

Environmental Public Interest Litigation: Conditions for Success

Presentation by the Hon. Justice Brian J Preston SC to the

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Introduction

Public interest litigation to prevent, mitigate, remediate or compensate for harm done to the environment has grown since the early 1970s when it began.¹ But the growth in the number of actions has not been matched by an increase in success. Many environmental public interest proceedings founder. What are the reasons? What are the conditions that need to be satisfied for environmental public interest litigation to be successful? In this paper, I identify a dozen conditions that make for successful public interest litigation. Each of the legislature, executive and judiciary in countries throughout the world has the responsibility and ability to take action to ensure that these conditions for successful public interest litigation are met. The paper will elucidate these conditions, illustrated by references primarily to Australian laws and litigation, particularly in the Land and Environment Court of New South Wales.

1. Adequate environmental laws

First and foremost the laws of the land must provide a foundation for environmental public interest litigation. The laws must create or enable legal suits or actions in relation to the aspect of the environment that is sought to be protected. If there is no right of action, there can be no litigation.

Civil actions could be to enforce compliance with the law by the government and private sectors, and to restrain and remedy non-compliance (civil enforcement); to

¹ The *Scenic Hudson* case (*Scenic Hudson Preservation Conference v Federal Power Commission* 407 US 9256, 92 S Ct 2453 (1972)) is often viewed as the birth of environmental litigation.

obtain compensation for loss or damage caused by breach of duties (damages actions); to review the legality of administrative decisions and conduct (judicial review); or to review the merits of administrative decisions on a rehearing (merits review). Criminal actions could be to prosecute and punish wrongdoers for offences against the laws.

To be adequate in providing a foundation for environmental public interest litigation, the laws should have adequate subject matter coverage, be effective and be enforceable by citizens.

As to coverage, the laws should address all substantive aspects of regulating the conservation and wise use of the environment, including public and private natural resources, natural and cultural heritage, and biological diversity and ecological integrity, as well as procedural aspects such as environmental impact assessment, access to information, public participation in decision-making, and access to justice in environmental matters.

As to effectiveness, the terms of the laws should give effect to the purpose of the laws and enable the achievement of any intended substantive or procedural outcome, such as by imposing public duties to take action or produce an outcome rather than conferring open-textured and unstructured discretionary powers which “provide an escape hatch for foot dragging agencies.”²

As to enforceability, the laws should impose duties or confer rights that are enforceable, or enable wrongs to be remedied or punished, at the suit of citizens; enable judicial review of merits review of governmental decisions and conduct by citizens; and enable the grant of appropriate remedies in citizen suits, including orders restraining, remediating or compensating for environmental harm.

The laws, therefore, need to be reviewed in order to evaluate their adequacy in enabling environmental public interest litigation.

² *Calvert Cliffs' Coordinating Committee Inc v United States Atomic Energy Commission* 449 F 2d 1109 at 1114. A government agency's exercise of discretion may be unreviewable where the statute is drawn in such broad terms that there is no law to apply or there is no meaningful standard against which to judge the exercise of discretion: *Sierra Club v Jackson* 648 F 3d 848 at 855 (DC Cir 2011).

2. Justiciability

The cause of action or other legal suit must be justiciable by the courts. Justiciability involves the quality of being capable of being considered legally and determined by the application of legal principles and techniques by the courts.³ If a legal suit is not justiciable, the court has no jurisdiction to hear and determine the suit and it would need to be dismissed at the outset.

The issue of justiciability arises with some types of environmental disputes. One type involves a country's international relations. Dealings between a country and foreign states will not normally, in the absence of legislation, create rights in or impose obligations on the citizens of the country.⁴ A breach of a country's obligations under international law will not, of itself, be a matter justiciable in municipal courts at the suit of a private citizen.⁵ The decision of a country's executive to negotiate and enter a treaty is non-justiciable by the courts – it cannot be challenged or questioned in the courts.⁶ A decision of a political branch of government to implement a treaty by taking some legislative or executive action is also non-justiciable.⁷

In *Minister for Arts, Heritage and Environment v Peko-Wallsend*,⁸ a mining company, holding mining leases over land in Kakadu National Park in the Northern Territory of Australia, challenged by judicial review proceedings the Australian Government's decision to nominate the land for inclusion in the World Heritage List pursuant to the *Convention for the Protection of the World Cultural and Natural Heritage*, to which Australia was a state party. The full Federal Court of Australia held that the decision was not justiciable.⁹ Similarly, the decision of Australia's Minister for Foreign Affairs to impose financial sanctions on senior members of the Burmese military dictatorship and their adult children, and the decision that one of

³ D M Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) 694; Hugh S Wilkins, "The Justiciability of Climate Change: A Comparison of US and Canadian Approaches" (2011) 34 *Dalhousie Law Journal* 528, 530 and 538.

⁴ *Simsek v Macphee* (1982) 148 CLR 636 at 642.

⁵ *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270 at 274.

⁶ *Blackburn v Attorney General* [1971] 1 WLR 1037 at 1040; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 307-308.

⁷ *Re Dittford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370; *Gerhardy v Brown* (1985) 159 CLR 70 at 138-139; *Thomas v Mowbray* (2007) 233 CLR 307 at 354.

⁸ (1987) 15 FCR 274.

⁹ *Ibid* 278-280 (Bowen CJ), 280 (Sheppard J) and 307-308 (Wilcox J).

those adult children's presence in Australia on a student visa was contrary to Australia's foreign policy interests, were non justiciable.¹⁰

However, if a matter is justiciable in a municipal court, it does not become non-justiciable because it involves political considerations, including a country's international relations with another country. As was held in *Baker v Carr*,¹¹ not every matter touching on politics is a political question and, more specifically, it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance".¹²

In *Japanese Whaling Association v American Cetacean Society*,¹³ the US Supreme Court held that the question of whether, under amendments to the *Fishermens' Protection Act of 1967*,¹⁴ the Secretary of Commerce was required to certify that Japan's whaling practices "diminish the effectiveness" of the *International Convention for the Regulation of Whaling* because that country's annual harvest exceeded quotas established under the convention, was justiciable. It presented a purely legal question of statutory interpretation, one of the judiciary's characteristic roles. The courts cannot shirk this responsibility merely because the decision may have significant political overtones.¹⁵

In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,¹⁶ an environmental, non-governmental organisation (NGO) commenced action against a Japanese company alleging that its fleet of whalers was killing Antarctic minke whales in part of the Australian whale sanctuary adjacent to the Australian Antarctic Territory, in breach of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and sought a declaration to that effect and an injunction to restrain future contraventions. It applied to the Federal Court of Australia for leave to serve the

¹⁰ *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449 at 451 (Spender J) and 474 (McKerracher J), Lander J dissenting (at 471-472).

¹¹ 369 US 186 at 209; 82 S Ct 691 at 706.

¹² 369 US 186 at 211; 82 S Ct 691 at 707. See also *Japanese Whaling Association v American Cetacean Society* 478 US 221 at 230; 106 S Ct 2860 at 2866.

¹³ 478 US 221; 106 S Ct 2860.

¹⁴ 22 USCA § 1978.

¹⁵ 478 US 221 at 230; 106 S Ct 2860 at 2866.

