COURT: SUPREME COURT OF TASMANIA

CITATION: *Tasmanian Conservation Trust Inc v Gunns Ltd* [2012] TASSC 18

PARTIES: TASMANIAN CONSERVATION TRUST INC
v
GUNNS LTD

FILE NO/S: 953/2011

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DELIVERED AT: Hobart

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JUDGMENT OF: Holt AsJ

CATCHWORDS:

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Aust Dig Procedure [668]

REPRESENTATION:

Counsel:
Plaintiff: D Kerr SC and A Browning
Defendant: D J Gunson SC
Solicitors:
Plaintiff: FitzGerald and Browne
Defendant: Shaun McElwaine

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TASMANIAN CONSERVATION TRUST INC v GUNNS LIMITED

REASONS FOR JUDGMENT

HOLT AsJ
20 April 2012

The application

1 The defendant has applied for an order requiring the plaintiff to give security for its costs, with the action to be stayed subject to the provision of such security.

Background

2 Pursuant to the *Pulp Mill Assessment Act* 2007 ("the Act"), a permit called the "Pulp Mill Permit" came into effect by resolution of each House of Parliament authorising the defendant to develop and operate a bleached kraft pulp mill in northern Tasmania.

3 The Pulp Mill Permit came into effect on 30 August 2007.

4 By virtue of the combined effect of ss8 and 9(1), reproduced below, the Pulp Mill Permit comprises each and every permit, licence or other approval which, but for the Act, would have been required under other legislation as specified in the Pulp Mill Permit. The other specified legislation includes the *Land Use Planning and Approvals Act* 1993, and the *Water Management Act* 1999.

5 The Act, ss7(1)(b), 8 and 9(1), are as follows:

> "7 **Approval of project**
>
> **(1)** The project is approved if –
>
> ...
>
> **(b)** each House of Parliament, by resolution, accepts the Pulp Mill Permit.
>
> ...
>
> **8 Effect of approval**
>
> **(1)** If the project is approved under section 7 –
>
> **(a)** the Pulp Mill Permit comes into effect; and
>
> **(b)** notwithstanding any other Act, the project may proceed on the conditions specified in the Pulp Mill Permit; and
>
> **(c)** a permit, licence or other approval is taken to have been issued under the Act specified in the Pulp Mill Permit in relation to each condition and that Act applies as if such a permit, licence or other approval had been issued on the conditions set out in the Pulp Mill Permit in relation to that Act; and
>
> **(d)** the person, body or State Service Agency responsible for the enforcement of each condition must enforce the condition to the extent of its powers.
>
> **(2)** If the conditions require the person proposing the project to apply for such other permits, licences or other approvals as may be necessary for the project, the person proposing the project must comply with that requirement.

(3) If the person proposing the project does not comply with a condition contained in the Pulp Mill Permit, the Pulp Mill Permit is suspended until such time as the condition is complied with.

(4) The Pulp Mill Permit lapses if the project is not substantially commenced before the end of the period of 4 years commencing on the date on which the Pulp Mill Permit comes into force.

(5) A permit that is to be taken, in accordance with section 8(1)(c), to be issued –

(a) under the *Land Use Planning and Approvals Act 1993* only lapses under section 53(5) of that Act when the Pulp Mill Permit lapses, if at all, under subsection (4); or

(b) under the *Water Management Act 1999* lapses under section 159(8) of that Act at the end of the period of 4 years commencing on the date on which the Pulp Mill Permit comes into force if the dam works within the meaning of that Act are not substantially completed within that 4-year period.

(6) A permit that –

(a) is to be taken, in accordance with section 8(1)(c), to be issued under the *Land Use Planning and Approvals Act 1993* or the *Water Management Act 1999*; and

(b) would have, but for this subsection, lapsed under that Act on and from a day (the 'relevant day') before this subsection commences –

is to be taken, on and from the relevant day, to have not so lapsed on and from the relevant day.

9 Provisions of Acts, planning schemes, &c, not to apply to project

(1) The provisions of any Act, planning scheme, special planning order or interim order –

(a) requiring the approval, consent or permission of any person in connection with any use or development in relation to the project; or

(b) empowering any body to grant or refuse its consent to any such use or development; or

(c) prohibiting any such use or development; or

(d) permitting any such use or development only upon specified terms or conditions; or

(e) regulating or permitting the regulation of any such use or development –

do not apply to the project."

