

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Council of the City of Gold Coast v Gold Coast Leisure Services Pty Ltd & Anor (No. 2)* [2024] QPEC 16

PARTIES: **COUNCIL OF THE CITY OF GOLD COAST**
(Applicant)

v

GOLD COAST LEISURE SERVICES PTY LTD
ACN 050 493 073
(First Respondent)

AND

SCOTT JONATHAN MENZIES
(Second Respondent)

FILE NO/S: 688 of 2023

DIVISION: Planning and Environment

PROCEEDING: Application in Pending Proceeding

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 10 April 2024 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 10 April 2024

JUDGE: Kefford DCJ

ORDER:

1. The Originating Application is dismissed.
2. The Applicant pay the First and Second Respondents' costs of and incidental to the proceeding:
 - (a) assessed on the standard basis between 20 March 2023 and 22 January 2024; and
 - (b) assessed on the indemnity basis between 23 January 2024 and 21 March 2024.
3. The Applicant pay the First and Second Respondents' costs of and incidental to the application in pending proceeding filed 5 April 2024, assessed on the standard basis.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION – COSTS – where the Council's application for declaratory relief and enforcement orders was dismissed – where the Council was entirely unsuccessful on all issues in its

application and failed to discharge its onus – where the respondents sought an order as to costs – whether the proceeding was frivolous or vexatious – whether the Council has introduced, or sought to introduce, new material – whether the Council has defaulted in the Court’s procedural requirements – whether the Council has failed to properly discharge its responsibilities in the proceeding – whether the power to award costs under s 60(1) of the *Planning and Environment Court Act 2016* is enlivened – whether the discretion to make an order as to costs should be exercised

LEGISLATION:	<i>Planning and Environment Court Act 2016</i> (Qld) ss 10, 59, 60, 61
CASES:	<i>Baxter v Preston & Ors</i> (No. 2) [2023] QPEC 37, approved <i>Mudie v Gainriver Pty Ltd</i> (No. 2) [2002] QCA 546; [2003] 2 Qd R 271, applied <i>Oshlack v Richmond River Council</i> [1998] HCA 11; (1998) 193 CLR 72, applied <i>Sincere International Group Pty Ltd v Council of the City of Gold Coast</i> (No. 2) [2019] QPEC 9; [2019] QPELR 662, approved
COUNSEL:	K Wylie for the Applicant D Purcell for the First and Second Respondents
SOLICITORS:	McInnes Wilson Lawyers for the Applicant MacDonnells Law for the First and Second Respondents

- [1] On 21 March 2024, I published my reasons for judgment (“*Reasons for Judgment*”) in relation to this proceeding, which was commenced by the Council of the City of Gold Coast (“*the Council*”) against Gold Coast Leisure Services Pty Ltd and Mr Scott Menzies, the First and Second Respondents respectively: *Council of the City of Gold Coast v Gold Coast Leisure Services Pty Ltd & Anor* [2024] QPEC 10.
- [2] The proceeding is a P&E Court proceeding for the purposes of the *Planning and Environment Court Act 2016* (Qld). It sought declaratory relief about the lawfulness of a use under s 11 of the *Planning and Environment Court Act 2016* and enforcement orders restraining a use under s 180 of the *Planning Act 2016* (Qld).
- [3] The proceeding relates to the long-term use of marina berths at Marina Mirage and the adjacent Mariner’s Cove marina by aircraft. The marinas are in the Gold Coast Broadwater near Seaworld Drive, Main Beach.
- [4] Relevant background to the proceeding is set out in my Reasons for Judgment.
- [5] As I indicated in my Reasons for Judgment, the Council did not discharge its onus with respect to the substantive relief that it sought.

- [6] At paragraphs [657] and [658] of my Reasons for Judgment, I record that:
- (a) the Council seeks an order pursuant to s 61(1) of the *Planning and Environment Court Act 2016* that the First and Second Respondents pay the Applicant's costs of and incidental to the application, including costs to investigate and gather evidence;
 - (b) the grounds of the Originating Application do not further particularise the Council's application for costs and the Council did not address its application for costs in its submissions;
 - (c) it seems reasonable to infer that the Council's application for costs was founded on an assumption that it would enjoy a level of success, which it had not; and
 - (d) nevertheless, I would hear from the Council about this aspect of its Originating Application.
- [7] On 21 March 2024, I ordered that:
- "1. if the Council persists in its application for costs, it is to file and serve any material that it seeks to rely on and written submissions not exceeding 10 pages in length with respect to its application for costs, by no later than 4 pm on 4 April 2024; and
 - 2. The matter be listed for further hearing at 10 am on 10 April 2024 for the purpose of:
 - (a) hearing any application for costs that the Council persists with; and otherwise,
 - (b) hearing from the parties about any consequential relief or other matters arising."
- [8] The Council did not file any material or submissions. On 4 April 2024, the Council informed the Court that it was not persisting with its application for costs.
- [9] On 5 April 2024, Gold Coast Leisure Services Pty Ltd and Mr Menzies filed and served an application in pending proceeding and supporting affidavit material in accordance with the *Planning and Environment Court Rules 2018*. The application seeks an order that the Council pay their costs of, and incidental to, the proceeding, including the costs of, and incidental to, the application for costs, assessed on the standard basis.
- [10] The application is made under any, or all, of ss 60(1)(a), (b), (e), (f) and (i) of the *Planning and Environment Court Act 2016*. Prior to the hearing of this application, Gold Coast Leisure Services Pty Ltd and Mr Menzies indicated that they no longer relied on s 60(1)(a) of the *Planning and Environment Court Act 2016*.
- [11] The grounds of the application in pending proceeding particularise, in a detailed way, the basis on which Gold Coast Leisure Services Pty Ltd and Mr Menzies contend that the Council should pay its costs. In short, the application for costs is founded on my findings in my Reasons for Judgment.

