CITATION:	*United Petroleum Pty Ltd v Alice Springs Town Council* [2019] NTSC 41
PARTIES:	UNITED PETROLEUM PTY LTD (ACN 085 779 255) v ALICE SPRINGS TOWN COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	SCC 125 of 2018 (21850619)
DELIVERED ON:	5 June 2019
HEARING DATE:	3 June 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

PROCEDURE – COSTS

Parties agree no further point to the litigation – no adjudication on the merits – if both parties have acted reasonably in commencing, defending and conducting proceedings generally appropriate for no order as to costs to be made.

Supreme Court Rules 1987 (NT) r 25.05, r 63.03, r 63.11

ASC v Aust-home Investments Ltd (1993) 44 FCR 194, *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, *Director-General, Department of Trade & Investment, Regional Infrastructure and Services v Lewis* [2012] NSWCA 436, *JT Stratford and Son Ltd v Lindley and Others (No 2)* (1969) 3 All ER 1122, *Marine Power Australia Pty Ltd v Comptroller-General of Customs* (1989) 89 ALR 561,

Minister for Immigration and Citizenship v Maman (2012) 200 FCR 30, *One.tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548, *Parap Hotel Pty Ltd v NT Planning Authority* (1993) 112 FLR 336, *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal & Torres Strait Islander Affairs* (2000) 103 FCR 539, *Re Minister for Immigration and Ethnic Affairs; ex parte Qin* (1997) 186 CLR 622, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, *United Super Investments Pty Ltd v Randazzo Investments Pty Ltd* [2010] NTSC 31, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	M Crawley SC
Defendant:	S McGee

Solicitors:

Plaintiff:	Minter Ellison
Defendant:	Povey Stirk

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

United Petroleum Pty Ltd v Alice Springs Town Council [2019] NTSC 41
SCC 125 of 2018 (21850619)

BETWEEN:

UNITED PETROLEUM PTY LTD (ACN 085 779 255)
Plaintiff

AND:

ALICE SPRINGS TOWN COUNCIL
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 5 June 2019)

[1] The plaintiff commenced this proceeding by Originating Motion filed on 7 December 2018. That application sought the review of a decision purportedly made by the defendant on 8 October 2018 refusing to approve a Traffic Impact Assessment Report submitted by the plaintiff pursuant to a condition of Development Permit DP17/0064. The permit was issued in relation to the development of a fuel station in Alice Springs. On 16 May 2019 the plaintiff sought and was granted leave to discontinue the proceedings on the basis that the costs of the proceeding remained to be determined by the Court.

[2] The particulars of the plaintiff's claim for prerogative or declaratory relief were that the defendant had considered and taken into account expert advice from Greenhill Engineers in refusing to grant the approval; that the defendant failed to make that material or the substance of it available to the plaintiff before making the decision; and that the plaintiff was thereby deprived of an opportunity to make any comment or submission in relation to material adverse to its interests.

[3] Following the commencement of proceedings, the advice from Greenhill Engineers was provided to the plaintiff and it was invited to provide any further information or representations it wished to make in relation to the application for approval. This is a case in which the parties agree that there is no further point to the litigation.[1] There has been no adjudication on the merits.

Governing principles

[4] The relevant principles were set out by this Court in *Parap Hotel Pty Ltd v NT Planning Authority*[2] and *United Super Investments Pty Ltd &*

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1 Rule 25.05 of the *Supreme Court Rules* provides that where a proceeding is discontinued, liability for costs shall be determined in accordance with the relevant rules relating to costs. Rule 63.11(6) provides that a party who discontinues a proceeding shall pay the costs of the party to whom the discontinuance relates to the time of the discontinuance. That rule is subject to any other order that the Court may make (r 63.11(9)), and subject to the overriding discretion of the Court (r 63.03(1)). The defendant has by consent or agreement waived reliance on that rule in order to allow the matter to be determined by the Court.

2 *Parap Hotel Pty Ltd v NT Planning Authority* [1993] NTSC 37; 112 FLR 336.

