

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Blue Mountains Conservation Society Inc v Director-General of National Parks and Wildlife & (2) Ors [2004] NSWLEC 196

PARTIES:

APPLICANT:

Blue Mountains Conservation Society Inc

FIRST RESPONDENT:

Director-General of National Parks and Wildlife

SECOND RESPONDENT:

Minister for Environment and Conservation

THIRD RESPONDENT:

AFG Talons Productions Pty Ltd

ACN 083 004 255

CASE NUMBER: 40491 of 2004

CATCH WORDS: Judicial Review

LEGISLATION CITED:

Environmental Planning and Assessment Act 1979 s 111

National Parks and Wildlife Act 1974 s 2A, s 30E, s 81, s 151, s 151B, s 152, s 153A, s 155

National Parks and Wildlife Regulation 2002, reg 20

Wilderness Act 1987 s 8, s 9 and s 19

CORAM: Lloyd J

DATES OF HEARING: 27/04/2004 and 28/04/04

DECISION DATE: 29/04/2004

LEGAL REPRESENTATIVES

APPLICANT:

Mr T F Robertson SC and Ms L M Byrne (barrister)

SOLICITORS:

Ms Ilona Miller

Environmental Defender's Office Ltd

FIRST AND SECOND RESPONDENTS:

Mr I G Harrison SC

SOLICITORS:

Mr C McElwain

Department of Environment and Conservation

THIRD RESPONDENT:
Mr N A Hemmings QC (solicitor)
SOLICITORS:
Allens Arthur Robinson

JUDGMENT:

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IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

40491 of 2004

Lloyd J

29 April 2004

BLUE MOUNTAINS CONSERVATION SOCIETY INC

Applicant

v

DIRECTOR-GENERAL OF NATIONAL PARKS AND WILDLIFE

First Respondent

MINISTER FOR ENVIRONMENT AND CONSERVATION

Second Respondent

TFG TALONS PRODUCTIONS PTY LIMITED

ACN 083 004 255

Third Respondent

JUDGMENT

1 The applicant, Blue Mountains Conservation Society Inc seeks to restrain the use of the Grose Wilderness in the Blue Mountains National Park for the purpose of a commercial film production and associated activities and seeks orders setting aside both an approval and a consent for such activity.

2 The application was filed on 27 April 2004 and came before me that day on an application for interlocutory relief. The third respondent, being the film production company, appeared and opposed the application. I declined, however, to determine the application for interlocutory relief in the absence of both the first respondent, the Director-General of National Parks and Wildlife, and the second respondent, the Minister for Environment and Conservation, being the relevant consent authorities. The matter was then heard yesterday, 28 April 2004, when all parties were represented.

3 Since filming is due to commence tomorrow, the parties agreed that I should deal with the matter on a final basis. The need for a determination of the application on an urgent basis is explained by the fact that any disruption to the filming schedule is said to cost the third respondent \$500,000 per day. The need to deliver a judgment today has meant that I have not been able to give the matter the full consideration that I would otherwise prefer.

4 The essential facts may be briefly described. The third respondent proposes to carry out location filming for a commercial feature film to be known as "Stealth". According to the evidence, the proposed film site near Mount Hay in the Blue Mountains was crucial to the third respondent's decision to shoot the film in New South Wales.

5 The film site is said to be important as it provides an unimpeded view of flat open heath landscape looking west up to the Grose Valley. The film specifically required a panoramic view of open landscape from a mountain leading into a long valley. The film site is said to possess advantages for filming in addition to its suitability on a creative level, in that it is based away from daily heavy tourist pathways, has adequate access points and is not crossed by fencing, bitumen car parking areas or constructed walkways.

6 The film site is said to be a key component of the final scene sequence for the film. It is so critical to the director's creative vision that prior to selection he personally inspected the site four times despite its distance from Sydney. Mr Dean Semmler, the film cinematographer, has also approved the film site. The final scene, to be shot at the film site, involves the lead female actor attempting to escape to safety and is an integral part of her character's journey as depicted in the film.

7 Eight locations in the Blue Mountains area are being used for the end sequence of the film. Six of these locations have already been filmed. Each of the Blue Mountains locations tie into the other for continuity purposes. Digital Domain, the visual effects company engaged to work on the film has already completed a large amount of work on visual effect shots for the Blue Mountains scenes including those for the film site.

