
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : PEARLMAN -v- WA A/INFORMATION
COMMISSIONER [2019] WASC 257 (S)

CORAM : SMITH J

HEARD : ON THE PAPERS

DELIVERED : 2 OCTOBER 2019

FILE NO/S : GDA 17 of 2018

BETWEEN : PATRICK W PEARLMAN
Appellant

AND

WA A/INFORMATION COMMISSIONER
First Respondent

THE UNIVERSITY OF WESTERN AUSTRALIA
Second Respondent

ON APPEAL FROM:

Jurisdiction : OFFICE OF THE INFORMATION
COMMISSIONER

Coram : ACTING INFORMATION COMMISSIONER C
FLETCHER

File Number : F2018292

Catchwords:

Costs - Application for indemnity costs by self-represented litigant who is legal practitioner - Application for costs made against Information Commissioner - Statutory provision preventing costs order against Information Commissioner applies - Inherent jurisdiction of court, whether ousted - *Chorley* exception to rule against self-represented litigant claiming cost of time spent in litigation

Legislation:

Freedom of Information Act 1992 (WA), s 85(1), s 89

Result:

Appellant's application refused

Category: B

Representation:

Counsel:

Appellant : No appearance
First Respondent : No appearance
Second Respondent : No appearance

Solicitors:

Appellant : In person
First Respondent : In person
Second Respondent : Minter Ellison

Case(s) referred to in decision(s):

Ardrey v State of Western Australia [No 2] [2017] WASCA 41
Bell Lawyers Pty Ltd v Pentelow [2019] HCA 29
Ex parte Coorey (1944) 45 SR (NSW) 287
Fagan v Crimes Compensation Tribunal [1982] HCA 49; (1982) 150 CLR 666
Fernando v Medical Complaints Tribunal [2007] TASSC 44; (2007) 16 Tas R
237

London Scottish Benefit Society v Chorley (1884) 13 QBD 872
Ogawa v Australian Information Commissioner [2014] FCA 229
Pearlman v WA A/Information Commissioner [2019] WASC 257
Pier (WA) Pty Ltd v Jean Maurice Pty Ltd (in Liq) [No 7] [2018] WASC 355
Psychologists' Registration Board of Victoria v The Herald Weekly Times Ltd
[2000] VSCA 118
R (Davies) v Birmingham Deputy Coroner [2004] 3 All ER 543
R v Australian Broadcasting Tribunal; Ex parte Hardiman [1980] HCA 13;
(1980) 144 CLR 13
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)
Unioil International Pty Ltd v Deloitte Touche Tohmatsu (A Firm) (1997) 18
WAR 190

SMITH J

SMITH J:

The appeal, the result and this application

1 The appellant appealed to this court from decisions of the Acting Information Commissioner (Commissioner), made on 26 October 2018 and 8 February 2019. The appeal was upheld on the ground that an error of law arises out of the decision made on 8 February 2019.

2 The appellant did not succeed on all grounds of his appeal. I was not satisfied that the Commissioner made a decision within the meaning of s 85(1) of the *Freedom of Information Act 1992* (WA) (FOI Act) on 26 October 2018, or that the decision made on 8 February 2009 was infected by a reasonable apprehension of bias.

3 The reasons for my decision are published in *Pearlman v WA A/Information Commissioner*.¹

4 The appellant now seeks orders for costs against the Commissioner.

5 The appellant makes his claim for costs on an indemnity basis within the court's power in the exercise of its inherent jurisdiction to award costs on the basis that:

- (a) the manner in which the Commissioner participated in the review proceedings went far beyond the limited role defined by the courts for administrative decision-makers and tribunals in accordance with principles articulated by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*;² and
- (b) the defences put forth by the Commissioner, in support of her 8 February 2019 decision, were frivolous and/or vexatious, and an abuse of process.³

6 The appellant's application is opposed on grounds that:

- (a) s 89(3) of the FOI Act provides that the Commissioner is not liable for any costs in respect of his or her decision or review proceedings which provision ousts the jurisdiction of the court to make an indemnity costs order;

¹ *Pearlman v WA A/Information Commissioner* [2019] WASC 257.

² Appellant's submissions regarding costs, filed 2 August 2019 [41].

³ Appellant's submissions regarding costs, filed 2 August 2019 [41], [55] - [82].

- (b) the appellant is a litigant in person and therefore he is not entitled to recover costs; and
- (c) in any event, no finding in the judgment published on 19 July 2019 supports an allegation that the Commissioner has engaged in an abuse of process.

7 Section 89 of the FOI Act provides:

89. Terms etc., Court may impose; costs

- (1) Subject to subsections (2) and (3), an order or decision made by the Supreme Court in review proceedings may be made on such terms and conditions (including terms and conditions as to costs) as the Supreme Court thinks fit.
- (2) If the agency is the appellant under section 85 it bears its own costs.
- (3) The Commissioner is liable for his or her own costs in relation to a reference under section 78 but otherwise is not liable for any costs in respect of his or her decisions or review proceedings.

