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CITATION: *St Helens Area Landcare and Coastcare Group Inc v Break O'Day Council* [2005] TASSC 46

PARTIES: ST HELENS AREA LANDCARE AND COASTCARE GROUP INC
v
BREAK O'DAY COUNCIL
SMARTGROWTH INTEGRATED ARCHITECTURE AND URBAN DESIGN

TITLE OF COURT: SUPREME COURT OF TASMANIA

JURISDICTION: APPELLATE

FILE NO/S: LCA 14/2005

DELIVERED ON: 31 May 2005

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JUDGMENT OF: Blow J

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Procedure – Costs – Security for costs – Poverty – Lack of means – Impecunious organisation – Appeal from statutory tribunal.
Supreme Court Rules 2000 (Tas), r828.
Friends of Hinchinbrook Society Inc v Minister for Environment (1996) 69 FCR 1, referred to.
Aust Dig Procedure [668]

REPRESENTATION:

Counsel:

Appellant: G L Sealy
Second Respondent, Freshwater Creek Pty Ltd and Numero Ace Pty Ltd: D R Armstrong

Solicitors:

Appellant: FitzGerald & Browne
Second Respondent, Freshwater Creek Pty Ltd and Numero Ace Pty Ltd: Don Armstrong

Judgment Number: [2005] TASSC 46
Number of paragraphs: 34

Serial No 46/2005
File No LCA 14/2005

St HELENS AREA LANDCARE AND COASTCARE GROUP INC v BREAK O'DAY COUNCIL and SMARTGROWTH INTEGRATED ARCHITECTURE AND URBAN DESIGN

REASONS FOR JUDGMENT **BLOW J**

31 May 2005

1 This is an application for an incorporated association to give security for costs in respect of an appeal by it from a decision of the Resource Management and Planning Appeal Tribunal ("the Tribunal").

2 The proceedings concern a site at Scamander comprising about 52 hectares. The land in question is bounded by the Tasman Highway to the west and by a beach to the east. The second respondent, which is apparently a firm of architects and urban design consultants, applied to the first respondent ("the Council") for a planning permit on behalf of two clients, Freshwater Creek Pty Ltd and Numero Ace Pty Ltd. The permit was sought for (a) a 101 lot residential subdivision in two parts, those parts being referred to as "the ecohamlet" and "Dune Street"; (b) a caravan park; (c) a camping ground; (d) a number of "eco-retreat cabins"; (e) a number of "beach retreat cabins"; (f) a cabin park; (g) a reception office; and (h) a sanctuary, comprising the balance of the land, which was apparently intended to remain undeveloped. A number of persons and organisations made representations opposing the development, but the Council granted a permit, subject to a large number of conditions. There were four appeals from the Council's decision to the Tribunal: one by the present appellant, one by the Tasmanian Conservation Trust, and two by individuals. Those appeals were partly successful and partly unsuccessful. The Tribunal varied the permit conditions so as not to permit the development of the eco-retreat cabins, the beach retreat cabins, the reception office, or the Dune Street subdivision. However, the permit as varied permits the development of the "ecohamlet", which includes nearly all of the 101 proposed lots, as well as the caravan park, the camping ground, and the cabin park. The proposed sites of the Dune Street subdivision, the eco-retreat cabins, the beach retreat cabins, and the reception office are to become parts of the sanctuary.

3 The appellant has appealed from that decision pursuant to the *Resource Management and Planning Appeal Tribunal Act* 1993 ("the RMPAT Act"), s25. No other person or organisation has appealed. The second respondent and its two clients have applied for an order that the appellant give security for their costs in the sum of

$15,000. I will refer to the three applicants as "the developers". They contend that the appellant is impecunious; that it is litigating for the benefit of its members and not for its own benefit; that its members do not have properties likely to be affected by the proposed developments and have only intellectual and emotional interests at stake; that the appeal is unlikely to succeed; and that, principally because of those circumstances, security for costs ought to be provided by the appellant.