8 The scene proposed for the film site involves actors only, without any film sets. The film site is therefore said to be crucial in that it provides the lynchpin in terms of continuity of the six other locations in which filming has already been completed in the Blue Mountains.

9 It is said that a search undertaken by the third respondent identified no alternative sites which satisfy the creative criteria specified by the film's director. The third respondent's review of alternative sites included Mount Victoria, Springwood, Mount Wilson, the Bells Line of Road to North Richmond, the Megalong Valley and Lithgow.

10 However, according to Mr Keith William Muir, a director of the Colong Foundation for Wilderness, there are other alternative sites. Mr Muir has expressed the opinion that, for example, there are many upland swamps in the Newnes State Forest that have extensive valley views, several terminating in cliffs or high dramatic sandstone landscapes. These sites provide unimpeded views of flat, open heath, in the same geology type as the Grose Valley.

11 It also seems that there are many areas on the Newnes Plateau that are State forests and thus are not within a national park. It seems that the third respondent did not explore the possibility of using an area such as the Newnes Plateau as a possible location for this film.

12 Moreover, Mr Muir states that as early as December 2003 he offered his assistance to the third respondent's environmental consultants to find a suitable site outside of the Grose Wilderness and which will satisfy all of its filming requirements.

13 There were initial discussions between the third respondent and the National Parks and Wildlife Service in late August 2003 regarding filming at the site near Mount Hay and a test film was conducted there. An application was made on 5 November 2003 to undertake filming. A review of environmental factors prepared by the third respondent's environmental consultants was provided on 13 January 2004. In the meantime, on 25 December 2003 the applicant had formally written to the third respondent's consultants expressing its concerns about the use of the proposed location.

14 The application and associated documents were placed on public exhibition from 5 March 2004 to 26 March 2004. On 15 March 2004 the Colong Foundation for Wilderness made a submission to the National Parks and Wildlife Service, commenting on the review of environmental factors and objecting to the proposal. On 24 March 2004 the applicant made a submission to the National Parks and Wildlife Service objecting to the proposal.

15 On 15 April 2004 Mr Simon Smith, the delegate of the Director-General of the Department of Environment and Conservation, issued a formal approval of the proposed activity in accordance with s 111 of the Environmental Planning and Assessment Act 1979 ("the EP&A Act"). The approval was said to be granted having regard to ss 2A, 30E, 81(1) and 81(4) of the National Parks and Wildlife Act 1974 ("the NP&W Act"); s 69(1) of the Threatened Species Conservation Act 1995 ("the TSC Act"); s 9 of the Wilderness Act 1997; the document entitled "*Review of Environmental Factors for Proposed Filming Activities at Mount Hay in the Blue Mountains National Park*" dated 12 January 2004 and prepared on behalf of the proponent by TDA Environmental Consulting; the provisions of the Greater Blue Mountains Plan of Management; the National Parks and Wildlife Service "*Wilderness Policy*" dated June 1989 and the National Parks and Wildlife Service "*Filming & Photography Policy*" dated July 2002.

16 The approval was granted subject to a number of conditions, which include a requirement that the activity be carried out in accordance with the review of environmental factors.

17 On 19 April 2004 the Department of Environment and Conservation issued a news release stating that the application had been approved.

18 On 23 April 2004 the National Parks and Wildlife Service issued a formal consent pursuant to cl 21(1)(d) of the National Parks and Wildlife Regulation 2002 for filming at Mount Hay, again subject to conditions.

19 The approval of the activity described in the review of environmental factors includes the following:

- (a) commercial film production;
- (b) construction, erection, assemblage, installation and use of raised decking platforms and walkways;
- (c) construction, erection, assemblage, installation and use of "*Spidercam*" platforms and associated equipment;
- (d) installation and use of temporary generators including the running of cables through walking tracks;
- (e) installation and use of other filming and lighting equipment;
- (f) use of micro explosives and other special effects;
- (g) dramatic performances and other activities associated with acting and filming; and
- (h) any activity incidental to the above matters.

20 The review of environmental factors states that seven days site access would be required for the activity, weather permitting, with the public being excluded during the actual two to three days filming period. However, a National Parks and

Wildlife Service ranger and a Department of Environment and Conservation endangered species officer will both be present at all times during the filming.

21 Access to the site was apparently impeded by protesters on 27 April 2004 who had established road blocks on the access road to the filming site. The New South Wales police negotiated with the protesters for the removal of the road blocks late on 27 April 2004.

