

FEDERAL COURT OF AUSTRALIA

VicForests v Friends of Leadbeater's Possum Inc (No 2) [2021] FCAFC 92

Appeal from: *Friends of Leadbeater's Possum Inc v VicForests (No 6)*
[2020] FCA 1199

File number(s): VID 615 of 2020

Judgment of: **JAGOT, GRIFFITHS AND SC DERRINGTON JJ**

Date of judgment: 3 June 2021

Catchwords: **COSTS** – discretion to award costs – costs of trial and appeal – where respondent succeeded at trial – where appellant's success depended on one ground not squarely raised below – whether to depart from usual costs rule – consideration of 'public interest litigation' – where particular circumstances of the case justified departure from the usual costs rule

Legislation: *Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 475*
Federal Court of Australia Act 1976 (Cth), s 43
Environmental Planning and Assessment Act 1979 (NSW), s 123

Cases cited: *Bob Brown Foundation Inc v Commonwealth of Australia (No 2)* [2021] FCAFC 20
Nassif & Anor v Fahd & Ors [2007] NSWCA 308
Oshlack v Richmond River Council [1998] HCA 11; 193 CLR 72
Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 9) [2011] FCA 661; 194 FCR 250

Division: General Division

Registry: Victoria

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 9

Date of last submissions: 27 May 2021

Date of hearing: Determined on the papers

Counsel for the Appellant: Mr I Waller QC with Mr H Redd

Solicitor for the Appellant: Baker & McKenzie

Counsel for the Respondent: Mr J Kirk SC with Ms J Watson and Mr P Coleridge

Solicitor for the Respondent: Environmental Justice Australia

ORDERS

VID 615 of 2020

BETWEEN: **VICFORESTS**
Appellant

AND: **FRIENDS OF LEADBEATER'S POSSUM INC**
Respondent

ORDER MADE BY: **JAGOT, GRIFFITHS AND SC DERRINGTON JJ**

DATE OF ORDER: **3 JUNE 2021**

THE COURT ORDERS THAT:

1. The appellant pay the respondent's costs of the proceeding before the primary judge, other than the costs of the separate question hearing, to be fixed by way of lump sum.
2. In the absence of any agreement between the parties, within 28 days of these orders, the question of an appropriate lump sum pursuant to order 1 above be referred to a Registrar for determination.
3. The appellant pay 50 percent of the respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 On 10 May 2021, the Full Court delivered reasons for judgment as to why the appeal brought by VicForests from the orders made by the primary judge in *Friends of Leadbeater's Possum Inc v VicForests (No 6)* [2020] FCA 1199 be allowed (see *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66).

2 The parties have provided written submissions regarding the costs order that should be made in circumstances where VicForests abandoned numerous grounds of appeal, at least one argument (in support of Ground 2) in its reply submissions, and failed in respect of all grounds of appeal other than Ground 1 (and incidentally Ground 6) that remained for determination. The Full Court indicated in its orders that it would determine the costs associated with the trial and the appeal on the papers and without a further oral hearing.

3 FLP contended that the appropriate costs order is that VicForests pay FLP's costs of the hearing below (excluding the separate question hearing) and 50 percent of FLP's costs of the appeal, or alternatively, that there be no order as to the costs of the trial or of the appeal.

4 VicForests contended that the appropriate order is FLP pay VicForests' costs of the hearing below and 50 percent of VicForests' costs of the appeal, acknowledging that it was appropriate that a costs order in its favour should be reduced in the manner proposed by FLP in light of the fact that although it succeeded on Ground 1 (and Ground 6), it did not press eight grounds and was not successful on the remaining grounds.

5 For the following reasons, we consider that the costs order made by the primary judge should not be disturbed and that VicForests should pay 50 percent of FLP's costs of the appeal.

Relevant principles

6 It is well established that the Court's discretion to award costs under s 43 of the *Federal Court of Australia Act 1976 (Cth)* (*FCA Act*) is broad, but must be exercised judicially and consistently with the purpose of the power and taking into account all relevant facts and circumstances.