6 Under the Act, s8(4), all permits taken to have issued under s8(1)(c) lapse if the project is not substantially commenced within four years of the date upon which the approval took effect, namely by 30 August 2011. Under the Act, s8(5)(b), the permits taken to be issued under the *Water Management Act* lapsed on 30 August 2011 unless the dam works approved as part of the project had been substantially completed by that date.

7 The Act, s9(1), provides that legislative provisions empowering any body to grant or refuse consent for any use or development in relation to the project and legislative provisions prohibiting any

use or development in relation to the project do not apply. Accordingly, arguably if the dam works were not substantially completed within that time, there is no authority for the issue of new permits for dam works under the *Water Management Act*.

8 The plaintiff, an association incorporated under the *Associations Incorporation Act* 1964, alleges that the project had not been substantially commenced by 30 August 2011, and that the dam works specified in the permit were not substantially completed by the due date. The defendant is the proponent of the Pulp Mill. The plaintiff alleges that after the dam works permits lapsed, the defendant applied on 10 September 2011 for the reissue of the permits under the *Water Management Act*. As I have said, by virtue of the Act, s9(1), it may be that there is no authority to reissue the permits for the dam works. By its statement of claim the plaintiff claims relief as follows:

> "A a declaration that the Pulp Mill Permit which came into effect pursuant to s8(1)(a) of the *Pulp Mill Assessment Act 2007* has lapsed as the Project was not substantially commenced before midnight on 30 August 2011 being the end of the period of 4 years commencing on the date on which the Pulp Mill Permit came into force.
>
> B a declaration that the permits that were taken, in accordance with s8(1)(c) of the *Pulp Mill Assessment Act,* to have been issued under the *Water Management Act 1999,* lapsed under s159(8) of that Act at midnight on 30 August 2011 being the end of the period of 4 years commencing on the date on which the Pulp Mill Permit came into force.
>
> C a declaration that the Assessment Committee for Dam Construction constituted by s138 of the *Water Management Act 1999* has no power to grant a permit under Division 4 of that Act for dam works as defined by that act where such permit is identical or substantially the same as a permit that was taken, in accordance with s8(1)(c) of the *Pulp Mill Assessment Act*, to be issued under the *Water Management Act 1999* and which lapsed under s159(8) of the *Water Management Act 1999* by virtue of s8(5) of the *Pulp Mill Assessment Act 2007*."

The jurisdiction to order security for costs

9 The following propositions are contained in the judgment of Kirby J in *Merribee Pastoral v ANZ Banking Group* (1998) 193 CLR 502:

- Superior courts of record have an inherent power to provide for security for costs where necessary or appropriate to the performance of their functions as a court. Legislative provisions including rules of court which provide expressly for the making of orders for security for costs do not ordinarily expel the inherent power. Only if the legislation amounts to a comprehensive statement of the court's powers, rather than an endeavour to preserve and partly regulate the power, is the inherent jurisdiction excluded. Par[13].

- The jurisdiction is to be exercised judicially for the purpose for which it exists, with the governing consideration being what is required by the justice of the matter. It would be wrong to hedge the jurisdiction by rules or practices. There are as many considerations as there are cases. Par[26].

10 *Supreme Court Rules* 2000, r828(1)(b), is as follows:

> **"828 Security for costs**
>
> (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 –

...

(b) the opposite party is a corporation; or ..."

11 "Corporation" is defined in the Rules as having the same meaning as in the *Corporations Act* 2001 (Cth). There is no dispute that the plaintiff is a corporation within the meaning ascribed to that word in the *Corporations Act*. The plaintiff, however, contended that the definition in the *Corporations Act* does not apply to the plaintiff by virtue of the *Associations Incorporation Act*, s3, which provides that an incorporated association is declared to be an excluded matter for the purposes of s5F of the *Corporations Act*. The exclusion has no impact on the meaning of the word "Corporation" because the Rules incorporate the relevant meaning, regardless of whether the *Corporations Act* in other respects applies to incorporated associations. It follows that the inherent power to make an order for security for costs against an incorporated association has not been excluded.

