New South Wales Land and Environment Court

[Index] [Search] [Download] [Help]

CGEA Transport Sydney Pty Ltd and Anor v Sydney City Council [2003] NSWLEC 95 (21 February 2003)

Last Updated: 15 May 2003

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: CGEA Transport Sydney Pty Ltd and Anor v Sydney City Council [2003] NSWLEC 95

PARTIES:
APPLICANT
CGEA Transport Sydney Pty Ltd and Anor

RESPONDENT
Sydney City Council

CASE NUMBER: 20013 of 2000

CATCH WORDS: Costs

LEGISLATION CITED:
Local Government Act 1993

CORAM: Pearlman J

DATES OF HEARING: 21/02/2003

EX TEMPORE DATE: 21/02/2003

LEGAL REPRESENTATIVES

APPLICANT
Ms S A Duggan (Barrister)
SOLICITORS
Piper Alderman

RESPONDENT
Mr C J Leggat (Barrister)
SOLICITORS

Abbott Tout

JUDGMENT:

**IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

20013 of 2000

Pearlman J

21 February 2003

**CGEA TRANSPORT SYDNEY PTY LTD and
CGEA TRANSPORT MANAGEMENT SYDNEY PTY LTD**

Applicants

v

SYDNEY CITY COUNCIL

Respondent

Judgment

1 By notice of motion the applicants in these proceedings seek an order that the respondent pay to the applicants the costs of the proceedings including the costs of the notice of motion.

2 The substantive proceedings concerned the making of charges under s 611 of the Local Government Act 1993 ("the LG Act") by the council on the applicants in respect of the Sydney Monorail.

3 It is critical to understand the claims that were made. They are set out in summary form in pars 5 – 8 of *CGEA Transport Sydney Pty Ltd and Anor v Sydney City Council* (2002) 122 LGERA 35 ("the judgment"). The claims can be divided, in general terms, into a challenge to the validity of the charges and a challenge to their quantum. As to validity, the applicants raised six bases for invalidity (see par 6 of the judgment). They also claimed that, even if the charges were valid, the quantum was incorrect and should be recalculated. The council's case was that the claims of invalidity must each fail. In addition, the council raised two other points, first, that the Court had no jurisdiction and secondly, that the privative provision contained in s 729 of the LG Act precluded the challenge to the validity. In the event, the validity claim by the applicants failed on all six bases but that failure was in a context where the council's claim of no jurisdiction and the operation of the privative clause also failed.

4 As the judgment indicates, I dealt with jurisdiction first (pars 10 – 13). Having determined that there was jurisdiction, I considered the operation of s 729, the privative clause (pars 14 – 17). Having then concluded that the challenge was not precluded by s 729, I dealt with the six bases of invalidity (pars 25 – 55) and decided that none of them were made out. What remained was the question of quantum. On that question, the applicants were wholly successful in that the considerable amount which the Council had levied, a charge of $550,000 in respect of one period and a charge of $275,000 in respect

of another period, was reduced to $23,734 for one year, $24,939 for another year and $12,620 for a six month period.

5 In par 8 of the judgment I noted that council raised two defences apart from asserting that the claim of invalidity did not exist. I expressed that as follows:

8. ... First, it claims that the Court has no jurisdiction to determine the validity of the impugned charges because those claims are raised in class 2 proceedings which are limited to an appeal in relation to quantum. Secondly, it claims that the challenge to validity of the impugned charges is precluded by the operation of the privative provision contained in s 729 of the LG Act.

6 In dealing with the jurisdictional defence that was raised by the council, I stated in par 12 and 13 as follows:

12. There is no argument that the Court has jurisdiction to hear and determine the challenges to the validity of the impugned charges in proceedings in class 4 of its jurisdiction. Section 611 falls within ch 15 of the LG Act, with respect to which the Court is vested with appropriate jurisdiction pursuant to s 20(2) and (3) of the Court Act. Nor was there any submission that the council would be prejudiced if the class 4 proceedings were to be heard and determined with the class 2 proceedings ...

13. In all these circumstances, and especially having regard to the absence of prejudice, I proceeded to hear evidence and submissions on all the issues in dispute between the parties, and it is in my view now appropriate to determine all those issues. That will effectively determine both the class 2 and class 4 proceedings, a course in conformity with s 22 of the Court Act ...