Ors v Randazzo Investments Pty Ltd & Ors[3]. They may be summarised as follows:

(a) it is inappropriate for the court determining costs to seek to determine the merits or the outcome of a hypothetical trial;[4]

(b) if both parties have acted reasonably in commencing and defending the proceedings and their conduct continued to be reasonable until the litigation settled, or became futile, then it is generally appropriate for no order as to costs to be made;[5]

(c) a distinction is properly drawn between cases in which one party effectively surrenders to the other in circumstances where that latter party might be considered "successful" in the proceedings, and cases in which some supervening event or settlement removes or modifies the subject of the dispute making it difficult to discern why one party or the other should be ordered to bear the costs of the proceeding or some part of it;[6]

(d) a plaintiff may be deprived of all or part of its costs, or ordered to pay costs, where it fails to make a demand before issuing proceedings, where the defendant has offered the substance of the

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3 *United Super Investments Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors* [2010] NTSC 31 at [29]-[33].

4 Citing *ASC v Aust-home Investments Ltd* (1993) 44 FCR 194 at 201; *JT Stratford and Son Ltd v Lindley and Others (No 2)* (1969) 3 All ER 1122. See also *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622 at 624.

5 Citing *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622; *JT Stratford and Son Ltd v Lindley and Others (No 2)* (1969) 3 All ER 1122.

6 Citing *One.tel Ltd v Commissioner of Taxation* [2000] FCA 270; 101 FCR 548. See also *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622 at 624-625.

relief claimed before proceedings commenced, or where the plaintiff could have pursued some other cause at less expense; and

(e) a defendant may be deprived of all or part of its costs, or ordered to pay costs, if its conduct has precipitated the proceedings.[7]

[5] I turn then to consider the relevant facts and circumstances.

Facts and circumstances

[6] On 15 November 2016, the Development Consent Authority referred the plaintiff's application for a Development Permit to the defendant for comment. The application was assessed by the defendant's Technical Services division. On 24 November 2016, the defendant sent a number of recommended preconditions for approval to the Development Consent Authority. Those conditions included that the plaintiff establish the suitability of the road for heavy vehicle use before permitting heavy vehicle loading on Schwartz Crescent.

[7] During the course of a meeting of the Development Consent Authority on 15 February 2017 to consider the application, the defendant reiterated its position that there needed to be a heavy vehicle suitability assessment. The defendant also drew attention to the fact that a secondary college in close proximity to the proposed development had expressed concerns about the impact heavy vehicles exiting from the site may have on the existing traffic flow during peak hours.

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7 Citing *ASC v Aust-home Investments Ltd* (1993) 44 FCR 194 at 201.

[8] On 3 March 2017 the Development Consent Authority issued the Development Permit subject to a number of conditions which had to be met before work could commence. Those conditions included that the plaintiff provide a Traffic Impact Assessment Report to the defendant and to the Department of Infrastructure, Planning and Logistics for approval. Approximately one week later the plaintiff provided the defendant with site plans and a Traffic Impact Assessment Report.

[9] On 19 April 2017, the defendant sought clarification from the plaintiff of certain matters arising from the Traffic Impact Assessment Report, and advised that a geotechnical investigation was necessary to establish the suitability of Schwartz Crescent for heavy vehicle loading. Schwartz Crescent services a fast food outlet with a drive-in facility, a building containing two retail shops, a drug and alcohol treatment centre, Charles Creek Town Camp and the local secondary college. It also connects to Sturt Terrace on the east of the Todd River. In the defendant's assessment, the intersection in its present configuration was at capacity during peak periods.

[10] On 26 May 2017, the plaintiff's consultant engineers provided technical clarification of certain aspects of the Traffic Impact Assessment Report. By reply dated 23 June 2017, the defendant expressed concern that the assessment was based on data taken at a time when the local secondary college was in a holiday period. The

defendant also requested the test results of the geotechnical investigation.