- [12] The Council opposes the application for costs. It does not rely on any material, such as evidence about receipt of an advice on prospects or about disintitling conduct. It does not raise any discretionary basis to resist the relief. It opposes the costs order on the basis that the Court's power to award costs is not enlivened.
- [13] There is no suggestion in the evidence of any disintitling conduct by Gold Coast Leisure Services Pty Ltd or Mr Menzies.
- [14] It is uncontroversial that, under s 59 of the *Planning and Environment Court Act 2016*, the starting point is that each party must bear its own costs. This is subject to, amongst other things, s 60(1) of the *Planning and Environment Court Act 2016*, which relevantly states:

“60 Orders for costs

- (1) The P&E Court may make an order for costs for a P&E Court proceeding as it considers appropriate if a party has incurred costs in 1 or more of the following circumstances—

...

- (b) the P&E Court considers the proceeding to have been frivolous or vexatious;

Example—

The P&E Court considers a proceeding was started or conducted without reasonable prospects of success.

...

- (e) without limiting paragraph (d), a party has introduced, or sought to introduce, new material;

- (f) a party has defaulted in the P&E Court's procedural requirements;

...

- (i) an applicant, submitter, assessment manager, referral agency or local government does not properly discharge its responsibilities in the proceeding.

- [15] Once an identified precondition is established, there is an unfettered discretion to award costs: *Mudie v Gainriver Pty Ltd (No. 2)* [2002] QCA 546; [2003] 2 Qd R 271 at 285 [42] per McMurdo P and Atkinson J; *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9; [2019] QPELR 662 at 668 [24] (per Williamson KC DCJ).
- [16] With respect to the application for costs, I have the benefit of:
- (a) the written submissions made by Gold Coast Leisure Services Pty Ltd and Mr Menzies, under the hand of Mr Holt KC and Mr Purcell, which were delivered yesterday in accordance with the practice directions of this court for delivery of such submissions; and, despite their late delivery

- (b) the written submissions made by the Council, under the hand of Mr Gibson KC and Mr Wylie.
- [17] At the hearing of the costs' application today, I have had the benefit of oral submissions from both parties, and the opportunity to test the assertions made by the Council in its submissions, both written and oral.
- [18] During those submission, it was readily, and appropriately, accepted by all parties that the Court's power to award costs under s 60(1)(b) of the *Planning and Environment Court Act 2016* is enlivened if the Court finds the proceeding to have been frivolous or vexatious. The words, and the phrase in which they appear, are not defined. The words are to be given their ordinary meaning: *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9; [2019] QPELR 662 at 669 [27].
- [19] Frivolous has been held to mean “*of little or no weight, worth or importance*”, “*not worthy of serious notice*” and “*characterised by lack of seriousness or sense*”. Vexatious has been held to mean “*causing vexation*”, “*vexing*”, “*annoying*” and “*productive of serious and unjustified trouble and harassment*”. Whether a proceeding is frivolous or vexatious turns on, among other things, the circumstances of the case: *Mudie v Gainriver Pty Ltd (No. 2)* [2002] QCA 546; [2003] 2 Qd R 271 at 283-4 [35] – [37] (per McMurdo P and Atkinson J) and at 291 [61] (per Williams JA); *Baxter v Preston & Ors (No. 2)* [2023] QPEC 37 at [41] (per Williamson KC DCJ).
- [20] The onus of proving frivolity and vexation lies with the party applying for costs. It is a high bar to be met. Something more than a lack of success needs to be shown: *Mudie v Gainriver Pty Ltd (No. 2)* [2002] QCA 546; [2003] 2 Qd R 271 at 283-4 [35] – [37] (per McMurdo P and Atkinson J).
- [21] It is also undisputed that the purpose of a costs order is not to punish, but to compensate: *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72.
- [22] In addition, it was conceded by Mr Wylie that, even though the application for costs only sought costs to be assessed on the standard basis, if the Court considers that indemnity costs are justifiable for all or part of the proceedings, it is open for the Court to order that they be assessed on that basis.
- [23] Having carefully considered all the submissions and the exchanges with Counsel, and having regard to the submissions abandoned and withdrawn by Mr Wylie and the concessions made by him, it seems to me that:
- (a) the real issue is whether, having regard to the Council's case and its conduct of it, whether the discretion to award costs is enlivened under s 60(1)(b) of the *Planning and Environment Court Act 2016*, and to some extent under s 60(1)(i);
 - (b) there is considerable force to the written and oral submissions made by Gold Coast Leisure Services Pty Ltd and Mr Menzies about how the Court's discretion is enlivened under s 60(1)(b) of the *Planning and Environment Court Act 2016*; and