12 It was also submitted on behalf of the plaintiff that jurisdiction to order security for costs does not exist unless the plaintiff is impecunious. In support of the proposition, the plaintiff relied solely upon the text *Law of Costs*, dal Pont, 2nd ed, LexisNexis, Butterworths 2009 [28.1] to [28.4] and [29.5]. In particular, the author of the text says at [29.5]: "... the plaintiff's impecuniosity is both a condition *sine qua non* to the making of an order and a substantial factor to be weighed in the exercise of the court's discretion ... ". This statement was made in the context of the statutory discretion contained in the *Corporations Act* 2001 (Cth), s1335(1), which relevantly provides that an order under the provision can be made: "... 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 or her defence". It is clear from the context that the author is using the word "impecuniosity", not in the sense of a person having little or no money, but to describe a corporation which will be unable to pay the defendant's costs. To require as a pre-condition to the making of an order that a plaintiff has little or no money would be to impose an impermissible fetter on the inherent jurisdiction to do what is required by the justice of the matter. The situation is as stated in *Merribee Pastoral* at [26(2)], namely: "... the inability of a party to meet the costs of an unsuccessful proceeding is not irrelevant to the exercise of the jurisdiction".

13 Accordingly, the plaintiff's submission that, as the plaintiff is not impecunious, the Court lacks the jurisdiction necessary to make the order is rejected.

The litigation

14 The plaintiff contends that the Pulp Mill Permit has lapsed for want of substantial commencement within the four year period specified in the Act, s8(4).

15 An objective test is to be applied to determine whether there has been commencement and, if so, whether it has been substantial. It is a question of degree. *Day v Pinglen Pty Ltd* (1981) 148 CLR 289 at 299.

16 The plaintiff has delivered particulars of its allegation that there has not been substantial commencement. Those particulars include a list of work, the subject of the permit, which is yet to commence at all. The list includes a failure to commence work on the dams being the work the subject of the permits taken to have issued under the *Water Management Act*.

17 If the Act, s9, properly construed, means that a permit for the dam works cannot re-issue this may, of itself, be sufficient to result in a conclusion that there cannot have been substantial

commencement, as the failure to complete the dam works within time means that it is now impossible to undertake the development in accordance with the Pulp Mill Permit.

18 However, the plaintiff puts its case on the broad basis that much other work has not been substantially commenced. The particulars delivered by the plaintiff identify vegetation removal, land clearing and minor earth works as the work undertaken by the defendant by 30 August 2011.

19 The defendant prepared a document entitled "Project Status Report As At 30 August 2011". In it, the defendant asserts that in furtherance of the project it had spent $239,000,000 to 31 August 2011, with $195,000,000 of this amount spent after the permit came into effect on 30 August 2007. The report identifies most of the work as being other than site works. The only site works undertaken, as identified in the report, are the erection of 12.9 kilometres of fencing, the clearing of 90 hectares of land, the construction of site access and wharf access roads, the construction of a site office, and the construction of temporary sedimentation ponds. The report identifies most of the work undertaken to 30 August 2011 at a cost of $239,000,000 as being work which had to be undertaken prior to construction work. In his affidavit, the solicitor for the defendant has said that the matters included in the report will be the subject of detailed evidence to be adduced at the trial on behalf of the defendant.

The defendant's costs of the litigation

20 The defendant's solicitor, in his affidavit, envisages an expensive discovery process and the need to prepare a large number of witness statements. He estimates a trial length of three weeks. He estimates the cost to the defendant as being in the order of $400,000 to $500,000. He estimates that if the defendant obtains an order for costs, the amount, when taxed on a party and party basis, would be likely to be in the vicinity of $300,000 to $400,000.

21 Counsel for the plaintiff submitted that the case could be run solely or predominantly on an agreed statement of facts with a trial time of about three to four days.

22 Further, counsel for the plaintiff submitted that the extensive evidence foreshadowed by the defendant will not be relevant to any issues in dispute unless and until the defendant pleads as facts the particular work it relies upon to counter the plaintiff's claim of lack of substantial commencement.

23 It is possible, but not certain, that many facts will be agreed. The defendant, however, may not wish to conduct its defence on agreed facts, and may consider that extensive evidence is needed to properly explain the work which has been undertaken in the context of what is required for the undertaking of the project.