¹⁶ [2005] FCA 664 (Allsop J) and [2006] FCAFC 116; (2006) 154 FCR 425 (Black CJ, Moore and Finkelstein JJ).

originating process outside the jurisdiction. The primary judge refused leave, first, because prosecution of the action may upset the diplomatic status quo under the *Antarctic Treaty* and be contrary to Australia's long term national interests and, secondly, that the action was futile because of the difficulty, if not impossibility, of enforcement of any court order against the Japanese company.¹⁷

The full Federal Court overturned the primary judge's decision, holding, firstly, that he was in error in refusing leave even if the pursuit of the claim was contrary to Australia's foreign relations. Where Parliament has provided that an action for enforcement of the statute is justiciable in an Australian court, there is no room for political considerations to be taken into account in deciding whether an action should be permitted to go forward.¹⁸ Secondly, a problem with the enforcement of an injunction (if it were to be granted) does not lead to there being no justiciable matter before the court. A justiciable matter includes both a controversy about a right, duty or liability and the existence of a remedy to enforce that right, duty or liability. If there were no remedy the controversy would not be capable of being quelled by the court. But the requirement that there must be an available remedy is to say nothing about the effectiveness of that remedy in a particular case.¹⁹

A decision at odds with these American and Australian decisions is the decision of the Canadian Federal Court (Trial Division) in *Friends of the Earth v Canada (Governor in Council)*.²⁰

The Canadian Parliament enacted the *Kyoto Protocol Implementation Act 2007*. The Act set out obligations and deadlines that the Federal Government was required to meet, including publication of a climate change plan specifying measures to ensure that Canada meets its commitments, the publishing of draft regulations, the holding of public consultations on the draft regulations, and the enactment of final regulations. After these deadlines passed, an environmental NGO brought judicial review proceedings seeking declaratory and mandatory injunctive relief to compel

¹⁷ [2005] FCA 664 at [27], [28].

¹⁸ (2006) 154 FCR 425 at 430.

¹⁹ (2006) 154 FCR at 432-433.

²⁰ [2008] FC 1183, [2009] 3 FCR 201; leave to appeal denied by the Federal Court of Appeal: see *Friends of the Earth v The Minister of the Environment and Governor in Council* [2009] FCA 297; 313 DLR (4th) 767 and further leave to appeal to the Supreme Court of Canada was also denied.

the government to take more effective measures to combat climate change and to comply with the Act. The NGO requested the Court to determine whether the government had fulfilled three specific duties under the Act.

In relation to the statutory provision requiring the Minister to prepare a climate change plan (s 5 of the Act), the Federal Court held that the Act had to be read as a whole and the language of s 5 could not be parsed into justiciable and non-justiciable components or judicially enforced on a piecemeal basis.²¹ Whilst the failure of the Minister to prepare a climate change plan may be justiciable, an evaluation of its content was not.²² In relation to the statutory provision concerning the making of regulations to ensure Canada met its Kyoto obligations (s 7 of the Act), the Court held that the language was permissive not mandatory, the time frame was merely directory, the Court could not craft a meaningful remedy, and the Court ought not to direct the other branches of government in the exercise of their legislative and regulatory functions.²³

In relation to the statutory provisions requiring publishing, reporting and consulting (ss 8 and 9 of the Act), the Court held that if s 7 did not create a mandatory duty to regulate, all of the regulatory and related duties in ss 8 and 9 were not justiciable.²⁴ The Court held that the Act creates elaborate reporting and reviewing mechanisms within the Parliamentary sphere. The statutory scheme must be interpreted as excluding judicial review of issues of substantive Kyoto compliance, including the regulatory function.²⁵

The decision has been criticised: first, the Court failed to answer the legal questions raised, instead basing its decision on the political nature of the government's response to the Act and, secondly the Court conflated the concepts of justiciability and enforceability by analysing whether Parliament intended the Act to be enforced by the courts.²⁶

²¹ [2009] 3 FCR 201 at [34].

²² *Ibid.*

²³ *Ibid* [38]-[40].

²⁴ *Ibid* [41].

²⁵ *Ibid* [42], [44].

²⁶ Wilkins, above n 3, 548-550.

Another type of case which some American and Canadian courts have held to be non-justiciable is tortious actions in nuisance concerning greenhouse gas emissions. Defendants to such climate change litigation have argued that courts lack subject matter jurisdiction to adjudicate the plaintiff's claims as they raise non-justiciable political questions. Some US District Courts have accepted that the claims are non-justiciable.²⁷ However, appellate courts have generally disagreed, holding that the claims are justiciable.²⁸ Common law tort claims do not present non-justiciable political questions. The only issues are those inherent in the adjudication of the plaintiff's common law tort claims. There is no federal constitutional statutory provision committing any of these issues to a federal political branch.

In conclusion, the issue of justiciability needs to be addressed by potential public interest litigants in the choice of the type and subject matter of the litigation. A wrong choice could doom the litigation from the start

3. Willing and able plaintiffs

While there may be legal suits capable of being brought to prevent, mitigate, remediate or compensate for harm to the environment, which are justiciable by the courts, citizens or citizen groups must be willing and able to bring them. Willingness is a product of not only enthusiasm and zeal for the environmental cause but also a cultural attitude. The cultural tradition of the country needs to support, and not inhibit or punish, citizen access to justice through bringing legal suits in the courts. Public interest litigation is often a form of protest, challenging powerful interests in the government and the private sector. Where protests and challenges to power are met with sanctions, citizens and citizen groups will be inhibited from taking public interest litigation. Hence, promotion of public interest litigation involves promotion of democratic principles of free speech and assembly, and access to justice.

²⁷ See, eg, *Connecticut v American Electric Power Co* 406 F Supp 2d 265 (SDNY 2005); *People of the State of California v General Motors Corp* 2007 WL 2726871 (ND Cal 2007); *Native Village of Kivalina v ExxonMobil Corp* 663 F Supp 2d 863 (ND Cal 2009) affirmed but on other grounds than non justiciability in *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 (9th Cir 2012).

²⁸ See, eg, *Comer v Murphy Oil* 585 F 3d 855 (5th Cir 2009); *Connecticut v American Electric Power Co* 582 F 3d 309 (2nd Cir 2009), the Second Circuit's exercise of jurisdiction affirmed by an equally divided Supreme Court in *American Electric Power Co v Connecticut* 131 S Ct 2527 (2011) but the Second Circuit's determination that the federal *Clean Air Act* did not displace the federal common law of nuisance was reversed.

Ability is a product of many factors, including knowledge and experience of the subject matter of the legal suit and of the substantive and procedural law governing the suit, the capacity to access sufficient and adequate human, financial and material resources to bring and maintain the suit, and personal attributes such as dedication, perseverance and resilience. Public interest litigation is not easy, only special plaintiffs prevail.

4. Knowledgeable, experienced and willing lawyers

Citizens and citizen groups can represent themselves in courts; they are not required to be represented by lawyers. However, lawyers can improve the prospects of a citizen action succeeding if they are knowledgeable and experienced in litigation, especially in litigation of the type and subject matter of the particular action. Public interest litigation, by its nature, complexity and importance, justifies engaging the assistance, advice and advocacy of leading lawyers. There is a need, therefore, to facilitate access to such lawyers, including by addressing the issue of cost. Means of funding access to lawyers is addressed in the next section.

5. Funding of litigation

A critical issue for the public interest litigant is how to fund public interest litigation, including the cost of access to leading lawyers. There are numerous methods that have been used around the world.