4 This Court has powers to make orders for security for costs that come from a number of sources, including its inherent jurisdiction, the *Supreme Court Rules* 2000, and the *Corporations Act* 2001 (Cth), s1335(1). However, s1335(1) does not apply to incorporated associations: *Associations Incorporation Act* 1964, s3. I have no doubt that the Court's inherent jurisdiction allows it to entertain the present application, but I think the application also falls within the scope of the *Supreme Court Rules*, r828(1), which relevantly provides as follows:

> "828 (1) The Court or a judge, on the application of a party to proceedings, may order an opposite party to give security for the costs of the party applying for security and that the proceedings against the party applying for security be stayed subject to the provision of security if the opposite party from whom security is sought is a plaintiff, applicant, defendant pursuing a counterclaim or respondent pursuing a cross application and if –
>
> (a) …; or
>
> (b) the opposite party is a corporation; or
>
> (c) the opposite party, not being a party who sues in a representative capacity, sues only for the benefit of some other person and there is reason to believe that the opposite party does not have sufficient assets in Tasmania to pay the costs of the party applying for security…".

5 The appellant is a "plaintiff" for the purposes of r828(1), in my view, because that word is defined in the *Supreme Court Civil Procedure Act* 1932, s3, as follows:

> '"plaintiff' includes every person asking for relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, petition, motion, summons, rule, or order to show cause, or otherwise".

That definition applies to the *Supreme Court Rules* because of the *Acts Interpretation Act* 1931, s5(2).

6 The discretion to order security for costs is not fettered by any rule or other legislative provision. The factors that may be relevant to the determination of an application for security for costs have been discussed and listed in a number of cases, including *K P Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 at 197 –

198. It has been said that "the circumstances in which the discretion should be exercised in favour of making an order cannot be stated exhaustively": *Spiel v Commodity Brokers Australia Pty Ltd* (1983) 35 SASR 294 at 300. The factors that I consider relevant for present purposes, and my comments in relation to each of them, are as follows.

Impecuniosity

7 The appellant's assets comprise about $1,450 and hand tools worth about $300. If it is ordered to pay the costs of the appeal following a hearing, it will be unable to do so. There is no suggestion that the appellant's impecuniosity has been caused or contributed to by the developers in any way.

8 Counsel for the developers, Mr Armstrong, rightly conceded that an order for security for costs should not be granted on the basis of impecuniosity alone.

Promptness

9 This application has been made promptly, only nine days after the filing of the notice of appeal.

Whether the applicant is litigating for the benefit of others

10 I do not have evidence of the objects of the appellant as formally stated pursuant to the *Associations Incorporation Act*, s7(2)(a)(ii), but I have evidence of its history and activities. It was set up in 1992. It obtained a grant for landcare activities in 1993. In 1995 it obtained a grant to erect fencing to protect an area of coastal heathland. In 1998 it received a grant for the rehabilitation and relocation of a car park near a beach. It has made representations to councils in relation to advertised permit applications, on average about once per year, when of the view that proposed developments will have significant environmental impact.

11 In *Friends of Hinchinbrook Society Inc v Minister for Environment* (1996) 69 FCR 1, which involved an application for an incorporated association to provide security for costs in relation to an application by it under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Branson J said the following at 21 – 22:

> "The applicant is an incorporated association of persons concerned with the environment. In one sense, every association is a front for its members: they stand behind it and may be assumed themselves to support the objectives of the association and, generally speaking, the association's actions in intended advancement of those objectives. There is, however, in my view, a very real difference between the relationship of a member of a non-profit association formed to advance a public interest to the association of which he or she is a member, and the relationship of a shareholder to the company in which he or she holds shares. The benefit which a shareholder might expect to obtain from litigation conducted by a company will ordinarily be, whether directly or

> indirectly, financial. Members of a non-profit association will not ordinarily benefit financially from litigation initiated by the association. The benefit which they might obtain from such litigation is likely to be constituted by intellectual or emotional satisfaction."