[11] On 17 August 2017, the plaintiff provided an updated Traffic Impact Assessment Report prepared by its consultant engineers to the defendant and to the Department. The Department approved the report. That updated Traffic Impact Assessment Report again used data taken during a school holiday period.

[12] On 6 September 2017, the defendant advised the plaintiff's consultant engineers that it could only consider the proposal for road train entry into Schwartz Crescent once it was provided with: (1) "realistic and updated traffic impact assessment data provided for consideration of potential traffic treatments on Schwartz Crescent, to allow safe movement of vehicles"; and (2) given the limited information contained in the geotechnical report, a written guarantee from the plaintiff or a structural warranty certificate from its consultant engineers to assure the defendant that "if the pavement is unable to withstand heavy vehicle loading any adverse impact on this portion of the road caused by Road Trains will be rectified at no cost to Council". The advice concluded that the defendant could not endorse the plan until those matters were addressed.

[13] On or about 15 September 2017, the plaintiff's consultant engineers provided a revised Traffic Impact Assessment Report, but without consideration of traffic data from school working days.

[14] On 21 September 2017, the defendant met with representatives from the plaintiff and the plaintiff's consultant engineers. The plaintiff advised that it would not be providing further reports as the intersection exceeded necessary capacity for the development. The defendant advised that the revised Traffic Impact Assessment Report ignored peak traffic which could be affected by a right turning truck on Schwartz Crescent. The defendant repeated its concern that the traffic data had been extracted during a holiday period and its concern that the suitability of Schwartz Crescent for heavy vehicle loading remained unclear. The plaintiff required an immediate answer to its application for approval and the defendant advised that the matter would be discussed at the meeting of its Development Committee and it would notify the plaintiff of its position as soon as practicable.

[15] On 2 October 2017, the Development Committee resolved that the defendant did not support the proposal for the exit from or entry into Schwartz Crescent as part of the proposed development. On 3 October 2017, the defendant advised the plaintiff's representative and consultant engineers that while it had no objection to the use of the Stuart Highway it was unable to support the proposal involving the entry and exit of vehicles using Schwartz Crescent. The defendant

reaffirmed its position on 4 December 2017. Thereafter, the matter went into abeyance for a time.

[16] On 31 August 2018, the plaintiff's solicitors wrote to the defendant requesting the defendant to reconsider the Traffic Impact Assessment Report which had been submitted by the plaintiff and, should it not be approved, to provide a response particularising the defendant's objections. Following receipt of that letter the defendant obtained an independent assessment from Greenhill Engineers of the advice given by the Technical Services division to the defendant in council. That independent assessment took the form of a one-page email dated 26 September 2018, and was consistent with the advice previously given by the Technical Services division.

[17] On 8 October 2018, the defendant wrote to the plaintiff's solicitors outlining its reasons for refusing approval and advising that advice from Greenhill Engineers "substantially inform this response". While the plaintiff was not provided with a copy of the advice from Greenhill Engineers at that time, it is plain from a comparison of the two documents that the relevant part of the defendant's response provided the substance and detail of the advice. In fact, that advice is rendered almost verbatim in the letter of 8 October 2018.

[18] By letter dated 30 November 2018, the plaintiff's solicitors requested the provision of the advice provided by Greenhill Engineers by close of

business on 4 December 2018. By reply dated 5 December 2018 the defendant stated, "I advise that Council is not disposed to produce the Greenhill Engineers' advice save to confirm that it is relevantly and fairly represented in Mr Mooney's letter to you of 8 October 2018". For the reasons already described, that was a correct characterisation of the contents of the letter dated 8 October 2018. That was the extent of any pre-suit correspondence. The plaintiff commenced this proceeding by Originating Motion filed on 7 December 2018.

[19] On 20 December 2018, the defendant provided the plaintiff with a copy of the advice from Greenhill Engineers. On 31 January 2019, the solicitors for the defendant wrote to the solicitors for the plaintiff advising that the defendant would reconsider its decision concerning approval in light of any further information and representations the plaintiff might wish to present.