First, the public interest plaintiff can raise the funds themselves. For citizen groups, this tends to be difficult. Fundraising activities and events tend to raise only a small proportion of the funds needed. Philanthropic funding sources, such as charitable foundations and donors, are usually disinclined to fund litigation because of its adversarial nature.²⁹

Secondly, plaintiffs and the lawyers they engage can seek legal aid for the particular case. Legal aid is usually provided by the government. In NSW, public legal aid for

²⁹ George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative, 2009) 48.

public interest environmental matters is becoming increasingly more difficult to obtain. The case must raise a matter of substantial public concern about the environment, the case must have merit (reasonable prospects of success) and the plaintiff (citizen or citizen group) needs to satisfy an increasingly more stringent means test.³⁰ Canada is an example where private legal aid is provided. The West Coast Environmental Law Centre runs an Environmental Dispute Resolution Fund providing \$200,000 in funding per year. It allows community groups and individuals to hire lawyers (from outside the West Coast Environmental Law Centre) at a legal aid rate to provide legal assistance. Grants from the fund also allow community groups to hire scientific experts to assist lawyers in the discharge of their work.³¹

Thirdly, public interest legal centres may provide legal advice, assistance and advocacy for citizens and citizens groups concerning environmental public interest matters. Examples in Australia are provided by the various environmental defenders offices in each of the states (EDOs),³² the longest established, best known and most successful of which is the NSW EDO.³³

An example in the United States is the Environmental Defender Law Center which aims to protect the human rights of individuals and communities who are fighting against harm to the environment. The Center identifies cases where individuals and communities need and want legal assistance and helps them free of charge through one of three programs, first, funding top law firms to advocate, negotiate or litigate on their behalf; secondly, advising, filing legal briefs, and providing resources; or thirdly, giving grants to fund cases.³⁴

Fourthly, professional legal associations, both formal and informal, have established pro bono services in the area of environmental law. In Australia, the Victorian Bar Association established a Climate Change and Environmental Panel in 2010 “to represent and advise litigants on a pro bono or reduced fee basis in matters of public

³⁰ See http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.13.-public-interest-environment-matters?SQ_DESIGN_NAME=print-section.

³¹ See <http://wcel.org/our-work/environmental-dispute-resolution-fund>.

³² See <http://www.edo.org.au/>.

³³ See <http://www.edo.org.au/edonsw/site/default.php>.

³⁴ See <http://www.edlc.org/>.

interest arising out of a concern for the environment and the impact of climate change”.³⁵

In the United Kingdom, environmental lawyers have formed a network called the Environmental Law Foundation (UK), providing free initial legal advice to individuals and community organisations suffering from environmental harm and threats to the environment as a result of decisions made by government.³⁶

Fifthly, law schools at universities may run legal clinics for law students which provide pro bono assistance to the public in environmental law matters. This is particularly evident in the United States and Canada where there are more than 30 environmental law clinics.³⁷ Five of the better known environmental law clinics are: Vermont Law School, Environmental and Natural Resource Law Clinic;³⁸ University of Denver, Sturm College of Law, Environmental Law Clinic;³⁹ Oregon Law School, Environmental Law Clinic and Advanced Environmental Law Clinic;⁴⁰ Lewis & Clark Law School, Environmental Clinic: Earthrise and International Environmental Law Project;⁴¹ and Pace Law School, Pace Environmental Litigation Clinic.⁴²

Sixthly, environmental lawyers may offer their services on a contingency basis (“no win, no fee”), a reduced fee basis or even on a no fee basis. The “no win, no fee” basis is a widely used mechanism in the United States but is less common in the United Kingdom and Australia.⁴³

Seventhly, litigation funders may provide funding for particular litigation. Litigation funding “involves a commercial entity, which is otherwise uninterested in a piece of litigation, agreeing to meet the cost (including any adverse costs) of the litigation in

³⁵ See <http://www.vicbar.com.au/pro-bono-community-work/climate-change-environment>.

³⁶ See http://www.probonouk.net/index.php?id=assist_pro and <http://www.elflaw.org/>.

³⁷ See Adam Babich and Jane F Barrett, “Why environmental law clinics?” (2013) 43 *Environmental Law Reporter* 10040, 10039; Pring and Pring, above n 28, 48-49.

³⁸ http://www.vermontlaw.edu/Academics/Clinical_and_Externship_Programs/Clinical_Programs/Overview.htm.

³⁹ <http://www.law.du.edu/index.php/law-school-clinical-program/environmental-law-clinic>.

⁴⁰ <http://law.uoregon.edu/academics/clinics/>.

⁴¹ <http://law.lclark.edu/clinics/>.

⁴² <http://www.law.pace.edu/pace-environmental-litigation-clinic>.

⁴³ Maria Adebawale, “Using the Law: Access to Environmental Justice, Barriers and Opportunities”, (Capacity Global, 2004), accessible at <http://www.capacity.org.uk/downloads/EJUsingtheLaw009Capacity04.pdf>.

return for a share of any recoveries if that litigation is successful”.⁴⁴ In *Campbells Cash & Carry Ltd v Fostif Pty Ltd*,⁴⁵ the High Court of Australia rejected the argument that litigation funding was contrary to the public policy against maintenance and champerty or an abuse of process.

Litigation funders are selective in the cases they fund – the cases must meet their investment criteria, including that there is a real likelihood of a sizeable award of monetary damages. In the environmental law context, this restricts the type of cases that may be funded to environmental and toxic tort cases claiming monetary damages.

An example was the suit by indigenous Ecuadorians against Chevron, funded by Burford, the largest and most experienced litigation funder in the world. The indigenous peoples in the Amazonian rainforest of Ecuador sued Chevron for personal injuries and environmental damage in the form of pollution of rainforests and rivers in Ecuador as a result of oil operations conducted by Texaco (subsequently acquired by Chevron in 2001) during drilling and operations that lasted from 1964 to 1990. In 2011, an Ecuadorian court awarded \$18 billion in damages against Chevron, comprising \$9 billion in compensatory damages and \$9 billion in punitive damages which was payable if Chevron did not apologise by a specified date, which Chevron did not.⁴⁶ The damages award is said to be the largest judgment ever imposed for environmental contamination in any court in the world.⁴⁷

Litigation funders are unlikely to fund civil enforcement, judicial review or merits review litigation where there would be no award of monetary damages.

Eighthly, intervenor funding has been awarded in some administrative proceedings. Intervenor funding involves a proponent of a project being ordered by an

⁴⁴ Wayne J Attrill, “The Future of Litigation Funding in Australia” in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2013) 167.

⁴⁵ (2006) 229 CLR 386 (Gleeson CJ, Kirby, Hayne, and Crennan JJ, Callinan and Heydon JJ dissenting).

⁴⁶ The facts are summarised in a subsequent satellite litigation judgment of *Chevron Corp v Donziger* 768 F Supp 2d 581 (SDNY 2011).

⁴⁷ Maya Steinitz, “The Litigation Finance Contract” (2012) 54 *William and Mary Law Review* 455, 466.

administrative body, such as an environmental assessment board, to pay the costs of objectors to the project (the intervenors) participating in the administrative procedure or hearing. The objectors' costs of participating may include fees for photocopying voluminous documents and obtaining transcripts, obtaining information to support substantive arguments, and hiring experts or consultants.⁴⁸

Ontario provides an example of a jurisdiction that has used intervenor funding. The Ontario Environmental Assessment Board made orders that the proponent of a roadway pay the intervenors' costs in advance to fund the intervenors' participation in the Board's hearing.⁴⁹ That order was subsequently set aside by the Ontario Divisional Court as being outside the Board's power to order costs, as the power was restricted to ordering costs after and not before hearings have been concluded.⁵⁰ However, subsequently the Ontario Parliament passed the *Intervenor Funding Project Act 1988*.⁵¹ This Act authorised certain tribunals, including the Environmental Assessment Board, to award funding to intervenors in advance of a hearing by the tribunal. Until its repeal in 1996, Jeffery opines that the Act "made a significant contribution in the area of citizen participation as well as [in] the quality of environmental decision-making".⁵²

Other costs of litigation are fees charged by the courts to file the originating process commencing the litigation and other interlocutory processes (such as motions), for photocopying of documents on the court file or produced to the court in response to a subpoena, and for transcripts. In most jurisdictions, the court has a discretion to waive, postpone or remit court fees. An indigent person may apply to the court for such court fees to be waived entirely. A person with a grant of legal aid or pro bono

⁴⁸ Michael I Jeffery, "Intervenor Funding as the key to effective citizen participation in environmental decision-making: putting the people back into the picture" (2002) 19 *Arizona Journal of International and Comparative Law* 643, 656.