24 As to the pleading point, it is inappropriate on this application for me to pre-empt what evidence the trial judge might permit as relevant. In any event, pleadings can, and often do, change.

25 Counsel for the plaintiff disputed that the trial would take three weeks, even if the defendant presents the extensive evidence contemplated. It was submitted that the plaintiff was unlikely to dispute many of the things which the defendant says that it has done in furtherance of the project. This may be so, but the context, importance and cost of the things done by the defendant in connection with the project, may be the subject of extensive investigation and challenge in cross-examination.

26 The defendant's solicitor's estimate of likely trial costs includes $12,000 per day for senior counsel from interstate. Counsel for the plaintiff submitted that far less than this would be allowed on a party and party taxation, as local counsel could provide satisfactory representation for about $4,000 per day. Counsel referred to *Dalgety Aust v F F Seeley* (1988) 49 SASR 75, where Bollen J, on a review of the taxation of the party and party costs of a successful litigant who had briefed eminent and expensive interstate counsel, said that as there were local counsel who could have handled the case,

the fees allowed should equate with the fees charged by local counsel unless the case or situation was "rare and exceptional".

27 Whether or not it is considered for the purposes of a party and party taxation reasonable and proper to brief particular counsel, and whether that counsel's fees are reasonable in the context of fees charged by other competent counsel, will be a matter for the taxing officer, if the defendant is successful. The facts and their application to legal principle may be extremely complex. The litigation may put an end to the project which has been estimated to cost $2.3 billion, in respect of which the defendant says it has already spent $239,000,000. The possibility of counsel fees being assessed on a party and party taxation at a rate significantly in excess of $4,000 per day cannot be excluded.

28 There is a possibility of a discrete legal issue being heard and determined which may resolve the litigation without any evidence being adduced. The Act, s11(1)(c), provides that: "no declaratory judgment may be given ... in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act". The defendant has pleaded reliance on this provision. The construction of the provision relied upon would result in a situation that where there is a substantial claim that the project no longer has a permit, the defendant, the defendant's shareholders and investors, various statutory authorities and the community are to be left not knowing whether there is or is not in existence a permit for the project. The plaintiff says, in its reply, that s11 has no application to proceedings related to a claim that the permit has lapsed; alternatively, that s11 can have no operation if in fact the permit has lapsed, and further in the alternative, that the provision is invalid insofar as it purports to remove an essential supervisory jurisdiction of the Court. The last point may involve significant research, preparation and argument as, unlike the situation in *Kirk v Industrial Relations Commission of NSW* (2009) 239 CLR 531, this is not a case where an inferior court or tribunal has exceeded jurisdiction.

29 There are many possibilities and variables which will attach to any estimate given at this early stage in the litigation as to the likely party and party costs of the defendant. Although I cannot estimate the defendant's likely party and party costs, I am persuaded that there is reason to believe that those costs will be in the order of $300,000 to $400,000. The case involves potentially highly complex factual and legal issues. At stake is whether or not a $2.3 billion project can proceed. The defendant has engaged senior counsel at a rate of $12,000 per day. The defendant contemplates calling many witnesses to present highly detailed evidence. This is sufficient to justify the existence of such a belief.

The incorporated association

30 The plaintiff was incorporated under the *Associations Incorporation Act* in 1975. Its basic objects are entirely concerned with environmental protection. In addition to the basic objects, the constitution includes authority for:

> "*the issuing or commencing any such proceedings in or before any court or tribunal so as to enforce compliance with any statutory or common law obligation by any other party whereby the apparent breach of that obligation or those obligations will lead or could possibly lead to direct or indirect harm or damage or degradation being caused to the natural, built, cultural or biological environment.*"

31 The plaintiff's balance sheet as at 29 February 2012 shows a reserved fund known as the "Dreaper Reserve" amounting to $75,800. This is a bequest made in 1995 to be held as a reserve for the payment of the plaintiff's debts. It has never been drawn against. The plaintiff has given an undertaking to the Court not to draw against the fund prior to the determination of the action. The balance sheet records a cash surplus, after provision for liabilities, of $43,035.41, in addition to the Dreaper fund.