12 In *Byron Shire Businesses for the Future Inc v Byron Shire Council* (1994) 83 LGERA 59, an application was made for an incorporated association to provide security for costs in relation to an application to have declared void a development consent with respect to the redevelopment of an existing tourist facility, which was intended to become a Club Med resort. An applicable rule of court empowered an order for security for costs to be made where it appeared that a plaintiff was suing "not for his own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so". At 61 - 62, Pearlman J said:

> "The mere fact of membership of an incorporated association does not place the members in the category of 'some other person' for the purposes of r 2(1)(b): see *Citizens Airport Environment Association Inc v Maritime Services Board* (Land and Environment Court of New South Wales, Bignold J, 9 October 1992, unreported) at 16. Corporations and incorporated associations both have members; and acts done by corporations and incorporated associations directly or indirectly benefit those members. Rule 2(1)(b) could not possibly have been intended to operate to require security for costs in all cases where corporations or incorporated associations were plaintiffs or applicants.
>
> …
>
> Simply because the members of the applicant may derive a benefit from the proceedings does not establish that the applicant itself will not derive a benefit. I am satisfied that in this case the applicant itself will benefit from the proceedings. It may not gain a financial benefit from a successful outcome of the proceedings, but it will achieve at least the furtherance of some of its objectives."

13 In my view the appellant is not litigating solely for the benefit of others. It is an association with objectives concerned with the protection and preservation of the environment. Success in this appeal would seem to be likely to further those objectives.

14 However I consider it to be a relevant factor that there is no evidence that any members or supporters of the appellant have shown any willingness to provide security for the developer's costs.

Effect on the right to litigate

15 There is no evidence that this application has been made merely to attempt to deny the appellant its right to litigate. When there is some prospect of an application for security for costs being successful, it makes good business sense for such an application to be made in order to avoid the risk of obtaining a worthless costs order. There is no suggestion that this is an intentionally oppressive application.

16 The evidence does not establish that the making of an order for security for costs will necessarily bring the appeal to an end. However I think that result is highly likely, since the sum specified in the application is $15,000, there is no suggestion that that sum is excessive, and none of the appellant's members or supporters appears to have any financial interest in the outcome of the proceedings.

Proportionality

17 It is appropriate to compare the amount of the developer's estimated costs and the overall cost of their development. As Pearlman J said in *Byron Shire Businesses* at 64:

> "This approach balances the risk that an order for security for costs may put a halt to the litigation against the risk of the possible inability to recover an amount of costs …".

The development as originally proposed included a 101 lot residential subdivision, a caravan park, 78 cabins, an office, and associated works. The inability to recover costs of $15,000 or thereabouts would be of the most marginal significance, having regard to the overall cost of the development.

Public interest litigation

18 The appellant contends that this appeal is in the nature of public interest litigation, and that one aim of the regime of land use and planning legislation in this State is to encourage public participation in the planning process.

19 The RMPAT Act, Sch1, sets out the "Objectives of the Resource Management and Planning System of Tasmania". The same list of objectives appears in other relevant legislation, eg the *Land Use Planning and Approvals Act* 1993 ("the LUPA Act"), Sch1. Schedule 1 to each of those Acts includes the following:

> "1 The objectives of the resource management and planning system of Tasmania are –
>
> (a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and
>
> (b) …;

(c) to encourage public involvement in resource management and planning; and

(d) …;

(e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.

2 In clause 1(a), 'sustainable development' means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment."

20 Consistently with the objective of encouraging public involvement in resource management and planning, whenever an application is made for a permit in respect of a use or development, the LUPA Act, s57(5), permits any person to make representations relating to the application, and s51(2)(c) requires the planning authority – usually a council – to take into consideration the matters set out in all such representations. Under the LUPA Act, s61(5), any person who has made a representation under s57(5) may appeal to the Tribunal against the granting of a permit. Public participation is also encouraged by the RMPAT Act, s28, which in substance provides that, *prima facie*, each party to an appeal to the Tribunal is to pay its own costs.