⁴⁹ *Ibid* 662. See *Hamilton-Wentworth (Regional Municipality) v Hamilton-Wentworth Save the Valley Committee Inc* 1984 CarswellOnt 1831, 17 OMBR 411 at 413; *Hamilton-Wentworth (Regional Municipality) v Hamilton-Wentworth Save the Valley Committee Inc* 1984 CarswellOnt 1832, 17 OMBR 411 at 416.

⁵⁰ *Regional Municipality of Hamilton-Wentworth* 51 OR (2d) 23 at [61]-[64].

⁵¹ RSO 1990 c I.13 § 16 (repealed 1996).

⁵² Jeffery, above n 48, 671.

legal assistance may apply to the court to postpone court fees until the finalisation of the proceedings.⁵³

In the United States, a poor person who cannot afford court costs and fees may apply for leave to proceed “in forma pauperis”. There are criteria that need to be considered by the court in granting such leave.⁵⁴

In Kenya, the Constitution of Kenya enables a prospective plaintiff to apply to the court to be exempted from paying a court fee, before filing the substantive originating process.⁵⁵ The High Court of Kenya has exempted a prospective plaintiff from paying a filing fee or any further fee on the petition where the petition relates to public interest litigation, is brought to advance legitimate public interest, will contribute to a proper understanding of the law, and is not aimed at giving the plaintiff a personal gain.⁵⁶

6. Standing to sue

Before a citizen or citizen group can commence litigation, they must have standing to sue or, in Latin, *locus standi*. This simply means that the person must be considered by the court as having a right to instigate the particular proceedings in question. An important point to note about standing is that it depends on the identity of the person, the type and subject matter of the proceedings, and the relationship the person has to those proceedings.

In Australia, the common law test for standing to bring judicial review or civil enforcement proceedings is that a person can sue, without joining the Attorney General, in two cases: first, where the interference with the public right is such that some private right of the person is at the same time interfered with and, secondly, where no private right is interfered with, but the person has a special interest in the

⁵³ See, eg, the “Guidelines for the waiver, remission and postponement of fees” applied by the NSW courts, including the Land and Environment Court, accessed at http://www.leg.lawlink.nsw.gov.au/leg/coming_to_the_court/cost.html.

⁵⁴ See 28 USC § 1915 and *Tafari v McCarthy* 714 F Supp 2d 317 at 386 (NDNY 2010).

⁵⁵ Article 22(2) and (3).

⁵⁶ *John Wekesa Khaoya v Attorney-General* [2013] eKLR, High Court of Kenya, (F. Gikonyo J, 25 February 2013), [25].

subject matter of the action.⁵⁷ The plaintiff's special interest need not be proprietary or pecuniary, but it must be more than intellectual or emotional.⁵⁸

The standing test can restrict the range of individuals that can bring environmental public interest litigation. The individual or group must be able to establish their special interest in the subject matter of the litigation. This might be by active use of the land the subject of the litigation;⁵⁹ spiritual or cultural relationship to the subject land;⁶⁰ adverse impact on the amenity of the plaintiff's land;⁶¹ protection of statutory participation rights;⁶² or because the government decision or conduct challenged relates particularly to the objects and activities of the plaintiff organisation.⁶³

In the United States, the test for standing contains three elements: first, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is concrete and particularised, and actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and, third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favourable decision.⁶⁴

This demanding standing test can prove difficult to satisfy for many citizens or citizen groups seeking to protect the environment. The national wildlife organisation which was the plaintiff in *Lujan v Defenders of Wildlife*, for example, was held not to have been sufficiently adversely affected by the conduct complained of so as to be able to

⁵⁷ *Boyce v Paddington Borough Council* [1903] 1 Ch 109, reformulated in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 527.

⁵⁸ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530-531, 539, 547-548.

⁵⁹ See, eg, *Fraser Island Defenders Organisation Ltd v Hervey Bay Town Council* (1983) 2 Qd R 72; 51 LGRA 94.

⁶⁰ See, eg, *Onus v Alcoa (Aust) Ltd* (1981) 149 CLR 27.

⁶¹ See, eg, *Day v Pinglen* (1981) 148 CLR 289; *Ex parte Helena Valley/Boya Association Inc; Re State Planning Commission* (1990) 2 WAR 422.

⁶² See, eg, *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473; *Australian Conservation Foundation v Forestry Commission of Tasmania* (1988) 19 FCR 127; 76 LGERA 369.

⁶³ *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGERA 200; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; 85 LGERA 270; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; 85 LGERA 296.

⁶⁴ *Lujan v Defenders of Wildlife* 504 US 555 at 560, 112 S Ct 2130 at 2136.

establish standing.⁶⁵ Another example, in *Florida Audubon Society v Bentsen*,⁶⁶ the bird society plaintiff could not establish standing to challenge an alleged failure to prepare an environmental impact statement on the effects of allowing a tax credit for the fuel additive, ethyl tertiary butyl ether.

In *Natural Resources Defense Council v Environmental Protection Agency*, a judicial review challenge brought by the NRDC concerning the Environmental Protection Agency's rule exempting critical uses of methyl bromide from the Montreal Protocol's ban on production and consumption of methyl bromide (a substance which degrades the stratospheric ozone layer) was originally dismissed for lack of standing.⁶⁷ Subsequently the court granted NRDC's petition for rehearing, withdrew its previous opinion and upheld NRDC's standing on the basis of evidence that at least one of the NRDC's members was statistically likely to develop cancer as a result of the EPA's rule.⁶⁸

In climate change litigation, the standing of private citizens to sue has proved difficult to establish.⁶⁹ However, the private plaintiffs who were the owners of property along the Mississippi Gulf coast and who sued oil companies and energy companies alleging their greenhouse gas emissions contributed to global warming and added to the ferocity of Hurricane Katrina which destroyed their property, were held to have Article III standing (under Article III of the United States Constitution).⁷⁰

State governments have been more successful in establishing standing to sue in climate change litigation. Massachusetts was successful in establishing standing to challenge the Environmental Protection Agency's failure to act under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles.⁷¹ Connecticut

⁶⁵ *Lujan v Defenders of Wildlife* 504 US 555, 112 S Ct 2130.

⁶⁶ 94 F 3d 658 (DC Cir 1996).

⁶⁷ *Natural Resources Defense Council v Environmental Protection Agency* 440 F 3d 476 (CADC 2006).

⁶⁸ *Natural Resources Defense Council v Environmental Protection Agency* 464 F 3d 1 at 7 (CADC 2006).

⁶⁹ See, eg, *Korsinsky v US Environmental Protection Agency* 2005 Dist LEXIS 21778 affirmed *Korsinsky v US EPA* 2006 US App LEXIS 21024 (2d Cir NY August 10, 2006) and *Native Village of Kivalina v ExxonMobil Corp* 663 F Supp 2d 863 (ND Cal 2009) affirmed in *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 (9th Cir 2012).

⁷⁰ *Comer v Murphy Oil USA* 585 F 3d 855 (5th Cir 2009).

⁷¹ *Massachusetts v Environmental Protection Agency* 549 US 497, 127 S Ct 1438.

also was held to have Article III standing to bring common law nuisance claims against electric power corporations that operated fossil fuel fired power plants.⁷²

In some jurisdictions, the hurdle of standing has been overcome legislatively. In NSW, for example, most environmental legislation contains an open standing provision, entitling any person (natural or legal) to bring proceedings for an order to remedy or restrain a breach of the legislation, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.⁷³ These open standing provisions have facilitated environmental public interest litigation.