22 Set-up work, including the placing of platforms and other filming equipment, continued yesterday and most of the set-up work required to commence the planned filming tomorrow will by now have been completed.

23 According to the third respondent the timetable for filming at the site is as follows:

Tuesday, 27th to Thursday, 29th April 2004: set-up and preparation of the film site in accordance with the conditions of approval.

Friday, 30th April to Saturday, 1st May 2004: filming by the main film unit in accordance with the conditions of approval.

Monday, 3rd May 2004: filming by the second (reduced) unit in accordance with the conditions of approval.

Tuesday, 4th May to Thursday, 6th May 2004: removal of film equipment from the site in accordance with the conditions of approval.

24 The film is said to be an intensively planned schedule. The 27 April 2004 is day 58 in a shooting schedule of 78 days. As I have said, any disruption to the schedule will cost \$500,000 a day. The main unit has a crew of 292 and the second unit has a crew of 120. Approximately 40 crew members are involved in the preparation of the film site.

25 Immediately after filming at the film site the film will be shot at another location in the Megalong Valley in the Blue Mountains until 10 May 2004.

26 On 12 May 2004 the main unit travels to the Flinders Ranges to shoot for a day on 13 May 2004.

27 Each day of filming or set-up anticipated in the filming schedule which is delayed significantly disrupts the film schedule. The per-day costs include labour, services, accommodation, living expenses, services and facilities. This would have a flow-on effect, as travel for approximately 80 crew has been booked for subsequent travel to Thailand. All Thailand travel and accommodation would have to be re-booked with possible cost and availability consequences.

28 The main objections to the activity raised by both the applicant and the Colong Foundation for Wilderness, are that the activity is unlawful within a wilderness area in a national park; the area in which the filming is to take place is a sensitive environment, being a hanging swamp and a transitional open forest; the impact will include the incidental destruction of native vegetation and the unintentional killing of the larvae of the endangered giant dragonfly; and there are said to be alternative sites which are not within a declared wilderness area.

29 The first respondent, the Director-General of National Parks and Wildlife is the determining authority for the purposes of Pt 5 of the EP&A Act, the NP&W Act and the National Parks (Land Management) Regulation 1995 for the grant of authorities to conduct activities in areas designated as wilderness under the NP&W Act.

30 The second respondent, the Minister for Environment and Conservation is the Minister administering the NP&W Act and is responsible for the grant of leases, licences and easements over reserved land pursuant to Pt 12 of that Act.

31 The area in question is declared as a wilderness area under s 8(1A) of the Wilderness Act and is within the Blue Mountains National Park.

32 The applicant's challenge to the validity of the approval of 15 April 2004 granted by the Department of Environment and Conservation, to the validity of the consent of 23 April 2004, and to the validity of the third respondent's proposed activity within the wilderness area is based upon the relevant legislation. The merits of the third respondent's proposed activities and its impact on the wilderness area are not relevant. There is no appeal available on the merits against the decisions to grant either the approval or the consent.

33 I turn firstly to the relevant provisions of the NP&W Act. The objects of the Act are found in s 2A(1) and are as follows:

- (a) *the conservation of nature, including, but not limited to, the conservation of:*
 - (i) *habitat, ecosystems and ecosystem processes, and*
 - (ii) *biological diversity at the community, species and genetic levels, and*
 - (iii) *landforms of significance including geological features and processes, and*
 - (iv) *landscapes and natural features of significance including wilderness and wild rivers,*
- (b) *the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:*
 - (i) *places, objects and features of significance to Aboriginal people, and*
 - (ii) *places of social value to the people of New South Wales, and*
 - (iii) *places of historic, architectural or scientific significance,*
- (c) *fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation,*

- (d) *providing for the management of land reserved under this Act in accordance with the management principles applicable for each type of reservation.*

34 Importantly, s 3 of the NP&W Act states that the Act binds the Crown, not only in right of New South Wales, but also the Crown in all its other capacities.