21 The objectives in the RMPAT Act, Sch1, suggest that there is a role in the resource management and planning system of Tasmania for community based organisations concerned with the protection of the environment. Because of cl 1(e) thereof, the community should share responsibility for resource management and planning. Because of cls 1(a) and 2(c), one of the objectives of the system is to manage the protection of natural and physical resources while avoiding any adverse effects of activities on the environment.

22 In *Friends of Hinchinbrook*, when considering the application for security for costs, Branson J took into account the provisions of the *World Heritage Properties Conservation Act* 1983 (Cth) ("the Conservation Act") and said the following:

"The above provisions, in my view, whilst concerned principally with the issue of standing, disclose an intention that legitimate organisations and

> associations concerned with world heritage properties should be able to agitate before the Court issues arising under ss9 and 10 of the Conservation Act. Organisations and associations of this kind will not infrequently have limited financial means. When considering an application for security for costs in a proceeding involving the Conservation Act, it is legitimate, in my view, for the Court to have regard to the apparent intention of Parliament that such organisations and associations should be able to initiate such litigation."

23 The relevant Tasmanian legislation does not refer specifically to organisations. However the taking of responsibility for resource management and planning by the community, in accordance with the intention of Parliament, is facilitated by the formation of community organisations concerned with the protection of the environment. For such organisations to serve their purpose, it will be necessary for them to make representations to councils and to initiate and take part in appeals to the Tribunal. Since the Tribunal is not infallible, there is nothing inherently inappropriate in such an organisation, even an impecunious one, pursuing its objectives by appealing from a decision of the Tribunal.

Significance of Tribunal hearing

24 *Friends of Hinchinbrook* was concerned with a challenge to a decision of a Minister, whereas this appeal is concerned with a challenge to a decision of a quasi-judicial tribunal, and a well credentialed one at that. When an impecunious appellant appeals from a decision of one court to a higher court, the fact that the appellant has been unsuccessful before the court of first instance will often be a powerful factor weighing in favour of the ordering of security. See, for example, *Smail v Burton* [1975] VR 776. I think it logically follows that the making of an adverse determination by a quasi-judicial tribunal must be relevant, but I think it must carry less weight than the making of an adverse determination by a court. The fact that an appellant has had an opportunity to ventilate arguments of law before a tribunal must, to some degree, weigh in favour of making an order for security. However that point will be of less significance when an appellant contends that a tribunal has fallen into error on some point that was not the subject of argument before it.

The appellant's bona fides

25 There is no evidence to suggest a lack of good faith on the part of the appellant.

Strength of the grounds of appeal

26 On any application for security for costs, the strength of the case of the respondent to the application is a relevant consideration. It may even be a decisive consideration. See, for example, *Environmental Defenders Office (Tas) Inc v Chipman* [2003] TASSC 72. Counsel of course did not fully argue the grounds of appeal in this case. The most that I can properly do is to make some preliminary assessment of their strengths and weaknesses on the basis of limited submissions and limited consideration of the materials before the Tribunal and the law.

27 There are three grounds of appeal. Ground 1 asserts in substance that the amended permit granted by the Tribunal was substantially different from the permit that the developers sought from the Council. A distinction has to be drawn between a modified version of the permit applied for, and a permit altogether different from that applied for. That sort of distinction is well recognised: *Legg v Inner London Education Authority* [1972] 3 All ER 177; *Addicoat v Fox (No 2)* [1979] VR 347 at 363; *Bernard Rothschild Pty Ltd v City of Melbourne* (1982) 52 LGRA 442 at 446 – 447. If the Tribunal concluded that the only appropriate permit was not a modified version of that applied for, but one altogether different from that applied for, it should have directed the Council not to grant the permit, leaving it open for the developers to make a fresh application. Ordinarily, an appeal in relation to this sort of distinction would stand a strong chance of failure on the basis that it relates to a question of fact rather than a question of law, and on the basis that the specialist qualifications of the members of the Tribunal should be respected unless it can be shown that they acted upon wholly irrelevant considerations or in some other respect erred in law: *R v Resource Planning and Development Commission; ex parte Aquatas Pty Ltd* (1998) 100 LGERA 1 at 8; *R v Land Use Planning Review Panel; ex parte M F Cas Pty Ltd* (1998) 103 LGERA 38 at 49; *R v Resource Planning and Development Commission; ex parte Stevens* (1999) 103 LGERA 181 at 186; *R v Resource Planning and Development Commission; ex parte Dorney* (2003) 12 Tas SR 69 at 97, [2003] TASSC 69 at pars34 – 36.