At the federal level in Australia, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) gives standing to seek injunctions relating to conduct or proposed conduct in contravention of the Act to individuals and organisations whose interests have been, are or would be affected by the conducted or proposed conduct, or who have engaged in the two years beforehand in activities for the protection or conservation of, or research into the environment, or in the case of an organisation, whose objects or purposes include the protection or conservation of, or research into, the environment.⁷⁴

7. Evidence to prove the case

The public interest plaintiff bears the onus of proving its case. To do so, the plaintiff needs to have access to evidence, both factual and expert opinion evidence.

For cases concerning governmental decisions and conduct, access to relevant government information is critical. Many jurisdictions have freedom of information laws. The current NSW version is the *Government Information (Public Access) Act 2009* (NSW) and the Australian federal version is the *Freedom of Information Act 1982* (Cth). Freedom of information laws are based on a philosophy which promotes transparency as a device for enhancing political accountability and increasing public

⁷² *Conneticut v American Electric Power Company* 582 F 3d 309 (2nd Cir 2009) affirmed by an equally divided Supreme Court in *American Electric Power Company v Connecticut* 131 S Ct 2527 (2011).

⁷³ The iconic example of an open standing provision is s 123 of the *Environmental Planning and Assessment Act 1979* (NSW).

⁷⁴ Section 475(6) and (7) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

participation in the processes of government. It is also valuable as a means of gaining access to government information prior to the commencement of litigation.

Understanding the government decision-maker's reasons for decision also assists potential plaintiffs. At common law, an administrative decision-maker is not bound to give reasons.⁷⁵ However, if a decision-maker fails to give reasons, a court may more readily infer an error of law, such as taking into account irrelevant considerations, failing to take into account relevant considerations, or acting unreasonably.⁷⁶

The common law position has been altered legislatively in some jurisdictions. At the Australian federal level, a person who is entitled to apply to the Federal Court for an order to judicially review an administrative decision may make a written request to the decision-maker to furnish a statement of reasons for the decision.⁷⁷ The decision-maker is then required to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving reasons for the decision.⁷⁸ Similarly, a person who is entitled to apply to the Administrative Appeals Tribunal to review on the merits an administrative decision may request, and the decision-maker must furnish, a statement of reasons setting out the same matters.⁷⁹

At State level, some courts have adopted rules permitting plaintiffs in judicial review proceedings to request, and requiring the defendant public authority to provide, a statement of reasons setting out the findings on material questions of fact, the evidence or other material on which those findings were based, and giving reasons for the decision.⁸⁰ The Land and Environment Court of NSW can also direct a public authority to make available to the plaintiff any document that records matters relevant to the decision.⁸¹

⁷⁵ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 665.

⁷⁶ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053-1054; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 663-664.

⁷⁷ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(1).

⁷⁸ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(2).

⁷⁹ *Administrative Appeals Tribunal Act 1975* (Cth) s 28(1).

⁸⁰ See *Uniform Civil Procedure Rules 2005* (NSW), Pt 59 r 59.9 and *Land and Environment Court Rules 2007* (NSW) Pt 4 r 4.3(b).

⁸¹ *Land and Environment Court Rules 2007* (NSW) Pt 4 r 4.3(a)

After commencement of proceedings, the plaintiff can utilise one or more of the traditional methods for obtaining documents (discovery, subpoenas and notices to produce) and information (interrogatories).

The preceding methods are useful in obtaining factual evidence to prove the plaintiff's case. In addition, much environmental litigation requires expert opinion evidence.⁸² If scientific, technical or other specialised knowledge will assist the court to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may give opinion evidence.⁸³

A difficulty public interest plaintiffs encounter is being able to access, and afford to pay for access to, experts who not only satisfy the minimum criteria for being an expert, but also have excellent knowledge, experience, reputation and communication skills so as to be reliable, credible and persuasive.⁸⁴ One impediment is that many experts who are work dependent on the government and private sectors may be unavailable to work for public interest plaintiffs challenging decisions and conduct of those sectors. An even greater impediment is public interest litigants' usual lack of financial resources to pay for experts. Some of the means discussed earlier for funding public interest litigation, such as by public or private legal aid grants, may provide funds to pay for experts, but other means do not. The provision by lawyers of their services on a pro bono, contingency or reduced fee basis, only addresses the costs of legal services, not of expert services.

Suggestions have been made for an expert aid program involving a system of pro bono expert assistance that increases the availability of expert assistance and improves the quality of that assistance. Experts in various disciplines could form associations which encourage and facilitate pro bono expert assistance. Legal

⁸² Pring and Pring, above n 29, 55.

⁸³ *Evidence Act 1995* (Cth) and (NSW) s 79 and US Federal Rules of Evidence, FRE 702; Evid Cod § 720.

⁸⁴ See J Berton Fisher and William R Keffer, "Selection, use and management of experts in environmental legal practice" (1998) 33 *Tulsa Law Journal* 1003 as to selection of experts. See Brian J Preston, "Science and the Law: Evaluating the evidentiary reliability" (2003) 23 *Australian Bar Review* 1 as to reliability of expert evidence.

professional associations could encourage and facilitate effective use of this expert assistance.⁸⁵ A similar initiative could be pursued by universities.

Courts are able to address plaintiffs' inability or inadequacy of access to expert evidence in a variety of ways. First, if an issue for an expert arises in any proceedings, a court may appoint an expert (referred to as a court appointed expert) to inquire into and report to the court on the issue, including inquiring into and reporting on any facts relevant to the inquiry.⁸⁶ The court may appoint as a court appointed expert a person selected by the parties, or by the court, or in a manner directed by the court.⁸⁷ The remuneration of the court appointed expert is fixed by agreement between the parties or, failing agreement, by the court. The court can direct when and by whom a court appointed expert is to be paid.⁸⁸

Secondly, a court can order that a single expert be engaged jointly by the parties (referred to as a parties' single expert).⁸⁹ A parties' single expert is selected by agreement of the parties or, failing agreement, by the court.⁹⁰ The remuneration of the parties' single expert is fixed by agreement of the parties or, failing agreement, by the court. The court may direct when and by whom the parties' single expert is to be paid.⁹¹

By the appointment of a court appointed expert or by ordering a parties' single expert, the cost of obtaining expert evidence is reduced for the parties. The court's power to direct by whom the expert is to be paid enables the court to take into account a plaintiff's financial means and direct that the defendant be responsible for a proportionately larger share or all of the expert's remuneration.

Thirdly, the court may obtain the assistance of any person specially qualified on any matter in the proceedings and may act on the adviser's opinion.⁹² The rules for

⁸⁵ Hannah J Wiseman, "Pro bono publico: the growing need for expert aid" (2008) 60 *South Carolina Law Review* 497.

⁸⁶ See, eg, in NSW Pt 31 r 31.46(1) of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR').

⁸⁷ UCPR r 31.46(2).

⁸⁸ UCPR r 31.53.

⁸⁹ UCPR r 31.37(1).

⁹⁰ UCPR r 31.37(2).

⁹¹ UCPR r 31.45.

⁹² UCPR r 31.54(1).

remuneration of such a person apply in the same way as they do to a court appointed expert.⁹³ This is akin to a court's use of an assessor to advise and assist the court for matters raising issues requiring special expertise.

Fourthly, in certain specialised environmental courts and tribunals, specially qualified persons are appointed as members, either on a full time or part time basis.⁹⁴ An example is the Land and Environment Court of NSW comprising judges as well as commissioners with qualifications, knowledge and experience in environmental or town or country planning; environmental science or matters relating to the protection of the environment and environmental assessment; land valuation; architecture, engineering, surveying or building construction; management of natural resources; Aboriginal land rights; or urban design or heritage.⁹⁵

These 'internal' experts may either advise and assist judges in the hearing of environmental cases,⁹⁶ or hear and determine cases themselves.⁹⁷ Either way, they bring to bear their expert knowledge and experience in the determination of the proceedings. In this way, they improve the availability of expert assistance to parties and improve the quality of decision-making on environmental matters.

