SUPREME COURT OF QUEENSLAND

CITATION:	*Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355
PARTIES:	**ALLIANCE TO SAVE HINCHINBROOK INC.** (applicant) v **CLIVE COOK AS DELEGATE OF THE CHIEF EXECUTIVE, ENVIRONMENTAL PROTECTION AGENCY** (first respondent) **BARRY JAMES AS DELEGATE OF THE CHIEF EXECUTIVE, ENVIRONMENTAL PROTECTION AGENCY** (second respondent) **PORT HINCHINBROOK SERVICES PTY LTD (ACN 081 055 414)** (third respondent) **CARDWELL PROPERTIES PTY LTD (ACN 058 737 643)** (fourth respondent)
FILE NO/S:	341 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	1 December 2005
DELIVERED AT:	Cairns
HEARING DATE:	7 November 2005
JUDGE:	Jones J
ORDER:	**Pursuant to s 49(1)(e) *Judicial Review Act* 1991, the applicant will bear only the applicant's own costs of the applications for statutory review of the decisions of the first and second respondents, regardless of the outcome of those proceedings.**
CATCHWORDS:	JUDICIAL REVIEW – COSTS – costs application under s 49 *Judicial Review Act* 1991 *Judicial Review Act* 1991 (Qld), s 49 *Anghel v Minister for Transport (No. 2)* [1995] 2 Qd R 454 *Oshlack v Richmond River Council* (1994) 82 LGERA 236

COUNSEL:	Mr S Keim SC for the applicant Mr I Pepper for the first and second respondents Mr R Litster for the third and fourth respondents
SOLICITORS:	Environmental Defenders Office for the applicants Environmental Protection Agency for the first and second respondents Hopgood Ganim Lawyers for the third and fourth respondents

[1] The Alliance to Save Hinchinbrook Inc. ("the applicant") seeks an order pursuant to s 49(1)(e) *Judicial Review Act* 1991 (Qld) ("the Act"). The order sought is that the applicant will bear only the applicant's costs of the applications for review of the decisions of the first and second first respondents, regardless of the outcome.

[2] The third and fourth respondents argue against this application; the first and second respondents do not.[1]

[3] Decisions of this kind are governed by the matters set out in s 49(2). Those matters are:

> (a) The financial resources of –
> (i) the relevant applicant; or
> (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
> (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
> (c) if the relevant applicant is a person mentioned in subsection (1)(a) – whether the proceeding discloses a reasonable basis for the review application; and
> (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c) – whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

[4] This is not an exhaustive list, and I can take other factors into account: *Lyness v Fennell*[2]*; Sharples v Council of the Queensland Law Society & Anor.*[3] It is convenient at this point to turn to the circumstances surrounding this application.

Facts

[5] The applicant is an incorporated association, and was formed in August 1997. According to its president, the applicant has worked, since its incorporation, to protect and conserve the Hinchinbrook/Cardwell environment.[4] This is reflected in the objects of the applicant.[5]

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[1] Transcript, p 33-34
[2] (unreported, 27 March 1998, Mackenzie J)
[3] [2000] QSC 392 per Mullins J
[4] See affidavit of Margaret Moorhouse sworn 8 August 2005, par 4-5, 9-11
[5] Ex MM1, affidavit of Margaret Moorhouse sworn 8 August 2005

[6] On 14 October 2005, the Cardwell Shire Council ("the Council") advertised that it had applied for permission to construct two breakwaters at the entrance to Port Hinchinbrook.[6] The notice invited interested persons to lodge written comments on the proposal to the Queensland Parks and Wildlife Service (QPWS). The applicant lodged submissions, as did a number of its members.

[7] On 17 May 2005, the second respondent gave approval to the Council for the construction of the breakwaters. On 18 May 2005, the first respondent granted permission to the Council to construct the breakwaters. On 16 June 2005 the applicant requested from the QPWS and the Environmental Protection Authority (EPA) a statement of reasons pursuant to s 32 of the Act. The reasons of the QPWS dated 8 July 2005[7] and the reasons of the EPA dated 11 July 2005[8] were received by the applicant on 18 July 2005.

[8] On 10 August 2005 the applicant filed in the Supreme Court a number of applications: being those for review, for further statements of reasons, and for the order pursuant to s 49 being dealt with presently.