7 The effect of that was that the claim by the council that the Court could not consider the validity challenge had the matter been limited to the class 2 proceedings failed. There was jurisdiction whether it was by reason of the effect of s 22 of the Court Act or the effect that formally class 4 proceedings were also commenced and heard instanter. I ruled that the Court had jurisdiction and then proceeded to deal with the claims step by step.

8 In the light of that analysis of the judgment, the competing claims for costs may be stated as follows. Ms Duggan, appearing on behalf of the applicants, submitted that this is a case for application of the normal rule that costs follow the event. There was a challenge to validity on which the applicants failed, but, as to quantum, they were wholly successful. In Ms Duggan's submission, they were successful in the proceedings because, ultimately, they succeeded in their claim that the quantum of the charges was not correctly calculated and should be another amount, which in substance they received. Ms Duggan referred to the general rule as stated in *Oshlack v Richmond River Council* (1998) 193 CLR 72 that a successful party is prima facie entitled to costs in the absence of disentitling conduct, that disentitling conduct arising in some way from the conduct of the litigation. Ms Duggan also relied on a letter which was written on 28 May 2001 (almost twelve months before the proceedings were heard) by the applicants' solicitors to the council's solicitors. It was an open letter offer which contained the following passages.

We were instructed that if the Council of the City of Sydney were to indicate that it would accept payment of the sum calculated by the report of Tammy Lindsay of Horwaths as the proper amount payable pursuant to Section 611 ...

Our clients would make that offer formally in settlement of all obligations ... Such a settlement would be conditional upon a deed being entered into between the applicants and respondents ... extinguishing all rights, both past, present and future of the respondent with respect to the Monorail, its owners and operators pursuant to Section 611 ...

9 Ms Duggan drew attention to that letter of offer submitting that the Court should take account of it. It was sent well before the hearing, it did require a conditional settlement, but the offer made within it

was substantially the ultimate result of the case.

10 In response Mr Leggat, appearing for the council, claimed that the ultimate success of the applicants is not the only relevant factor. There were, in his submission, two separate bases of challenge, one was to validity, one was to quantum. The council succeeded in relation to the challenge to validity. The council failed in relation to quantum. Therefore, in Mr Leggat's submission, the case is analogous to the decision of *Ashington Holdings Pty Ltd v Wipema Services Pty Ltd [No 3]* (Young J, NSWSC, 1 October 1998, unreported). In that case, Young J, relying upon a decision of Kirby P, as he then was, in *Lenning v Alexander Proudfoot Company World Headquarters* (NSWCA, 22 April 1991, unreported) held that it is appropriate to take into account the time taken by the resolution of particular issues, although not with mathematical precision and it is sufficient that there are two or more distinct points which need to be decided. Justice Young went on to say:

... looking at the word "issue" in this wide sense, there were virtually two issues, one on which the plaintiff succeeded and the other on which the defendant succeeded.

11 In response to that submission, Ms Duggan, I think correctly, pointed out that this present case could not be divided so neatly into two distinct issues. In general terms there were two challenges to the impugned charges. One as to their validity and the other as to their quantum. But in fact the issues of the case were not so neatly divided. The council's position, as I have explained, was that it denied invalidity on each of the six bases raised but it also raised two other points of defence and it failed on those two points of defence. The effect is that it cannot neatly be said that the applicants wholly failed in relation to the validity of the impugned charges and wholly failed in relation to everything that related to those impugned charges. They succeeded in relation to the two points of defence raised by the council and they succeeded in the amount of quantum. It seems to me therefore, that it is not so easy in this particular case to divide it neatly into two distinct issues and simply make no order as to costs.

12 I think in all the circumstances that the ultimate success, looking at the whole matter generally, was the applicants' success. Although they failed on the six bases of invalidity, they did succeed in defeating the council's charge that the Court had no jurisdiction and the council's claim that the challenge was defeated by the operation of the privative provision. They succeeded in relation to the quantum. In those circumstances, it is my opinion that the applicants are entitled to their costs in terms of the notice of motion and including the costs of this hearing.

13 Accordingly, I make the following formal orders:

1. The council to pay the costs of the applicants of the proceedings including the hearing of the notice of motion dated 5 July 2002, as agreed or as assessed.

2. The exhibit to be returned.