8. Commencement of the litigation

Commencing public interest litigation should be simple and affordable. The originating process (the application to the court commencing the proceedings) should not be technical or complicated, or require legal expertise to complete. The court and the court rules should provide instruction as to the type of originating process required and its content, and on the means of lodgement. The Land and Environment Court provides simple applications or summonses for commencement of different types of proceedings. It provides information on each type of case and the procedure for commencing the case. It makes available the forms and

⁹³ UCPR r 31.54(2).

⁹⁴ See Pring and Pring, above n 29, 56-57.

⁹⁵ *Land and Environment Court Act 1979* (NSW) s 12(2).

⁹⁶ *Land and Environment Court Act 1979* (NSW) s 37.

⁹⁷ *Land and Environment Court Act 1979* (NSW) s 30.

information on completing and filing the forms.⁹⁸

The fees for commencing proceedings should also be affordable. Special provision should be made to waive or postpone court fees for public interest plaintiffs of limited means.⁹⁹

9. Interlocutory practice and procedure

After commencement of proceedings and before the final hearing occurs, different interlocutory applications and processes take place. A court's practice and procedure regarding these interlocutory applications can act as barriers impeding public interest litigation. Mindful of this risk, courts can adopt rules of practice and procedure, and determine interlocutory applications in a way, which overcome these barriers and promote access to justice. I will give some illustrations.

Environmental public interest litigation may concern conduct or proposed conduct that harms or is likely to harm the environment. The plaintiff may apply for an interlocutory injunction to restrain the conduct or proposed conduct until the final hearing. The traditional practice in civil litigation is that an interlocutory injunction should not be granted by the court unless the plaintiff offers an undertaking to the court to pay damages for the loss the defendant might sustain by being restrained from carrying out the conduct between the time of the interlocutory injunction and the final hearing, which restraint would have been unjustified if the plaintiff is ultimately unsuccessful in the litigation. In environmental public interest cases, this traditional practice can deter or render inutile litigation. A public interest litigant of limited financial means cannot offer an undertaking as to damages that may run to many hundreds of thousands or millions of dollars. If an undertaking is not offered, the court, following the traditional practice, would refuse the interlocutory injunction. The conduct would continue unabated, causing harm to the environment sought to be protected by the litigation.

⁹⁸ See "Types of cases" and "Forms and Fees" on the Land and Environment Court's website – <http://www.lec.lawlink.nsw.gov.au/lec/index.html>

⁹⁹ See above discussion on Funding of Litigation.

Recognising the inappropriateness of this practice, the Land and Environment Court has adopted a different approach in public interest litigation. The failure of a plaintiff to offer an undertaking as to damages is not determinative of how the court should exercise its discretion to grant or refuse an interlocutory injunction, but rather is only a factor to be taken into account when considering where the balance of convenience lies.¹⁰⁰

The Court has also adopted a court rule that, in any proceedings on an application for an interlocutory injunction, the Court may decide not to require the applicant to give any undertaking as to damages in relation to the injunction or order sought by the applicant, if it is satisfied that the proceedings have been brought in the public interest.¹⁰¹

A defendant may make its own interlocutory applications against the plaintiff. If the plaintiff is of limited financial means, it may not be in a financial position to meet any order for costs of the proceedings that might be made against it in favour of the defendant if it is unsuccessful in the litigation. To pre-empt this potential financial loss, the defendant may make an interlocutory application for a court order that the plaintiff give security for the defendant's costs of the proceedings and the proceedings be stayed until the security is given.¹⁰²

Again, however, an order for security for costs may deter or prevent environmental public interest litigation. Court rules have been adopted to overcome this problem in public interest litigation and judicial review proceedings. The Land and Environment Court Rules provide that the Court may decide not to make an order requiring an applicant in any proceedings to give security for the defendant's costs if it is satisfied that the proceedings have been brought in the public interest.¹⁰³ Recently, new civil procedure rules in NSW dealing with judicial review proceedings provide that a

¹⁰⁰ *Ross v State Rail Authority (NSW)* (1987) 70 LGERA 91 at 100; *Tegra (NSW) Pty Ltd v Gundagai Shire Council* (2007) 160 LGERA 1 at 11-12; Brian J Preston, "Injunctions in planning and environmental cases" (2012) 36 *Australian Bar Review* 84, 94. A similar approach has been adopted in Kenya in environmental public interest litigation: see *Fadhila S Ali & 2 others v National Housing Corporation & Another* [2012] eKLR, High Court of Kenya, (E. M. Muriithi J, 4 December 2012).

¹⁰¹ *Land and Environment Court Rules 2007 (NSW)*, Pt 4 r 4.2(3).

¹⁰² An example of a source of power to order security for costs is UCPR r 42.21.

¹⁰³ *Land and Environment Court Rules 2007 (NSW)* r 4.2(2).

plaintiff is not required to provide security for costs in respect of judicial review proceedings except in exceptional circumstances.¹⁰⁴ Much environmental public interest litigation involves judicial review of government decisions.

A public interest plaintiff of limited financial means may wish to take the initiative to protect itself against an adverse costs order if it is ultimately unsuccessful in the proceedings by applying in advance for an order capping the maximum costs that may be recovered by the defendant against it. This is called a protective costs order or maximum costs order. Court rules may empower a court, on its own motion or on the application of a party, to specify the maximum costs that may be recovered by one party from another.¹⁰⁵

The purpose of a maximum costs order is to facilitate access to justice. Access to justice is impeded where the costs of litigation are high. The costs of litigation may include not only a party's own legal costs but also the other parties' legal costs if an adverse costs order is made. A party may be inhibited in accessing justice where its own legal costs will be high but also where it fears an order that it may pay high legal costs of the other parties.¹⁰⁶

A category of litigation where a fear of an adverse costs order may impede access to justice is environmental public interest litigation. This has been recognised in many cases.¹⁰⁷ The legal costs in public interest litigation may be significant, reflecting the fact that the subject matter of the litigation may be important, complex and of high value. There can be considerable disparity in the financial resources of the public interest plaintiff and the governmental and corporate defendants. The making of a maximum costs order may enable the public interest litigation to continue, but

¹⁰⁴ UCPR r 59.11(1).

¹⁰⁵ UCPR Pt 42 r 42.4.

¹⁰⁶ *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22 at 27; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at 444-445, 465, 466 and 468.

¹⁰⁷ See, eg, *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 222 at 238 affirmed *Oshlack v Richmond River Council* (1998) 193 CLR 72, particularly at [114]; *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [31]; *Caroona Coal Action Group v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22 at 29; and *Delta Electricity v Blue Mountains Conservation Society* (2010) 176 LGERA 424 at 466.

conversely if a maximum costs order were not to be made, the public interest plaintiff may discontinue the proceedings.¹⁰⁸

An example of the inhibiting effect of not having the protection of a maximum costs order can be seen in the litigation brought by the Tasmanian Conservation Trust against the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities. The applicant conservation organisation had commenced judicial review proceedings in the Federal Court of Australia challenging the Commonwealth Minister's decisions in relation to a pulp mill in northern Tasmania proposed by Gunns Limited, a timber company. At an interlocutory stage, the court made orders by consent capping the maximum costs that the then two parties, the applicant and the Minister, could recover against each other at \$30,000. However, subsequently Gunns Limited applied to be joined to the proceedings and opposed any protective costs order being made. The applicant would therefore have been exposed, without cap, to the risk of a large adverse costs order in favour of Gunns if the applicant had been unsuccessful in the litigation. The applicant was not willing to face the financial risk of continuing the litigation in these circumstances and instead discontinued the proceedings.¹⁰⁹

Maximum costs orders have been made in a number of public interest cases in the United Kingdom¹¹⁰ and in Australia.¹¹¹

Finally, the court rules and practice governing orders for the costs of proceedings after they have been determined can act as financial disincentives to environmental public interest litigation. In Australia, the usual costs rule in civil litigation is that the costs of a successful party be paid by the unsuccessful party.¹¹² This usual costs rule has been repeatedly identified as an obstacle to the achievement of access to

¹⁰⁸ *Caroona Coal Action Group v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22 at 29.