[20] On 12 February 2019, the solicitors for the defendant advised the court that it did not wish to attend mediation because the Greenhill Engineers' advice had been provided and the defendant had agreed to consider any further submissions the plaintiff might wish to make. In other words, the defendant's position was that the relief sought by the plaintiff in its application was redundant.

[21] On 29 March 2019, the plaintiff's solicitors sought the defendant's consent to the orders sought in the Originating Motion and to an order that costs be reserved. The defendant did not consent to that course.

[22] On 9 April 2019, the plaintiff prepared an amended Traffic Impact Assessment Report. On 2 May 2019, the defendant's solicitors invited the plaintiff to submit the amended report and any further submissions to the defendant for consideration. Leave to discontinue the proceedings was thereafter granted subject to the resolution of the costs issue.

Consideration

[23] The defendant is the local government authority in respect of the area that included the proposed development. Under its constituting legislation, the defendant is a statutory corporation required to act as a representative, informed and responsible decision-maker in the interests of its constituency.[8] The defendant is bound to make its decisions and exercise its functions in the public interest. As this case demonstrates, those functions include the consideration of development proposals which have the potential to impact on the interests of its constituents.

[24] The plaintiff's opportunity to make further comment or submission in relation to the matters raised in the defendant's letter of 8 October

8 *Local Government Act 2008* (NT), s 11(a).

2018 and the Greenhill Engineers' report must be considered in context and bearing in mind the sequence of events. The plaintiff's solicitors wrote to the defendant seeking a reconsideration of the decision after the matter had been in abeyance for almost 10 months. The plaintiff did not seek to introduce or submit any further information. The plaintiff's request acknowledged that the defendant had previously raised concerns about the utility of traffic data collected during school holidays, the capacity of the intersection, and the likely impact of the increased flow of traffic from the development site and to Schwartz Crescent. The plaintiff was clearly aware of those concerns and its request for reconsideration engaged on those issues.

[25] The defendant responded to the plaintiff's request for a reconsideration raising what were effectively the same concerns which had been raised during the course of correspondence and meetings with the plaintiff between February and October 2017, and which had been addressed in the request. The defendant's response was, in effect, that it remained of the opinion that the proposed egress into Schwartz Crescent would significantly affect the safety and functioning of the road and could not be supported. That was consistent with the position it had expressed in October 2017. Moreover, that was simply a reiteration by the defendant's chief executive of the position which had been expressed at that time following a determination by the defendant in council. It was not a fresh determination by the defendant in council.

[26] The defendant's letter of 8 October 2018 did not, either explicitly or implicitly, indicate that it was not prepared to consider any further information which the plaintiff wished to put forward. It was open to the plaintiff in response to that advice to make submissions in relation to the six matters which were addressed in the defendant's letter of 8 October 2018. Rather than do so, the plaintiff requested a copy of the Greenhill Engineers' advice in the circumstances which I have already described, and immediately commenced proceedings when the defendant failed to accede to that request. In assessing the reasonableness of the defendant's conduct in that respect, it is necessary to consider the circumstances as they presented at that time.

[27] The defendant understandably took the letter from the plaintiff's solicitors dated 31 August 2018 seeking a reconsideration of the Traffic Impact Assessment Report to be a challenge to the decision made in 2017, and the precursor to an application for judicial review of that decision. That understanding was informed by the fact that the plaintiff had not provided any fresh material. The letter from the plaintiff's solicitors also requested particulars of the defendant's objections. That was also taken to be a request for a statement of the grounds on which the original decision was made. As has already been seen above, in commissioning the advice from Greenhill Engineers the defendant was not seeking opinion in relation to some fresh issue or objection to the application for approval; and nor did the advice advert

to any new issue. Rather, the defendant was seeking a second opinion on the validity of the conclusions drawn by its Technical Services division when the matter had been considered in 2017.