28 However in this case the Tribunal dealt with the point in question in a somewhat unusual way. At par49 of its decision, it said the following:

> "Refusal of the proposal in respect of the eastern portion of the site and allowing only the proposed development upon the western portion of the site might be thought to be substantially different from what was proposed, and therefore essentially a refusal. The Tribunal would ordinarily have refused the whole proposal upon that basis. The Tribunal was however invited by Counsel for the applicant, in the event that part of the development was excluded, to nevertheless permit the remainder. Against the event that the Tribunal's conclusion falls within that invitation, the Tribunal will allow those aspects which it has not stated above that it excludes. If counsel's invitation did not extend to so doing, and the Tribunal was required to express a decision in those terms, the Tribunal would refuse the total development."

29 In my view the finding of fact reflected in the first two sentences of that paragraph enables the appellant to argue that the development permitted by the Tribunal was so substantially different from the development for which a permit was sought from the Council that the Tribunal did not grant a modified version of the permit applied for, but granted a different permit altogether – one that had not been applied for, and had not been the subject of public advertising or representations. If that were correct, the appellant could further argue that no invitation from counsel could make a difference to that state of affairs, and that the Tribunal erred in law by granting a permit that had not

been applied for. In my view such an argument would have a significant chance of success.

30 The second ground of appeal asserts that the Tribunal erred in law in failing to consider the provisions of the *State Coastal Policy* as required by the *State Policies and Projects Act* 1993, s15 and the LUPA Act, s63(2). The developers contend that the Tribunal considered all the issues that the *State Coastal Policy* required it to consider, but without always referring in its decision to the provisions of the policy. The appellant contends that one provision in the policy, cl 2.4.3, required the Tribunal to determine the validity or otherwise of relevant provisions in the applicable planning scheme. Clause 2.4.3 was apparently intended to impose a requirement upon the makers of planning schemes. It reads as follows:

> "2.4.3 Any urban and residential development in the coastal zone, future and existing, will be identified through designation of areas in planning schemes consistent with the objectives, principles and outcomes of this Policy."

31 The appellant contends that the proposed development included residential development in the coastal zone; that the planning scheme designated areas in which particular types of development were to be permitted, discretionary or prohibited; that such provisions in the planning scheme were void if they did not satisfy the requirements of cl 2.4.3; and that the Tribunal erred in not considering and determining whether any of the relevant provisions of the planning scheme were void on that basis. I am simply not in a position to evaluate the chances of such an argument succeeding. I am not able to say that it is likely to fail.

32 The third and final ground of appeal asserts that the Tribunal erred in law in failing to have regard to cl 2.7.1 of the Break O'Day Planning Scheme 1996. That clause requires the Council to refuse an application for use or development "that cannot demonstrate compliance with any Scheme standard applicable to that use or development". I do not think it appropriate for me, in the present context, to undertake the task of identifying every relevant standard in the planning scheme, and analysing the Tribunal's decision with a view to determining the chances of this ground succeeding, particularly since counsel said little to me about this ground.

33 My conclusion is that ground 1 seems to have significant merit, and that grounds 2 and 3 cannot be said to have no merit.

Conclusion

It is true that the appellant is impecunious, that an order for costs is likely to be of little use to the respondents if the appeal fails, and that other factors referred to above weigh in favour of security being ordered. However, because an order for security for costs is likely to bring this litigation to an end, because there seems to be significant merit in at least the first ground of appeal, because the likely costs

of resisting the appeal are small in comparison to the overall costs of the development even after its scope has been reduced by the Tribunal, and because I think participation in litigation by community environmental groups is consistent with the intentions of Parliament in relation to the resource management and planning system of Tasmania, I have decided to refuse the application