¹⁰⁹ See Nicola Pain and Sonali Seneviratne, "Protective costs orders: increasing access to courts by capping costs" (2011) 26 *Australian Environment Review* 276, 277.

¹¹⁰ Examples are *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 and *R (on the application of Buglife: the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209.

¹¹¹ Examples are *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1 affirmed in *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424; *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137.

¹¹² See, eg, UCPR r 42.1.

environmental justice and a significant deterrent to the commencement of public interest litigation.¹¹³

Courts have begun to realise the chilling effect of the usual costs rule on public interest litigation and have responded in two ways: first, by exercising the court's discretion to depart from the usual costs rule if it is satisfied that some other order should be made and, secondly, by making special costs rules for public interest litigation or other environmental matters.

In relation to the first way, the court rules usually expressly allow a court to depart from the usual costs rule if it is satisfied that some other order should be made. For example, a court may, in appropriate cases, refrain from ordering costs in favour of a successful party. The circumstances in which a court may depart from the usual costs rule are varied, but there must be something out of the ordinary in the case to justify departure.¹¹⁴ One circumstance that courts have increasingly recognised may justify departure from the usual costs rule is that the proceedings have been brought in the public interest.¹¹⁵

Courts have endeavoured to explain when it will be justifiable to depart from the usual costs rule in public interest cases. In NSW, a three step approach has been suggested to determine whether the departure is justified:

first, can the litigation be characterised as having been brought in the public interest?; secondly, if so, is there "something more" than the mere characterisation of the litigation as being brought in the public interest? and thirdly, are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?¹¹⁶

¹¹³ See *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280 at 287-289 and cases and commentaries therein referred to; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at 466; C Tollefson, D Gilliland and J DeMarco, "Towards a costs jurisprudence in public interest litigation" (2004) 83 *Canadian Bar Review* 473; Chris Tollefson, "Costs in public interest litigation: recent developments and future directions" (2009) 35 *The Advocate's Quarterly* 182 and Chris Tollefson, "Costs in public interest litigation revisited" (2011) 39 *The Advocate's Quarterly* 197.

¹¹⁴ *Hastings Point Progress Association Inc v Tweed Shire Council (No 3)* (2010) 172 LGERA 157 at [18].

¹¹⁵ *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [49], [134], [136], [143].

¹¹⁶ *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280 at 285.

The three step approach has been applied in subsequent cases.¹¹⁷

This sequential approach recognises that not all cases claiming to be brought in the public interest justify being excepted from the usual costs rule. Sorting out the public interest cases which do warrant exception is best achieved through the three step inquiry. The first step acts as a screen to identify whether the litigation can be characterised as being brought in the public interest. If not, the public interest cannot be a circumstance justifying departure from the usual costs rule and any justification to do so would need to be found in some other circumstance.¹¹⁸

If the litigation can be characterised as being brought in the public interest, the second step is to examine more closely the nature, extent and other features of the public interest involved in the particular litigation to ascertain whether they provide justification, in the circumstances of the case, for departure from the usual costs rule.¹¹⁹ The circumstances may relate to the nature of the case (such as the breadth and nature of public benefits associated with its resolution) or the identity or motivation of the proponent (the degree of altruism and lack of financial gain).¹²⁰

If the plaintiff succeeds on these first two steps, the court must still consider, as the third step, whether there are any countervailing factors, such as any unreasonable conduct of the plaintiff before or during the litigation, that would militate against an order departing from the usual costs rule.¹²¹

¹¹⁷ See, eg, in NSW, in the Land and Environment Court, in *Jacobs v Hurstville City Council* [2011] NSWLEC 15 at [16]; *Martin v NSW Minister for Mineral and Forest Resources* [2011] NSWLEC 38 at [43]-[48]; *McGinn v Ashfield Council* (2011) 185 LGERA 230 at [17]-[24]; *Friends of Turrumurra Inc v Minister for Planning (No 2)* [2011] NSWLEC 170 at [31]; *McCallum v Sandercock (No 2)* [2011] NSWLEC 203 at [25]-[30]; *Oshlack v Rous Water (No 3)* [2012] NSWLEC 132 at [6]-[14] and *Lester v Ashton Coal Pty Ltd (No 2)* [2012] NSWLEC 254; in the Supreme Court of NSW, in *Snowy River Alliance Inc v Water Administration Ministerial Corporation (No 2)* [2011] NSWSC 1132 at [6]-[18]; in the NSW Court of Appeal, in *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at 467-468; and in the Northern Territory, in *Director of Public Prosecutions (DPP) v Dickfoss (No 2)* [2011] NTSC 29 at [26]-[27]; and considered academically overseas by Tollefson (2011), above n 113, 212-213.

¹¹⁸ *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280 at 285-286.

¹¹⁹ (2010) 173 LGERA 280 at 286.

¹²⁰ See the factors at (2010) 173 LGERA 280 at 294-295.

¹²¹ (2010) 173 LGERA 280 at 286, 295-296.

In Canada, other approaches have been suggested for determining whether it is appropriate to depart from the usual costs rule in public interest litigation. One approach involves application of a bundled, four element test that: the case involves matters of public importance that transcend the immediate interest of the named parties, and which have not previously resolved; the plaintiff has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify proceeding economically; the defendant has a superior capacity to bear the cost of the proceeding; and the plaintiff has not conducted the litigation in an abusive, vexatious or frivolous manner.¹²² Another is the single inquiry of whether the plaintiff is a “genuine” public interest litigant.¹²³

The second way courts can address the problem of adverse costs orders in public interest litigation is by making special provision in the court rules. In NSW, the Land and Environment Court has adopted such a special rule providing that the court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.¹²⁴

10. No delay in hearing and determining cases

“The delay of justice is a denial of justice” pronounced Lord Denning MR. He continued: “All through the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time [Hamlet, Act III, sc 1]. Dickens tells how it exhausts finances, patience, courage, hope [Bleak House, ch 1].”¹²⁵

¹²² Recommended in Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989), 179 and applied (with some modifications) in *Guide Outfitters Association of British Columbia v British Columbia (Information and Privacy Commissioner)* 2005 BCCA 368; *Victoria (City) v Adams* 2009 BCCA 563; 313 DLR (4th) 29; and *Georgia Strait Alliance v Minister of Fisheries and Oceans* [2011] FCJ No 587, 59 CELR (3d) 103; and C Tollefson (2011), above n 113, 208-209.

¹²³ *Incredible Electronics Inc v Canada (Attorney General)* (2006) 80 OR (3d) 723 and Tollefson (2011), above n 113, 211-212.

¹²⁴ *Land and Environment Court Rules 2007* (NSW) r 4.2(1).

¹²⁵ *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 245.

Delay is particularly pernicious for environmental public interest litigation. The purpose of much environmental litigation is to prevent or mitigate harm to the environment. Delay in the final determination of the proceedings defers the making of an order preventing or mitigating that environmental harm. In some instances, the order may be too late - the environmental harm may have already occurred and be irreversible. The heritage building may have been demolished, the old growth forest clear felled or the wetland drained or filled. Environmental litigation, therefore, needs to be heard and determined in a timely manner.