35 Section 30E(1) of the NP&W Act sets out the purpose of reserving land as a national park and is as follows:

- (1) *The purpose of reserving land as a national park is to identify, protect and conserve areas containing outstanding or representative ecosystems, natural or cultural features or landscapes or phenomena that provide opportunities for public appreciation and inspiration and sustainable visitor use and enjoyment so as to enable those areas to be managed in accordance with subsection (2).*

36 Section 30E(2) of the NP&W Act states that a national park is to be managed in accordance with the following principles:

- (2) *A national park is to be managed in accordance with the following principles:*
- (a) *the conservation of biodiversity, the maintenance of ecosystem function, the protection of geological and geomorphological features and natural phenomena and the maintenance of natural landscapes,*
 - (b) *the conservation of places, objects, features and landscapes of cultural value,*
 - (c) *the protection of the ecological integrity of one or more ecosystems for present and future generations,*
 - (d) *the promotion of public appreciation and understanding of the national park's natural and cultural values,*
 - (e) *provision for sustainable visitor use and enjoyment that is compatible with the conservation of the national park's natural and cultural values,*
 - (f) *provision for the sustainable use (including adaptive reuse) of any buildings or structures or modified natural areas having regard to the conservation of the national park's natural and cultural values,*
 - (g) *provision for appropriate research and monitoring.*

37 The reference in s30E(2)(e) to provision for sustainable visitor use and enjoyment is in turn a reference to s 5(5) of the NP&W Act which states: "*In this Act, a reference to sustainable visitor use and enjoyment includes a reference to appropriate public recreation*". I observe at this stage that I do not think that the production of a commercial feature film is appropriate public recreation in the context of the objects of the Act or in the context of the purpose of reserving land as a national park. Such an activity has nothing to do with those objects or that purpose.

38 Section 151 of the NP&W Act enables the Minister to grant leases of and licences over land within a national park. In particular, s 151(1)(f) states that the Minister may grant licences to occupy or use lands within a national park.

39 Section 151B of the NP&W Act enables the Minister to grant a licence to occupy and use land within a "reserve" (which is defined in that section to include a national park), for any purpose, but may do so only if:

- (a) the land is a modified natural area, and
- (b) the licence is granted for a term not exceeding three consecutive days.

40 A "modified natural area" is defined in s 5(1) as follows:

***modified natural area** means an area of land where the native vegetation cover has been substantially modified or removed by human activity (other than activity relating to bush fire management or wild fire) and that is identified in a plan of management as not being appropriate for or capable of restoration.*

That description does not fit the subject land.

41 Section 152 of the NP&W Act enables the Director-General of National Parks and Wildlife to grant licences to carry on trades, businesses or occupations within national parks. This section also enables the Minister to grant a franchise to any person for the sale of goods and services, the provision of public transportation, or the supply of other facilities or amenities within a national park. It does not seem, however, that this section relates to activities of the kind in question here.

42 Section 153A provides a limitation on the general power of the Minister or the Director-General to grant leases or licences to occupy or use land within a national park. That section is as follows:

The Minister or Director-General shall not

- (a) *grant a lease or licence under section 151(1) or 151B, or*
- (b) *grant a licence or franchise under section 152,*

in respect of land that is within a wilderness area.

43 The consent of 23 April 2004 is said to have been granted pursuant to cl 20(1)(d) of the National Parks and Wildlife Regulation 2002 ("the Regulation 2002"). Regulation 20 of the Regulation 2002 relevantly states:

- (1) *A person must no, in a park:*

...

- (d) *take any photograph, video, movie or television film for sale or hire or profit.*
Maximum penalty 30 penalty units.

- (2) *A person does not commit an offence under this clause for anything done or omitted with the consent of a park authority and in accordance with any conditions to which the consent is subject.*

44 The regulation was made pursuant to the regulation-making power in s 155 of the NP&W Act. Sub-section 2 of that section relevantly states:

- (2) *The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that, by this Act, is required or permitted to be prescribed by regulations or that is necessary or convenient to be prescribed by regulations for carrying out or giving effect to this Act and, in particular, for or with respect to:*

...

- (n) *the reservation of any portion of a park for such separate or exclusive use as the regulations may prescribe,...*

45 The regulation to which I have referred was thus made pursuant to the regulation-making power in s 155(2)(n) of the Act. It is important to note however that any regulation must not be inconsistent with the Act. Thus the power to make a regulation for the reservation of any portion of a park for separate or exclusive use must be subject to the express limitation in s 153A of the NP&W Act to which I have referred. If the approval and the consent in the present case is a licence for the use of the area in question, then the first and second respondents cannot rely upon regulation 20(2) of the Regulation 2002 as authority therefor.