8 It is convenient to deal first with the *Hardiman* point; and second the principles that apply to an application for costs by a self-represented legal practitioner; and third whether the Commissioner engaged or proceeded in litigation that was frivolous or vexatious, and an abuse of process.

The *Hardiman* principle and its relevance for costs

9 *Hardiman* stands for the proposition that, other than in exceptional cases, a tribunal should not take an active role in appeal or judicial review proceedings challenging its decisions.⁴

10 In *Hardiman*, the High Court unanimously observed that a tribunal should not normally present a substantive argument upon an application to a superior court for a prerogative writ directed to it, but should submit to such an order as the court may make:⁵

In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this court there is the risk that by so

⁴ *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13.

⁵ *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13, 35 - 36.

doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.

11 Justice Brennan, in *Fagan v Crimes Compensation Tribunal*, explained the principle in the following terms:⁶

Where curial proceedings arise out of a matter which is contested between parties appearing before a tribunal, it is not ordinarily appropriate for the tribunal to appear to contest the curial proceedings brought by one of the parties before it.

12 The principle applies to administrative decision-makers generally, not just administrative tribunals.

13 Notwithstanding these general rules, however, the application of the *Hardiman* principle requires some adapted flexibility to the particular circumstances which present themselves to the court for consideration.⁷ For example, it was observed by Greenwood J in *Ogawa v Australian Information Commissioner* that where there is no active contradictor to frame propositions concerning the legality of the decision-making, the court might well elect to entertain submissions from the decision-maker.⁸

14 The relevance of these principles to the question of costs is whether, if the tribunal acts as contradictor, the tribunal should be liable to pay the appellant's costs of the appeal. The general rule is that decision-makers are not liable to pay costs in the event of a successful appeal, except perhaps in extreme circumstances.⁹

15 However, there is some authority for the proposition that an administrative decision-maker or body may be liable for costs in circumstances where it participates in proceedings and adopts the role of a litigant in court (contrary to the *Hardiman* principle) when it was

⁶ *Fagan v Crimes Compensation Tribunal* [1982] HCA 49; (1982) 150 CLR 666, 681 - 682.

⁷ *Ogawa v Australian Information Commissioner* [2014] FCA 229 [23] (Greenwood J).

⁸ *Ogawa v Australian Information Commissioner* [2014] FCA 229 [24].

⁹ *Psychologists' Registration Board of Victoria v The Herald Weekly Times Ltd* [2000] VSCA 118 [11] (Charles JA); *Fernando v Medical Complaints Tribunal* [2007] TASSC 44; (2007) 16 Tas R 237 [16] (Crawford J).

not required to do so. On this point, it was said in *Fernando v Medical Complaints Tribunal* by Crawford J that:¹⁰

[The tribunal] was under no obligation to actively seek to sustain its determinations on appeal. By choosing to do so, it rendered itself liable for costs in the event of defeat.

16 In *Fernando*, the Medical Complaints Tribunal had been erroneously named as a respondent to the appeal.¹¹ Counsel appeared for the Tribunal and actively opposed the appeal.

17 In my view, the approach espoused in *Ogawa* is correct, and in such circumstances it is inappropriate to make an order as to costs against a Tribunal or decision-maker where the court invites the Tribunal or decision-maker to participate in an appeal.¹² The authorities that suggest that such a course might be open are not applicable as they consider circumstances where the decision-maker had the choice of whether to participate, without an invitation to do so from the court.

18 In this matter, the agency, being the University of Western Australia, filed a notice of intention not to participate in the appeal on 14 December 2018. The Commissioner herself filed a notice of intention not to participate in the appeal on 16 November 2018.

19 At directions hearings on 20 December 2018 and on 22 February 2019 before the Chief Justice, his Honour raised concerns about the absence of a contradictor with counsel appearing on behalf of the Commissioner.¹³ It was because of the court's invitation, very early in the proceedings, that counsel for the Commissioner offered on behalf of the Commissioner to participate in the proceedings.

20 For reasons that follow, it is unnecessary to engage with the argument advanced by the appellant as to whether the Commissioner exceeded the limits of the proper role of a contradictor in the appeal, as I am not satisfied that the Commissioner engaged in an abuse of

¹⁰ *Fernando v Medical Complaints Tribunal* [2007] TASSC 44; (2007) 16 Tas R 237 [21]; applying *Ex parte Coorey* (1944) 45 SR (NSW) 287, 307; *R (Davies) v Birmingham Deputy Coroner* [2004] 3 All ER 543, 557 (Brooke LJ).

¹¹ *Fernando v Medical Complaints Tribunal* [2007] TASSC 44; (2007) 16 Tas R 237 [6].

¹² See also, the discussion of Brooke LJ in *R (Davies) v Birmingham Deputy Coroner* [2004] 3 All ER 543, 558, where his Lordship discusses the circumstance of a tribunal offering to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and so on. In these circumstances it would be inappropriate to order costs against the tribunal.

¹³ ts 2, 20 December 2018; ts 32, 22 February 2019.

process so as to enliven the court's inherent jurisdiction (if not ousted by s 89(3) of the FOI Act) to make an award of indemnity costs.

Is the appellant entitled to an award of indemnity costs on the basis that the action taken by the Commissioner was frivolous and vexatious, and an abuse of process?