There are various mechanisms for reducing delay. First, allocation of environmental cases to environmentally specialised judicial bodies, such as an environmental court or tribunal (green court), an environmental division or chamber of a court (green chamber or green bench) or certified environmental judges (green judges), can assist in reducing delay. Such specialised bodies have a better understanding of the characteristics of environmental disputes and environmental law, and are better positioned to move more quickly through environmental cases, achieve efficiencies and reduce the overall cost of litigation.¹²⁶

Secondly, delay can be reduced by efficient case management. The overriding purpose of court practice and procedure is to facilitate the just, quick and cheap resolution of proceedings.¹²⁷ To achieve this overriding purpose, proceedings in the court need to be managed to achieve the objectives of: the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.¹²⁸

Case management involves a variety of policies, processes and technologies to achieve the just, quick and cheap resolution of proceedings. Policies include court rules, practice notes and policies regarding the process of litigation from filing to

¹²⁶ Pring and Pring, above n 29, 14; Brian J Preston, "Benefits of Judicial Specialisation in Environmental Law: the Land and Environment Court of NSW as a Case Study" (2012) 29 *Pace Environmental Law Review* 396, 425-426, 436.

¹²⁷ See, eg, *Civil Procedure Act 2005* (NSW) s 56.

¹²⁸ See *Civil Procedure Act 2005* (NSW) s 57.

finalisation. These policies can employ differential case management to deal discriminatively with the different types of cases. The Land and Environment Court, for example, has court rules and practice notes that deal differentially with the different types of cases that come before the Court.¹²⁹

Processes include: directions hearings before judges or registrars to: set timelines in the particular proceedings for filings of applications, documents and evidence, document and information exchange between the parties, interlocutory applications and the final hearing; case management conferences; alternative dispute resolution processes such as conciliation conferences or mediations; and case review by the court to assure appropriate handling and timing of the case and ensure that deadlines are met and filed documents are complete.¹³⁰

Technologies include a clear, comprehensive and current court website providing all necessary information for parties; electronic filing and processing capability (eCourt); teleconferencing and videoconferencing capability for hearings and taking evidence; and computer data management systems that track the status, progress and deadlines for each case and provide regular reports on individual cases and overall caseload.¹³¹

Thirdly, courts need to deal promptly with interlocutory applications and rebut attempts to adjourn or delay the final hearing and disposal of the proceedings. Defendants to environmental public interest litigation may make interlocutory applications with the intention, or that may have the effect, of staying or summarily dismissing the litigation. These applications may include an application for dismissal of the proceedings on the basis that they are frivolous or vexatious, disclose no reasonable cause of action, or are an abuse of process of the court¹³² or that the plaintiff provide security for costs and that the proceedings be stayed until the

¹²⁹ See "Types of the Cases" and "Practice and Procedure" on the Court's website at <http://www.lec.lawlink.nsw.gov.au/lec/index.html> and Preston (2012), above n 126, 420.

¹³⁰ See Preston (2012), above n 126, 419-421; *Land and Environment Court Annual Review 2011*, Ch 3, 'Caseflow Management'; Pring and Pring, above n 29, 76-78.

¹³¹ See *Land and Environment Court Annual Review 2011*, 17, 23, 34 and 36-37; Pring and Pring, above n 29, 76-78.

¹³² See, eg, r 13.4 of the UCPR.

plaintiff does so.¹³³ The defendant may also make applications which have the effect of delaying or increasing the costs of the proceedings, thereby depleting the already limited financial resources of public interest plaintiffs. These may include applications concerning the adequacy of the originating process or pleadings; applications to set aside subpoenas or notices to produce; applications concerning evidence, including its content and admissibility; and applications that a question or questions be heard separately from other questions in the proceedings.

Courts need to deal with such interlocutory applications promptly and hasten the final hearing and judgment of environmental public interest proceedings to avoid adverse effects on access to justice.

11. Independent, impartial and competent court

The court hearing and determining environmental public interest litigation needs to be independent and impartial. Independence requires separation of the judiciary from the political branches of government, being the executive and the legislature, and also from all influences external to the court which might lead it to decide cases other than on the legal and factual merits.¹³⁴ Impartiality requires that there be no conflict of interest and no actual or apprehended bias by the judge hearing the case.¹³⁵

The court also needs to be competent. The judges of the court need to be knowledgeable and experienced in the applicable law, both substantive and procedural, and in the environmental issues raised (that is to say, be environmentally literate).¹³⁶ The court also needs to have adequate human, financial and material resources to be able to fulfil its charter and functions, including achieving the overall purpose of the just, quick and cheap resolution of the proceedings.

¹³³ See, eg, r 42.21 of the UCPR.

¹³⁴ Brian J Preston, "The enduring importance of the rule of law in times of change" (2012) 86 *Australian Law Journal* 175, 180-181; T Bingham, *The Rule of Law* (Penguin Books, 2011) 91-93.

¹³⁵ *Ibid.*

¹³⁶ Preston (2012), above n 126, 425 and Pring and Pring, above n 29, xiv, 14, 56-57.

12. Adequate remedies

A justiciable matter not only requires a controversy about a right, duty or liability but also the existence of a remedy to enforce that right, duty or liability. The remedies available need also to be adequate if environmental public interest litigation is to be successful. The available remedies will depend on the type and nature of the cause of action or other legal suit. The available remedies may be specified in the legislation creating the right of action in the court's charter or rules, or in the common law or equity.

The remedies in civil actions may include: a declaration as to rights, duties or liabilities and whether there has been a wrong committed; an injunction, either prohibitory (restraining wrongful conduct) or mandatory (remedying wrongful conduct or its effects); orders in the nature of prerogative orders, such as a mandamus (compelling the exercise of a public duty by government), including continuing mandamus (compelling the ongoing performance of a public duty), prohibition (restraining government action), or certiorari (quashing government decisions); monetary damages, including compensatory damages (compensating for personal or property injury or for economic loss); punitive damages (punishing past wrongdoing and deterring similar future wrongdoing) and natural resources damages (compensation for damage to public natural resources, such as marine and terrestrial waters, and their birds, fish and other wildlife); and restitution (removing unjust enrichment, such as property or money gained by the wrongdoer and restoring the property or its value to the wronged party).

These substantive remedies in civil actions may be supplemented by an order for the payment of the costs of the proceedings (which includes the legal fees, expert witness fees and other court costs), such as an order that the unsuccessful party pay the costs of the successful party.

In administrative proceedings involving merits review of administrative decisions, the court usually has the same functions and powers as the administrative decision-maker whose decision is under review, such as granting or refusing permits, making

administrative orders, or making any other decision the administrative decision-maker could have made.

The court also usually has power to enforce its judgments and orders, including by punishment for contempt.

Adequate redress and remedy are fundamental to the achievement of access to environmental justice.¹³⁷ If rights cannot be upheld, duties cannot be enforced or wrongs cannot be remedied, justice is left undone.

The court must also be willing to grant the appropriate remedies. The grant of a remedy is usually at the discretion of the court. This is necessary to achieve justice in the individual circumstances of the case. However, inappropriate or too frequent exercise of the discretion to withhold relief can undermine the rule of law and the statutory purpose and scheme, and may not secure equal justice.¹³⁸

Conclusion

I have suggested twelve conditions for successful environmental public interest litigation. The meeting of these conditions depends upon action being taken by each of the organs of government – the legislature to make adequate laws, the executive to execute those laws and the judiciary to uphold and enforce the laws and facilitate access to justice. The lack of success of some environmental public interest litigation in the past may be attributed to some of these conditions not being satisfied. This suggests that there is still work to be done to achieve access to environmental justice.

¹³⁷ See, eg, Principle 10 of the Rio Declaration on Environment and Development, 31 ILM 874 (1992) <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163> at 17 April 2013.

¹³⁸ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-340.