CITATION:	*Yarabala Pty Ltd & Anor v Sweetpea Petroleum Pty Ltd (Costs)* [2024] NTSC 5
PARTIES:	YARABALA PTY LTD AND BB BARKLEY PTY LTD v SWEETPEA PETROLEUM PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-00338-SC
DELIVERED:	31 January 2024
HEARING DATES:	Issue of costs decided on the papers
JUDGMENT OF:	Barr J

CATCHWORDS:

COSTS – APPLICATION FOR LEAVE TO APPEAL – Application for leave to appeal and appeal heard together – Leave to appeal granted – Appellant failed to establish vitiating errors of law – Appeal dismissed – Appellant submits *contra* costs order on several grounds – 'First testing' of regulations in relation to access agreements – 'Test case' – 'Matter of very general importance' – Held appellant engaged in private litigation in pursuit of private interests – Order that appellant pay the respondent's costs on the standard basis

Northern Territory Civil and Administrative Tribunal Act 2014, s 131, s 132(2)

Petroleum Regulations 2020 (NT), r 56(1), r 57(2)

Supreme Court Rules 1987, Order 63.03, Order 63.72(9)(b)

Oshlack v Richmond River Council (1998) 193 CLR 72, referred to

REPRESENTATION:

Counsel:

Applicants:	J M Horton KC, E J Morzone KC
Respondent:	H Baddeley

Solicitors:

Applicants:	Emanate Legal
Respondent:	Squire Patton Boggs

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yarabala Pty Ltd & Anor v Sweetpea Petroleum Pty Ltd (Costs) [2024] NTSC 5
No. 2022-00338-SC

IN THE MATTER of an application for leave to appeal, pursuant to s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*

BETWEEN:

YARABALA PTY LTD

AND

BB BARKLEY PTY LTD
Applicants

AND:

SWEETPEA PETROLEUM PTY LTD
Respondent

CORAM: BARR J

REASONS FOR DECISION ON COSTS

(Delivered 31 January 2024)

[1] On 22 and 23 June 2022, I heard an application by the applicants (referred to collectively as "Yarabala") for leave to appeal against the decision of the Northern Territory Civil and Administrative Tribunal

made 7 February 2022. On 9 June 2023, I made an order granting leave to appeal but dismissed the appeal. The question of costs was reserved.

[2] Acting on the principle that costs normally follow the event, I made a direction that, if Yarabala contended that a costs order should not be made against it, it should file and serve written submissions within 21 days of the appeal decision. Yarabala subsequently filed and served written submissions,[1] and the respondent filed and served written submissions in response.[2] Yarabala did not avail itself of a right of reply and neither party sought an oral hearing. As a result, as foreshadowed, I propose to deal with the issue of costs on the papers.

[3] I summarize Yarabala's submissions below, with some observations of my own. In brief, Yarabala resists the making of a costs order.

[4] Yarabala contends that the appeal involved questions of general public importance on a new (and novel) statutory regime, the objectives of which included reducing risks to the environment.[3] The particular regime invoked by the applicants was said to be "at the intersection of the rights and obligations of landholders and petroleum companies". The appeal was said to be "the first testing of the application and effect of a regime which exists to balance the interest of landholder and petroleum companies". Yarabala referred to an express purpose stated

1 Applicants' submissions on costs, 30 June 2023.

2 Respondent's submissions on costs, 19 July 2023.

3 Referring to *Petroleum Act* 1974 (NT), s 3(2)(f).

in sub-regulation 57(2) *Petroleum Regulations 2020* to "find a reasonable balance between the interests of an interest holder and the interests of a designated person [here, the landholder]".

[5] Under sub-regulation 56(1) *Petroleum Regulations 2020*, an interest holder is responsible for the reasonable costs of a landholder in any proceeding before the Tribunal unless that person, in the opinion of the Tribunal, has acted unreasonably or in a way intended to frustrate or delay those proceedings. Yarabala relies on these matters to submit that costs should not simply 'follow the event'.

[6] I do not accept the submission that a costs order should not be made against an unsuccessful applicant/appellant in this Court because of the costs provision in sub-regulation 56(1) *Petroleum Regulations 2020* or costs considerations under the *Northern Territory Civil and Administrative Tribunal Act 2014*.

[7] Sub-regulation 56(1) is expressly limited to proceedings before the Tribunal. Once a party seeks to invoke the jurisdiction of this Court to appeal the decision of the Tribunal, very different considerations apply. Yarabala must be taken to have been aware of those different considerations because, by its draft notice of appeal filed in this Court, it sought orders that Sweetpea pay the applicants' costs of the appeal, in addition to the Tribunal hearing.

[8] The same is true in relation to the general rule that parties bear their own costs in proceedings before the Tribunal.[4] That also does not displace this Court's discretion to make such order as it thinks fit in relation to costs. Order 63.03 *Supreme Court Rules 1987* provides that the costs of the proceeding are in the discretion of the Court.

[9] Yarabala contends that there are three main reasons why, despite the lack of ultimate success on the appeal, the appropriate order is that each party bears its own costs of and incidental to the appeal:

8.1 The appeal showed that there had been a clear error in the decision below.

8.2 The appeal raised grounds about the 'new regime' the testing of which was of general importance, and from which Sweetpea will benefit in its dealings with other landholders.