32 The income of the plaintiff is derived from subscriptions, donations, bequests and Government grants. In the year ended 30 June 2011, the total income was about $179,000, comprised mostly of Government grants of about $80,000, donations of about $30,000, rental income of about $43,000, interest earned of about $16,000, and subscriptions of about $7,500. The total expenses for the year ended 30 June 2011 were about $183,000. Of this, about $100,000 consists of wages and employee expenses. The net result for the 2011 financial year was a deficit of between $3,000 and $4,000. For the eight months ending 29 February 2012, the expenditure (excluding a provision of $15,000 for the plaintiff's own legal costs of the action) is about $145,000. The expenses are regular and a projection can be made to 30 June 2012. The projected expenses (excluding the $15,000 provision for legal costs) are about $215,000. This appears to be due to an increase in wages and employee expenses of about $25,000 to $30,000. Because of the nature of the income in the form of donations and grants, income trends for the balance of the current financial year cannot be predicted from the financial statements tendered in evidence.

33 The plaintiff has made special financial arrangements for this litigation. It has engaged a legal team with costs of the team capped at the sum of $15,000 in the event that the plaintiff is unsuccessful. The plaintiff has obtained 19 pledges of contributions towards the defendant's costs ranging between $50 and $25,000. The total of the pledges is $107,000.

The ability of the plaintiff to pay the defendant's legal costs

34 The only amount which it is certain that the plaintiff will be able to pay to the defendant for legal costs if the plaintiff is unsuccessful is the amount of $75,800 in the Dreaper fund, the subject of the undertaking given to the Court not to disburse any part of the fund pending the determination of the action.

35 There is nothing to indicate that the current cash surplus of about $43,000 recorded in the balance sheet as at 29 February 2012 will still exist at the conclusion of the litigation. It appears from the increased wages and employee expenses in the current financial year that this cash surplus may be substantially exhausted before the litigation is finalised.

36 There is no evidence as to the capacity to pay of those persons who have provided litigation cost pledges.

37 Even assuming that the cash surplus remains about the same and all of the pledges are honoured, the amount available, including the Dreaper fund, to pay the defendant's costs will be $226,000. I have found that there is reason to believe that the defendant's costs, taxed on a party and party basis, will be in the order of $300,000 to $400,000. Accordingly, there is reason to believe that the plaintiff will be unable to pay the defendant's costs if unsuccessful.

The strength of the plaintiff's case

38 The only claim that the plaintiff's case lacks merit or is weak was that, regardless of all else, the Court is unlikely to grant the declarations sought because there would be no utility in doing so. Counsel for the defendant referred to *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, where Mason CJ, Dawson, Toohey and Gaudron JJ said, at 581 – 582:

> "It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.' However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred

and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'." (Footnotes not reproduced.)

39 The submission depends on the Act, s9(1), which I have already reproduced in these reasons. It was said that even if through lack of substantial commencement the permit has lapsed, s9(1) removes all statutory provisions otherwise prohibiting the project.

40 Counsel for the plaintiff submitted that the Act, s9(1), should be interpreted so as to have no application after the Pulp Mill Permit has lapsed, and that if necessary, words can be implied into the Act to achieve this object. It has been held that in some circumstances, reading words which are not expressly included in an Act is permissible. For example, in *Jones v Wrotham Park Estates* [1980] AC 74, Lord Diplock said, at 105 – 106:

> "My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

41 The scope of the ability to read words into legislation is not beyond doubt. See *R v Young* (1999) 46 NSWLR 681.

42 Although there is a question as to whether or not the lapse of the Pulp Mill Permit would make proceeding with the project unlawful, I am not persuaded that that the plaintiff's case should be characterised as a result as lacking merit or weak.

The likelihood of the defendant obtaining a costs order

43 Counsel for the plaintiff submitted that even if the defendant succeeds in its defence of the claim, it will not necessarily follow that costs will be awarded. He gave the example of *Blue Wedges Inc v Minister for the Environment Heritage and the Arts* (2008) 165 FCR 211. There, Heerey J said, at pars[73] - [75]:

> "73 In my view, however, this is a clear case for the application of the *Oshlack* approach. The condition of Port Phillip Bay is a matter of high public concern, and not only for the four million or so Victorians who live around it. As might be expected, the Project has attracted much controversy. On Saturdays the Melbourne *Age* publishes a list of which it considers to be the 'Five Big Issues' of the week. Last Saturday, 12 January, Port Phillip Bay channel deepening was third, topped only by Andrew Symonds in the Sydney Test and Hillary Clinton in New Hampshire. Although, as has been said in another context, there is a difference between what is in the public interest and what is of interest to the public (*Lion Laboratories Ltd v Evans*

