

CITATION: *Potae v Fyles* [2022] NTLC013

PARTIES: David Potae

v

Natasha Fyles

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 2022-00711-LC

DELIVERED ON: 8 July 2022

DELIVERED AT: Darwin

HEARING DATE(s): 17 June 2022

DECISION OF: Acting Judge O'Loughlin

CATCHWORDS:

Public interest costs order

REPRESENTATION:

Counsel:

Appellant: Self

Respondent: Mr G O'Mahoney

Solicitors:

Appellant: Self

Respondent: Solicitor for the NT

Decision category classification: B

Decision ID number: [2022] NTLC013

Number of paragraphs: 27

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA
No. 2022-00711-LC

BETWEEN:

David Potae

Appellant

AND:

Natasha Fyles

Respondent

REASONS FOR DECISION

(Delivered 8 July 2022)

ACTING JUDGE O'LOUGHLIN

Introduction

1. The appellant is challenging the extension of a declaration of a public health emergency and are seeking a public interest costs order. Such an order would result in the appellant not being liable for the respondent's costs if they are unsuccessful in their appeal.
2. These reasons and orders apply to two proceedings which are essentially identical and were argued together.

Background

3. In March 2020 the respondent declared a public health emergency for the Northern Territory in response to the public health risk posed by COVID-19. The declaration was pursuant to section 48 of the *Public and Environmental Health Act 2011* ("PEH Act") which allows such a declaration when "*circumstances of such seriousness and urgency exist that are, or threaten to cause, an immediate serious public health risk*".
4. The World Health Organisation had recently declared a pandemic and every other jurisdiction in Australia took similar action in response to the COVID-19 virus.
5. The declaration allowed the Chief Health Officer ("CHO") to then make orders thought "*necessary, appropriate or desirable to alleviate the public health emergency*". The CHO made a number of these orders including mandating the wearing of masks and requiring most people to be vaccinated for their employment.

6. The declaration of emergency was extended on several occasions¹ and on 15 March 2022 the declaration was extended for a further 90 days.
7. Section 107 of the *PEH Act* allows a person whose interests are affected by such a declaration or extension to appeal against that decision to the Local Court.
8. A proportion of the population were opposed to the emergency declaration, and the CHO orders, with 98 appeals lodged against the extension. Many of these appeals have since been discontinued and there are presently now only five ongoing appeals.
9. Importantly, on 9 June the respondent announced her decision not to extend the emergency declaration and it ended on 16 June 2022. Thus the substantive relief claimed by the appellants (that the respondent's decision be set aside) has effectively already been achieved.

Public Interest Costs Order

10. Two of the remaining five appeals have applied for a public interest costs order under Rule 38.10² which provides (in part):
 - (1) *A party may apply to the Court at any stage of proceedings, including at the commencement, for a public interest costs order under this rule.*
 - (2) *The applicant must satisfy the Court that the proceedings:*
 - (a) *will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;*
 - (b) *will affect the development of law generally and may reduce the need for further litigation; or*
 - (c) *otherwise has the character of public interest or test case proceedings.*

....

 - (5) *The Court may make an order under this rule despite a party to the proceedings having a personal interest in the matter.*
11. Such an order can alter the usual order (of costs following the event) by preventing the successful party from recovering its costs or capping those recoverable costs.
12. 38.10 (2) lists three alternatives where one must be satisfied before a court can make a public interest costs order.
13. In respect of the (2) (a), I find there is no important right or obligation affecting the community as the emergency declaration ceased to have effect on 15 June 2022. The language of this provision is in the present tense ("*will determine, enforce or clarify an ... obligation affecting*") suggesting (2) (a) is aimed at making public interest costs orders that challenge an emergency declaration currently in force. This is not the case here. One could imagine a different circumstance where a challenge to a discontinued emergency declaration could determine an important right (i.e. where future declarations were likely) but this is not the case here.

¹ Pursuant to subsection 50 (2) of the *PEH Act*

² *Local Court (Civil Jurisdiction) Rules 1998*

14. Furthermore, the *PEH Act* was amended in May 2022 such that for the next two years an emergency declaration is no longer required for the CHO to make orders in respect of COVID-19. An appeal to the declaration is therefore unlikely to clarify any rights or obligations.
15. In any event, for reasons given below, these proceedings are poorly pleaded, and with little apparent merit, making the appeals unlikely to determine, enforce or clarify any rights.
16. I also find the appellant fails satisfy the second alternative ground in (2) (b) as these proceedings will not affect the development of law generally nor reduce the need for further litigation.
17. The proceedings plead a number of grounds in the appeal and the following are examples with my comments and preliminary views in brackets:
 - a. the decision to extend the declaration was unreasonable and offence human rights obligations (there are no particulars of how this is so);
 - b. the respondent Minister failed to provide reasons for her decision (there is no statutory or common law requirement to do so - *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at [7]);
 - c. the pandemic was not serious or urgent to justify the declaration (there is ample evidence in the public domain suggesting otherwise);
 - d. alternative medical treatments have been prohibited or delayed by the Commonwealth Government (without providing any particulars); and
 - e. that the NT medical system did not collapse shows the declaration was unnecessary (when we compare the NT to other countries, it could equally show that the declaration was necessary and indeed successful).
18. The proceedings are generally poorly drafted and appear to lack merit. I find they are unlikely to affect the development of the law generally, nor reduce the need for further litigation.
19. The last alternative which the appellants must satisfy is that the proceedings otherwise have the character of public interest or test case proceedings (38.10 (2) (c)). The reasons I have given in the paragraphs above are applicable here and I conclude that this is not a suitable test case.
20. As to whether the proceedings have “the character of public interest”, this was discussed in *Phillips & Ors v Chief Health Officer & Anor* [2022] NTSC 29 by Brownhill J.
21. *Phillips* dealt with a similar (but different) application in a proceeding seeking judicial review of orders made by the CHO. In that matter Brownhill J. dealt with common law principles as the Supreme Court Rules do not provide for a public interest costs order.
22. Notwithstanding these differences, the analysis of whether the proceedings in *Phillips* was “public interest litigation” is relevant where the following conclusions were reached by Her Honour:
 - a. It could be inferred that a significant number of people were affected by the orders [45];
 - b. The prime motivation of the plaintiffs was personal interest [46];

- c. The level of interest in the media was not relevant [48];
 - d. The pleadings were broad, complex, and many propositions were “novel” [51].
23. Although the legal issues here are slightly different, I find the above factual conclusions are applicable in this proceeding.
24. At paragraph [51] Her Honour concluded “it is doubtful whether there is a sufficient public interest in the proceedings to justify the making of a protective costs order”. I similarly find that there is insufficient public interest to satisfy 38.10 (2) (c), particularly as the declaration has come to an end. I reach that conclusion noting that 38.10 considerations are slightly different from the common law.³
25. I also note that the *PEH Act* was amended in May 2022 where, for the next two years, the CHO can make orders without requiring an emergency declaration. These proceedings are therefore unlikely to affect future rights or obligations and unlikely to be in the public interest.
26. The appellant fails to satisfy subsection 38.10 (2) and the application for a public interest costs order is refused.
27. I will hear the parties as to the costs of this application if necessary.

Orders

1. The Appellant’s application for a public interest costs order is dismissed;
2. The costs of the application are reserved.

Dated this 8th day of July 2022



Ben O'Loughlin
ACTING LOCAL COURT JUDGE

³ For example 38.10 (5) appears to not to be a common law principle.