7 The Full Court has recently discussed the principles concerning when it might be an appropriate case to depart from the usual costs order, particularly in the context of unsuccessful ‘public interest litigation’: **Bob Brown Foundation Inc v Commonwealth of Australia (No 2)** [2021] FCAFC 20. The Full Court noted the following matters which it regarded as relevant to the exercise of its discretion:

- (a) the significance of the breadth of the standing provision in s 475(7) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) in determining costs in the context of unsuccessful ‘public interest litigation’ must be acknowledged, as was emphasised with respect to the breadth of s 123 of the *Environmental Planning and Assessment Act 1979* (NSW) in **Oshlack v Richmond River Council** [1998] HCA 11; 193 CLR 72 (*Bob Brown* at [7], [9]).
- (b) the true issue is not whether the proceedings involved ‘public interest litigation’, but whether, in the exercise of the discretion under s 43 of the *FCA Act*, any considerations extraneous to any object the legislature could have had in view in enacting s 43 of the *FCA Act* are relevant, including the operation of s 475 of the *EPBC Act*: *Oshlack* [49], [134] (*Bob Brown* at [11]–[14]).
- (c) merely because an ‘interested person’ has initiated unsuccessful public interest litigation does not mean that there will be a departure from the usual rule as to costs; if there is to be an exception in respect of proceedings brought by ‘interested persons’ from the usual rule as to costs, “that exception must be found in the circumstances of a particular case”: *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 9)* [2011] FCA 661; 194 FCR 250 at [7] (*Bob Brown* at [15]).
- (d) costs cannot be appropriately determined by a ‘tick the box’ approach (*Bob Brown* at [16]).

Where should the costs lie?

8 The matters relevant to the exercise of the discretion in this case include the following:

- (1) there was no dispute, either in the proceedings below or on appeal, that FLP had the standing to seek the relief it sought (*Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178; (2018) 260 FCR 1 at [2]).
- (2) FLP was overwhelmingly successful at trial in establishing, as matters of fact, that VicForests contravened State legislative instruments with respect to the endangered

Greater Glider and Leadbeater's Possum species. Those factual findings were not disturbed on appeal.

- (3) on appeal, VicForests advanced 31 grounds of appeal in its amended Notice of Appeal. It abandoned eight grounds at or shortly before the hearing.
- (4) the ground on which VicForests succeeded, Ground 1, was dispositive of the appeal. It was a question of statutory construction that was decided on a basis not put to the primary judge: *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66 at [26].
- (5) Although the consequence of the Full Court's finding with respect to Ground 1 meant that FLP should not have succeeded at trial, that does not mean that there is no just basis upon which it should recover its costs of the trial, as was submitted by VicForests (citing *Nassif & Anor v Fahd & Ors* [2007] NSWCA 308).
- (6) Although the proceeding may properly be described as 'public interest litigation', this matter is not determinative. As Kirby J observed in *Oshlack* at [134], while the legitimate pursuit of a public interest is a legitimate matter to take into account, "litigants espousing the public interest are not thereby granted an immunity from costs or a "free kick" in litigation" (see also *Bob Brown* at [16(d)]).
- (7) the Full Court did not overturn any of the primary judge's factual findings which were challenged on appeal and which occupied much of the trial and a considerable portion of the hearing of the appeal. These were costs which were wasted due to VicForests' conduct.

The costs orders should reflect these facts.

Conclusion

- 9 For these reasons, and with particular attention to the facts and circumstances of this proceeding, we consider that the costs order made by the primary judge should not be disturbed and that VicForests, although successful on appeal, should pay 50 percent of FLP's cost of the appeal.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot, Griffiths and SC Derrington.

A handwritten signature in black ink, appearing to be 'C. H. W.' with a long, sweeping underline.

Associate:

Dated: 3 June 2021