21 The Supreme Court is a superior court of record. Its powers are conferred by statute but are identified by reference to the powers of the superior courts at Westminster at the commencement of the *Supreme Courts Ordinance 1861* (UK).¹⁴

22 The court has an inherent jurisdiction to control and supervise proceedings within its jurisdiction for the purpose of enabling it to act effectively within that jurisdiction and to prevent injustice.¹⁵ The powers are not restricted to defined and closed categories; but, as counsel for the Commissioner observes, the power is not at large.¹⁶

23 It is clear that a superior court, in its inherent jurisdiction, may make indemnity costs orders. An indemnity costs order may be appropriate in situations which are shown to involve some element of improper, or at least unreasonable, conduct by a party or a party's legal advisers.¹⁷ There is also an inherent disciplinary jurisdiction.¹⁸ Such a jurisdiction is to be exercised judicially and is not a part of the ordinary course of costs disposition, namely, that costs be awarded on a party/party basis.¹⁹

24 On the extent of this jurisdiction to award indemnity costs, as Ipp J observed, the categories in which an indemnity costs order may be made are not closed.²⁰ However, as Buss P made clear in *Ardrey v The State of Western Australia [No 2]*, although the court may exercise this inherent jurisdiction it may only do so insofar as the inherent power can be exercised without contravening the statute or the rules of court.²¹

25 Ultimately, whether or not s 89(3) of the FOI Act impedes this court's jurisdiction to grant an award of costs against the Commissioner

¹⁴ *Supreme Court Act 1935* (WA) s 16(a), s 23, s 24.

¹⁵ *Ardrey v State of Western Australia [No 2]* [2017] WASCA 41 [73].

¹⁶ First respondent's submissions on costs, filed 16 August 2019 [11]; *Ardrey v State of Western Australia [No 2]* [2017] WASCA 41 [73].

¹⁷ *Swansdale Pty Ltd v Whitcrest Pty Ltd* [2010] WASCA 129 (S) [10] (Buss P).

¹⁸ *Pier (WA) Pty Ltd v Jean Maurice Pty Ltd (in Liq) [No 7]* [2018] WASC 355 [9] (Kenneth Martin J).

¹⁹ *Supreme Court Act 1935* (WA) s 37; see also, *Swansdale Pty Ltd v Whitcrest Pty Ltd* [2010] WASCA 129 (S) [10] (Pullin JA & Kenneth Martin J).

²⁰ *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (A Firm)* (1997) 18 WAR 190, 191.

²¹ *Ardrey v State of Western Australia [No 2]* [2017] WASCA 41 [73].

by the court's power to award indemnity costs is not a question with which this court need grapple in this matter. There has been no finding entered against the Commissioner of the kind alleged by the appellant. There is also nothing before the court to support a contention that the Commissioner has engaged in conduct which amounts to an abuse of process. Indeed, any such finding would be an extraordinary case.

26 In the appellant's written submissions as to costs, filed on 2 August 2019, the appellant refers to and quotes from exchanges between counsel for the Commissioner and the bench and also from passages of the judgment in *Pearlman*²² and makes a submission that counsel for the Commissioner engaged in submissions going to the construction of provisions of the FOI Act that were without any merit in an attempt to justify the decisions and actions of the Commissioner.

27 Whilst it is the case that each of the arguments put by counsel for the Commissioner failed, the arguments put cannot be said to be so hopeless so as to justify an award of indemnity costs. The arguments properly raised important questions going to the proper construction of the FOI Act.

28 Thus, there is no basis upon which this court could exercise a discretion to award indemnity costs.

29 Consequently, it is unnecessary for this court to determine in this matter the question of whether s 89(3) of the FOI Act ousts the court's inherent jurisdiction to make an award of indemnity costs.

Costs - the self-represented legal practitioner

30 As a general rule, self-represented litigants are not entitled to seek recompense for the value of their time spent in litigation. However, *London Scottish Benefit Society v Chorley* has, for some time, provided for an exception to the general rule entitling a self-represented litigant who is a solicitor to recover his or her professional costs of acting in the litigation.²³

31 The High Court has, however, very recently determined that the *Chorley* exception to the general rule that a self-represented litigant cannot claim recompense for time spent in litigation is not a part of the common law of Australia.²⁴ Indeed, their Honours remarked that it is

²² *Pearlman v WA A/Information Commissioner* [2019] WASC 257.

²³ *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

²⁴ *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 [3], [57] (Kiefel CJ, Bell, Keane & Gordon JJ).

an affront to the principle of equality before the law.²⁵ Therefore, even if the appellant was entitled to costs he could not seek his professional costs as a legal practitioner.

Conclusion and orders

32 On the basis that each of the appellant's substantive submissions on costs have been rejected, any other incidental matters raised fall away.

33 The appellant's application for costs is refused and the parties to the appeal should bear their own costs.

²⁵ *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 [3] (Kiefel CJ, Bell, Keane & Gordon JJ).

SMITH J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

EH

Research Associate/Orderly to the Honourable Justice Smith

2 OCTOBER 2019