8.3 The appeal was necessarily defensive.

[10] As to 8.1, although Yarabala's submission is factually correct, that the Tribunal wrongly attributed to Yarabala arguments and submissions which had not in fact been made, the error was found to be without consequence and hence not a vitiating error.[5] It was thus legally irrelevant. The fact that the error was identified as such in this Court's

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4 *Northern Territory Civil and Administrative Tribunal Act 2014*, s 131. The Tribunal nonetheless has the power to make a costs order, taking into account the matters set out in s 132(2) *Northern Territory Civil and Administrative Tribunal Act 2014*.

5 See *Yarabala Pty Ltd and Anor v Sweetpea Petroleum Pty Ltd* [2023] NTSC 50 at [29].

decision on the application for leave to appeal does not in my opinion affect the issue of costs.

[11] As to 8.2, Yarabala contends that there is benefit to an interest holder (here, Sweetpea) in having clarification of the matters that were raised, because it is a 'repeat player', holding, as it does, an Exploration Permit which covers many different properties. In response, Sweetpea submits that it has received no special benefit from the Yarabala appeal because there was already on foot an appeal or application for leave to appeal by Rallen Australia Pty Ltd. The implication is that a second such application was an unnecessary duplication. Sweetpea also submits that the effect of Yarabala's proceeding has been to delay and frustrate the determination of an access agreement such that it is still not able to proceed.

[12] I would not be prepared to find that Yarabala has done Sweetpea any favours in seeking to challenge the Tribunal's decision by its application for leave to appeal. To the contrary, the application for leave to appeal and the associated delays have been to Sweetpea's disadvantage.

[13] As to 8.3, Yarabala argues that it was in the position analogous to that of a compulsorily dispossessed landholder and that, "having lost its rights to its land", it should not be deterred from seeking to have the provisions of an access agreement and compensation "appropriately

determined", including by taking an important test case to the Supreme Court. Yarabala contends that its case was "not unarguable". The latter contention may be true, but it is not particularly relevant in relation to whether costs should be ordered on the standard basis, which is all Sweetpea is seeking.

[14] As to the other matters in 8.3, the legislation and regulatory regime favours landholders seeking to have the provisions of an access agreement determined by the Tribunal, in that they are generally entitled to a costs order in their favour if they conduct themselves reasonably. But that is where the legislative/regulatory 'favouritism' ends. If a dissatisfied party seeks to appeal the decision of the Tribunal, that party then must accept the real possibility that costs will be ordered against it if it is not successful, as an indemnity for the successful party, which has been an unwilling participant in the Supreme Court litigation.

[15] Yarabala argues that there are circumstances that favour each party bearing its own costs. It points out, correctly, that there is "no absolute rule … (that) a successful party is to be compensated by the unsuccessful party" following litigation.[6] It refers to what may be called the 'public interest litigation' situation, or environmental protection litigation, suggesting that its unsuccessful appeal should be seen in that light. Yarabala points out that courts have declined to

6 *Oshlack v Richmond River Council* (1998) 193 CLR 72 per Gaudron and Gummow JJ at [40].

order costs against an unsuccessful party where the litigation is categorised as a 'test case'[7] or a matter of 'very general importance'[8] or where matters affecting the public interest are ventilated.[9]

[16] I do not consider that the authorities referred to by Yarabala are of direct relevance here. Rather, as counsel for Sweetpea points out, Yarabala's appeal was not brought in the public interest; rather Yarabala was at all times pursuing its private interests as the lessee under the Beetaloo Station pastoral lease. Undoubtedly there was a vague environmental 'undercurrent' to the case, but the grounds relied on by Yarabala raised issues such as the timing of entitlement to compensation, evidence of compensable loss and the valuation thereof, the duration of the access agreement and other technical legal arguments.

Conclusion

[17] I order that the appellants pay the respondent's costs of the application for leave to appeal/appeal, on the standard basis.

[18] I further order that the appellants pay the respondent's costs of the argument in relation to costs, also on the standard basis.

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7 *Pareroultja v Tickner* (1993) 42 FCR 32, 49; *Atrill v Richmond River Shire Council* (1995) 38 NSWLR 545, 556.

8 *Eg Liversidge v Anderson* [1942] AC 206 at 283 approved in *Osidack v Richmond River Council* (1998) 193 CLR 72, 89.

9 *Oshlack v Richmond River Council (1998)* 193 CLR 72, 91, 124; *Liveridge v Anderson* [1943] AC 206; *R v Commissioner of Police Ex parte Blackburn No 3* (CA) [1973] QB 241 at 265; *Cairns Port Authority v Albitz* [1995] 2 Qd R 470 at 475. See also Durbach, McNamara, Rice & Rix, *Public interest litigation: making the case in Australia* (2013) Alternative Law Journal, 38 (4), 219-223.

[19] To the extent necessary, I certify for senior and junior counsel, pursuant to SCR 63.72(9)(b).

[20] The parties should file orders in the Registry consistent with these Reasons.