Consideration

[9] As to the applicant's financial resources, I am satisfied on the basis of the material before me that they are quite limited.[9] In particular I note the applicant's statement of income and expenditure for the period 1 April 2004 to 31 March 2005.[10] Mr Litster of counsel for the third and fourth respondents submitted that I should not rely upon the affidavit evidence on behalf of the applicants, as that evidence pleaded the issue. For example, some affidavits read: "ASH [the applicant] has limited financial resources."[11] However these comments must be read in their context. They are followed by explanations of how and why the applicant's financial resources are limited. I was also provided with recent bank statements of the applicant,[12] as well as the aforementioned statement of income and expenditure. I am prepared to find on this material that the applicant's financial resources are limited.

[10] I am also satisfied that the substantive application involves an issue that affects, or may affect, the public interest. Cf *Barker v Queensland Fire and Rescue Authority*.[13] The decision to approve the breakwaters may have drastic impacts upon the natural environment of the area, if the submissions of the applicant are taken at their highest. "Public interest" is not defined in the Act, and it is not surprising that courts have experienced difficulty in reaching a solid definition. In *Oshlack v Richmond River Council*[14] Stein J held the view that there, litigation "which had nothing to gain…other than the worthy motive of seeking to uphold

[6] Ex MT1, affidavit of Margaret Thorsborne sworn 8 August 2005
[7] Ex MM19; affidavit of Margaret Moorhouse sworn 8 August 2005
[8] Ex MM18; affidavit of Margaret Moorhouse sworn 8 August 2005
[9] Affidavit of Margaret Thorsborne sworn 8 August 2005, par 7-8; Affidavit of Noeleen Napoli sworn 8 August 2005, par 4-6
[10] Ex NN1 to affidavit of Noeleen Napoli sworn 8 August 2005
[11] Par 5; affidavit of Noeleen Napoli sworn 8 August 2005
[12] Ex NN2; affidavit of Noeleen Napoli sworn 8 August 2005
[13] [2000] QSC 395
[14] (1994) 82 LGERA 236

environmental law and the preservation of endangered fauna" amounted "public interest litigation" (at 246). Also relevant to his Honour's conclusion was the fact that the litigation sought to clarify the application of environmental laws.

[11] Concluding that litigation is in the public interest will not always be so easy, however, especially in cases where public and private interests overlap. That was the case in *Anghel v Minister for Transport (No. 2)*.[15] But even being in that position is not determinative: where a proceeding is brought for private interests, an applicant is not necessarily disentitled to an order under s 49(1).

[12] Here the applicant does not stand to gain materially from the proceeding.[16] Mr Litster submits that the question of public interest in this case is vexed, and compares the interests of the supporters of the applicant and the interests of the levy payers who will be affected by the proceeding. The former number about 70; the latter roughly 300. I am not sure how useful numerical comparisons are. If the submissions of the applicant on the environmental impacts of the decision were accepted, the interests affected by the respondents' decisions would reach beyond the members and supporters of the applicant. I am satisfied that the proceeding brought by the applicant involves issues that affect or may affect the public interest.

[13] Finally there is the question of whether this proceeding has disclosed a reasonable basis for the review application. This application is not the place to examine the parties' cases exhaustively. Upon hearing Mr Keim of Senior Counsel for the applicant, and having had regard to his detailed submissions, I am satisfied the substantive proceeding is not frivolous, unreasonable or without reasonable basis.[17] While the application's merits cannot be known until the hearing of the application, the information placed before me on this interlocutory application – in the form of affidavits and exhibits annexed thereto – demonstrates there is at least a "reasonable basis" for it. I note in passing the decision in *Anghel v Minister for Transport (No. 2)*, where an application for review was disposed of summarily but was still said to have a "reasonable basis".[18]

Orders

[14] I therefore make the following order:

1. That pursuant to s 49(1)(e) *Judicial Review Act* 1991, the applicant will bear only the applicant's own costs of the applications for statutory review of the decisions of the first and second respondents, regardless of the outcome of those proceedings.

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[15] [1995] 2 Qd R 454

[16] Par 10, affidavit of Noeleen Napoli sworn 8 August 2005; Par 25; affidavit of Margaret Moorhouse sworn 8 August 2005

[17] Cf *Barker v Queensland Fire and Rescue Authority* [2000] QSC 395

[18] at 456 per Fitzgerald P