46 I have said that the area in question has been declared to be a wilderness area under s 8(1A) of the Wilderness Act. Section 9 of that Act is as follows:

A wilderness area shall be managed so as:

- (a) *to restore (if applicable) and to protect the unmodified state of the area and its plant and animal communities;*
(b) *to preserve the capacity of the area to evolve in the absence of significant human interference; and*
(c) *to permit opportunities for solitude and appropriate self-reliant recreation.*

47 It is immediately self-evident that the proposed activity in the present case does not satisfy any of the paragraphs of s 9.

48 Section 19 of the Wilderness Act states:

A plan of management for a wilderness area, or for any part of a wilderness area or an area subject to or proposed to be made subject to a wilderness protection agreement, that is prepared under the National Parks and Wildlife Act 1974 shall not be inconsistent with the principles set out in section 9 for the management of wilderness areas.

49 The National Parks and Wildlife Service has produced and published a document entitled “*Filming & Photography Policy*” for lands managed by the service. Paragraph 19 of that document states:

The service will not normally permit commercial filming and photography in wilderness and wildlife conservation areas unless the subject matter of the proposed film or photography is consistent with the management objectives and policies for those areas.

50 It is again self-evident that the proposed activity in the present case could not be said to be consistent with the management objectives set out in s 9 of the Wilderness Act.

51 It is submitted on behalf of the third respondent that all it has been authorised to do is a mere permission to enter land: there was no express grant of a licence. Reliance is placed on the judgment of Barwick CJ in *NSL Pty Ltd v Hughes* (1966) 120 CLR 583 at 587.

52 In that case the Chief Justice drew a distinction between the grant of a licence and a permission to enter land. The facts in the present case are different from those in *NSL Pty Ltd v Hughes*. In the present case, however, the third respondent has not only been granted permission to enter the land, but has been granted permission to enter it and perform certain activities upon it and has been granted exclusive use of a defined part of the land to the exclusion of the public. That is a licence. It is expressly proscribed by s 153A of the NP&W Act in a wilderness area. Moreover, the proposed activity contravenes s 9 of the Wilderness Act. It is unlawful; and the approval and consent are also unlawful.

53 This conclusion is consistent with authority. If a power of leasing or licensing is conferred in unconfined terms on a body or person in whom a reserve or national park was vested, the power to lease or licence is not untrammelled. There can be no such leasing or licensing of the land which would be inconsistent with the purpose for which it is held: see *West Australia v Ward* (2002) 76 ALJR 1098 at 1155 par [243] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. In the present case what has been granted is, as I have said, clearly inconsistent with s 9 of the Wilderness Act.

54 In *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710, the Minister had purported to grant a licence under s 151(1)(f) of the NP&W Act to the William E Simons School of Business Administration, an offshoot of an American university, to carry on a business of conducting post-graduate courses in business administration within some existing buildings in Sydney Harbour National Park. It was held by the Court of Appeal that the licensing powers in question are not at large and are controlled by the nature and scope of the legislation conferring them and are to be understood as powers to advance the objects of that legislation. In that case Samuels JA said (at 732) that the Minister could not enjoy a power to grant a licence for some purpose wholly inimical to the objects of a national park and involving activities hostile to its

environment. In the present case the proposed activities are, as I have noted, contrary to s 9 of the Wilderness Act and are hostile to its environment.

55 In *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185, a local government council wished to construct a sewerage outfall through land which had been dedicated as a public reserve. The proposal involved the erection of temporary fencing to exclude the public from parts of the reserve during construction. The temporary nature of the exclusion of the public was held to be inconsistent with public recreational use; and anything that was antipathetic to public recreational use was not permissible.

56 In *Packham v Minister for the Environment* (1993) 31 NSWLR 65, the Minister had granted a licence under s 151(1)(f) of the NP&W Act for vehicular access through a national park to private land. The access road would also possibly serve the park as a fire break and drain. It was held, applying *Woollahra Municipal Council v Minister for the Environment*, that the Minister had no power to grant the licence. The purpose was not one which preserved the park or promoted or was ancillary to its use as a park and was not a purpose justifying the grant.

57 It is submitted on behalf of the third respondent that what is proposed here is no different from allowing a sporting event within a national park by which members of the general public are excluded from a defined area for the duration of that event. Whilst this may be a regular occurrence within a national park I am unaware of any sporting event within a declared wilderness area. Such an event would clearly be contrary to s 9 of the Wilderness Act.