> *and Others* [1985] QB 526 at 553), in the present case the two happen to coincide. There is a public interest in the Approval Decision itself, and equally in whether it has been reached according to law. Also, the application raised novel questions of general importance as to the approval process under the Environment Act: cf *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 430 at [11]-[12] (acknowledging that the existence of a novel and important question of statutory construction will be relevant to a court's discretion in public interest litigation to depart from the ordinary costs rule, but concluding that the issues of construction presented in that case were not questions of general importance.)
>
> 74 As often happens in litigation, after a full hearing the Court can reach a firm conclusion. But it by no means necessarily follows that the case of the party who loses could have been seen from the start as hopeless and without merit. Certainly that is not so in the present case. Further, there was not unreasonable delay by Blue Wedges in bringing its application. Until the Victorian Minister provided his assessment to the Federal Minister, an application could well have been attacked as premature.
>
> 75 Accordingly, although I will order that the application be dismissed, there will be no costs order."

44 I do not attach any weight to the question of likelihood of the defendant obtaining an order for costs. Firstly, I cannot assess the likelihood; and, secondly, weight must be attached to that which is known and relevant, namely that the defendant might be successful and might obtain an order that the plaintiff pay its costs.

Other considerations

45 There are some other matters to be taken into account:

- Success in the litigation will not result in a financial benefit to the plaintiff or others.
- The plaintiff is not litigating on behalf of others, but has brought the proceedings pursuant to the specific objects contained in its constitution.
- The case is being pursued in furtherance of the public interest in having a binding determination made as to whether authority for the project in the form of the Pulp Mill Permit still exists.
- The overall cost of the project is in the order of $2.3 billion. The defendant estimates its party and party costs to be between $300,000 and $400,000. In light of the plaintiff's undertaking not to disburse the sum of $75,800 held in its Dreaper Reserve, and the pledges which the plaintiff has obtained to cover the defendant's costs, the defendant, if successful, will recover at least some of its costs. Even assuming that the defendant is left with a shortfall of about $300,000 in respect of its party and party costs, this is a tiny proportion of the overall cost of the project. Proportionality is relevant. See *St Helens Area Landcare and Coastcare Group Inc v Break O'Day Council* [2005] TASSC 46 at [17].

Conclusion

46 Whether or not the power to provide for security for costs ought be exercised depends upon the justice of the matter. There are no rigid rules or practices to be followed.

47 I have found that there is reason to believe that the plaintiff will be unable to pay the defendant's costs. The existence of this feature does not result in a predisposition to order security for costs. See *Weily's Quarries v Devine Shipping* [1994] ACSR 186, per Zeeman J at 188. It is nonetheless a factor to be taken into account in considering whether an order ought be made.

48 Factors weighing against an order that the plaintiff provide security for the defendant's costs include my findings that the plaintiff's case has not been shown as lacking merit or weak; the plaintiff is pursuing the case in the public interest and not for financial benefit for itself or others; the plaintiff has made financial arrangements in respect of the defendant's costs in the form of its undertaking to preserve the Dreaper Reserve, the capping of its own legal costs in the sum of $15,000, and obtaining litigation pledges and, finally, the defendant's costs represent only a tiny portion of the $2.3 billion estimated cost of the project.

49 Whether or not security for costs should be ordered, and if so the amount of the security, involves a balancing exercise. I refer to *National Institute for Truth Verification v Computer Voice Stress Analyser Pty Ltd* [2007] FCA 736, where French J said at [16]:

> "Orders requiring the provision of security for costs involve a balancing of the legitimate interests of the applicant, to pursue its claimed entitlement to remedies against wrongs allegedly done to it and the legitimate interests of the respondents that they not be exposed to irrecoverable loss by reason of proceedings which cause them to incur substantial expense but are ultimately unsuccessful against them. It is because the award of security involves a balancing of contending legitimate interests that the amount of the security to be provided is generally not the full amount of estimated costs."

50 On balance, I am not persuaded that the justice of the matter rests with making an order that the plaintiff give security for the costs of the defendant. The application will be dismissed.