applicant was unaware of, or did not appreciate, the likelihood of an adverse costs order being made in the event that it was unsuccessful in its application for judicial review.

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9 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 75.

[12] I have set out at length in the principal judgment my reasons for refusing the application for judicial review. Even acknowledging that the first argument advanced by the applicant was properly abandoned upon the delivery of further evidence by the first respondent, the balance of the arguments turned largely on criticisms of the environmental assessment report. As I noted in the principal reasons[10], the applicant's criticisms were unfounded.

[13] Finally, the applicant's implied criticism of the role taken by the second respondent in the proceeding ignores the simple fact that the second respondent was joined as a party by the applicant. The second respondent, as it was entitled, participated fully in the proceeding, and advanced independent arguments against the positions mounted by the applicant.

[14] I am not at all persuaded that there is any reason either to depart from the usual order as to costs or to reduce the quantum of costs recoverable by the second respondent in the way suggested by the applicant's alternative argument.

[15] Accordingly, it will be ordered that the applicant pay the second respondent's costs of and incidental to the proceeding.

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[10] At [56].