[28] It may be accepted that procedural fairness requires a party directly affected by a decision to be informed of the nature and content of adverse material.[9] However, in many cases that requirement will be satisfied by the disclosure of the gravamen, substance or essential features of the adverse information without the entire text or document in which that information is contained necessarily also being disclosed.[10] Procedural fairness is not denied if the gist of information has been disclosed "sufficient to enable any person wishing to make a submission ... to do so".[11] The defendant's response dated 8 October 2018 provided both the substance and the detail of the matters raised in the Greenhill Engineers' report. Those matters traversed the concerns which had been the subject of the dealings between the plaintiff and the defendant over the course of 2017.

[29] There is nothing in the particular circumstances of this case or the content of the Greenhill Engineers' advice which required the

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9 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32], applying *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591.

10 *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30 at [37]; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal & Torres Strait Islander Affairs* (2000) 103 FCR 539 at [70]; *Director-General, Department of Trade & Investment, Regional Infrastructure and Services v Lewis* [2012] NSWCA 436 at [71]-[74].

11 *Marine Power Australia Pty Ltd v Comptroller-General of Customs* (1989) 89 ALR 561 at 574.

provision of the advice itself. Having regard to the ordinary principles, it cannot be said that the defendant's refusal to provide the advice itself when it was requested by the plaintiff in November 2018 was unreasonable. The defendant's in-house counsel confirmed to the plaintiff's solicitors that the advice was "relevantly and fairly represented" in the letter dated 8 October 2018. That was a correct statement of the position. The proceedings commenced by the plaintiff assumed that the advice itself contained further detail, or at the very least that the plaintiff was entitled to be provided with the advice itself. Whilst with hindsight it may perhaps have been advisable or preferable for the defendant to have provided the advice on request, its conduct in that respect cannot be characterised as unreasonable. Equally, the fact that the advice was subsequently provided, although that provision answered one limb of the relief sought by the plaintiff, cannot in context be characterised as a "surrender" by the defendant.

[30] The plaintiff also contends that the defendant's decision made in council on 29 January 2019 was also a "surrender" or "change of heart" which vindicated the position adopted by the plaintiff in commencing and pursuing the proceedings sufficient to characterise the plaintiff as the successful party in the matter. That decision was that the defendant would "agree to reconsider its decision in light of any further representations [the plaintiff] might wish to make now that it has possession of [the] Greenhill advice".

[31] What has since happened is that the Department of Transport has advised both the plaintiff and the defendant that it intends to realign the intersection between Schwartz Crescent and the Stuart Highway and will have traffic lights installed to address any safety concerns. The plaintiff has instructed its consultant engineers to undertake a new traffic count of Schwartz Crescent; to confirm the data contained in the previous Traffic Impact Assessment Report; to prepare an addendum to the previous report to present updated traffic counts; and to review the Greenhill Engineers' advice and draft a response to the key points. In response to those instructions the plaintiff's consultant engineers have prepared an amended Traffic Impact Assessment Report and the defendant has invited the plaintiff to submit the amended report and any further representations to the defendant for consideration.

[32] Having regard to those circumstances, it cannot be said that one or other party has been "successful" in the proceedings in the sense of the other surrendering its position. While it is true that the defendant will reconsider the application for approval in light of a revised Traffic Impact Assessment Report, it cannot be said that result would not have ensued without litigation or that the plaintiff's position in the proceedings has been vindicated by the defendant's indication that it is willing to consider new information and submissions. At no stage prior to the commencement of proceedings did the defendant indicate that it was unwilling to do so.

[33] That then leaves the question of the costs of this argument concerning costs. The solicitors for the defendant wrote to the solicitors for the plaintiff on 13 May, 21 May, and 29 May 2019 offering in various configurations to pay some portion of the plaintiff's costs of the proceedings in settlement of the matter. Those offers were not accepted. However, given the timing of those offers and the particular circumstances of this case it cannot be said that the plaintiff's failure to take up one or other of those offers should make it liable to pay the defendant's costs of the argument.

Disposition

[34] I make no order as to costs.