58 The conclusions to which I have come are not necessarily the end of the matter. The Court has a discretion. There is no doubt that if an injunction is granted the effect on the third respondent would be devastating. The relevant principles governing the exercise of the Court's discretion are conveniently set out by Kirby P in *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, in particular at 339-341. I need not repeat them.

59 In my opinion the governing consideration in the present case is this: declared wilderness areas are sacrosanct. The applicant has a right under s 27 of the Wilderness Act and under s 176A of the NP&W Act to claim the relief it seeks and the relief it seeks will be granted.

60 Accordingly the Court makes the declaration sought in para 1 of the application. The Court makes an order setting aside the approval granted on 15 April 2004 and the consent granted on 26 April 2004 by, or on behalf of, the first and second respondents respectively to the third respondent to undertake the said activities. The Court makes an order restraining the first and second respondents from granting any licence, franchise or other authority to use and/or occupy the land in question for the purpose of carrying out the activities described in the declaration.

61 Do you seek costs Mr Robertson?

ROBERTSON SC: Yes your Honour.

LALICH: Costs are opposed on behalf of the third respondent your Honour, do you want to hear some submissions on that?

HIS HONOUR: Yes.

LALICH: The Court has discretion under s 69, I need not go through that in any great detail, it would be well known to you. We say though in the present circumstances of this case the usual rule in terms of costs following the event should be departed, primarily as a result of the conduct of the applicants in the lead-up to in the bringing of the application.

That conduct your Honour effectively is crystallised in terms of the late stage in the proceedings at which the applicant articulated its claim.

You'll recall that from the affidavit of Mr Smith which was exhibit 1 there was a reference to a conversation with myself and there was some correspondence attached from the applicant to the Department. That correspondence identified an issue with respect to structures, which wasn't advanced in the hearing. That correspondence also identified a potential argument on harm. Now neither of those matters were raised in the proceedings and there were no arguments brought to that.

The submissions prepared by the third respondent and it's evident from those submissions were in some respects evident of us preparing a case that we weren't ultimately required to meet. That involved wasted costs on the part of the third respondent at the very least, but also the first and second respondent.

It wasn't then until approximately 2.30 pm yesterday that Mr Robertson in providing his written submissions articulated with any clarity what in fact the case was that we had to meet. So if there are to be any costs at all we would say that that should be confined to the time between 2.30 pm and 4.00 pm when we knew what we were arguing about.

But secondly we would say that there has been another reason why costs should not following the event and that is the extreme expense that the third respondent has been put to we say, by the delay, in the applicant bringing these proceedings.

Again we refer to the issue in terms of the threatened application that was to be made and that wasn't made. But the applicants were aware of the approval granted on 15 April and it was that approval that was initially the subject of the challenge. It's in the first paragraph of my friend's written submissions. As I say that argument wasn't ultimately brought.

But in any event the time at which the proceedings were brought were such that, and we say the applicant had knowledge of the filming or the activities commencing on 27 April, as per the affidavit of Mr Bennett, the setup has already been completed, there's been significant costs incurred in that respect. In the circumstances we would be saying as a result of the delay, but specifically as a result of the lateness at which the actual argument was articulated and the resultant wasted preparation time on our part, that there should be no order as to costs in the exercise of the Court's discretion on costs in this instance.

HARRISON SC: I don't wish to make any submissions.

HIS HONOUR: I do not wish to hear from you Mr Robertson.

62 On the question of costs it would normally follow that the successful party should have its costs. It is submitted that the third respondent was only told yesterday of the basis of the claim for relief. That is coupled with what is said to be the delay on the part of the applicant in bringing its claim for relief.

63 In my opinion there has been no delay such as to disqualify the applicant from an order for costs. In reciting the relevant facts it appears to me that the applicant acted quickly to obtain the relief which it has now been successful in obtaining. It was indeed a relatively short timeframe overall and that should not disqualify the applicant for an order for costs.

64 As to the other basis for opposing an order for costs, the third respondent has been aware for some time that the applicant was opposed to what the third respondent proposed to do. There was no request for particulars, for example, on the part of the third respondent, inviting the applicant to particularise the basis of its claim and in view of the speed with which the matter came before the Court I do not think that is a disentitling factor.

65 It follows that there will be an order that the respondents pay the applicant's costs. The exhibits may be returned.

I hereby certify that the preceding 65 paragraphs are a true copy of the reasons for judgment herein of the Honourable Mr Justice Lloyd

Associate

Dated: 29 April 2004