- (c) there is also force to the written and oral submissions made by Gold Coast Leisure Services Pty Ltd and Mr Menzies about how the Court's discretion is enlivened under s 60(1)(i) of the *Planning and Environment Court Act 2016*.
- [24] On the other hand, on my careful consideration of the submissions and the exchanges with Counsel today, it is fair to say that the Council's remaining submissions were underwhelming. As I have alluded to, several of the submissions were withdrawn or abandoned during exchanges at today's hearing when I tested Mr Wylie as to their veracity. To the extent that Mr Wylie withdrew or abandoned submissions, it was appropriate that he did so. As was revealed by my testing of the submissions during the hearing today, those submissions that were abandoned and withdrawn were nothing more than bald assertions. They had no proper foundation. Even though some of the Council's submissions were abandoned or withdrawn, other submissions were not.
- [25] In terms of the submissions that remain, they reveal a continued attempt by the Council to justify its proceeding as arguable and having reasonable prospects of success. In effect, the Council seeks to do so on the basis that:
- (a) it had an entitlement to test the strength of the defence raised by Gold Coast Leisure Services Pty Ltd and Mr Menzies; and
 - (b) evidence may be elicited from Mr Menzies during cross-examination thereby proving the offence.
- [26] During the hearing today, when I asked Mr Wylie to take me to the Council's evidence that was capable of demonstrating the commission of the particularised offences, he was unable to identify any such evidence to substantiate his assertion that the Originating Application had reasonable prospects of success from its inception.
- [27] The Council's submissions fail to confront an uncontroversial matter, namely that to have reasonable prospects of obtaining the relief that it sought, the Council was required to demonstrate:
- (a) a *prima facie* entitlement to the relief sought in its Originating Application, which required that the Council have evidence that was capable of demonstrating the commission of the offences particularised in the Originating Application; and
 - (b) that the discretion to grant the relief should be exercised in its favour.
- [28] This is symptomatic of the Council's overall failure in this entire proceeding to confront the fundamental difficulties in its own case.
- [29] The difficulties with the Council's case are so numerous that to catalogue them here imposes an oppressive task on this Court over and above that already undertaken by the Court in producing the lengthy reasons for judgment that were published on 21 March 2024.
- [30] In my Reasons for Judgment published on 21 March 2024, I address at length:
- (a) each of the allegations made by the Council in its Originating Application;

- (b) the nature of the evidence adduced by the Council with respect to those allegations and the reasons why that evidence was inadequate to substantiate the allegations;
- (c) each of the more recently manufactured allegations that were not the subject of allegations in the Originating Application and that the Council impermissibly sought to level at Gold Coast Leisure Services Pty Ltd in its submissions; and
- (d) the strong discretionary considerations that comfortably satisfied me that, even if the Council had established any of its allegations, this was one of those rare cases where it would not be appropriate to grant any relief.

[31] To fully appreciate the egregious nature of the Council's conduct in this case and the many fundamental difficulties in the Council's case, both legal and evidential, it is necessary to have regard to the entirety of my Reasons for Judgment published on 21 March 2024. Considered overall, my Reasons for Judgment demonstrate that:

- (a) the Council's proceeding lacked reasonable prospects of success from its inception;
- (b) the Council's proceeding was productive of serious and unjustified trouble and harassment for Gold Coast Leisure Services Pty Ltd and Mr Menzies; and
- (c) even though the Council's proceeding did not enjoy reasonable prospects of success from its inception, the fundamental difficulties with the Council's proceeding were brought into sharp focus on multiple occasions before the hearing commenced such that the Council's conduct in maintaining the proceedings became even more egregious:
 - (i) after Gold Coast Leisure Services Pty Ltd and Mr Menzies filed its Statement of Facts, Matters and Contentions on 27 July 2023; and, even more so
 - (ii) after Gold Coast Leisure Services Pty Ltd and Mr Menzies filed the affidavit material on which it would rely between 13 October 2023 and 19 October 2023; and yet even more so
 - (iii) after Gold Coast Leisure Services Pty Ltd and Mr Menzies filed their Outline of Submission on 22 January 2024.

[32] Having regard to my Reasons for Judgment, all the written and oral submissions about costs and the exchanges with Counsel, including the submissions abandoned and withdrawn by Mr Wylie and the concessions made by him, I am comfortably satisfied that:

- (a) the Council's proceeding lacked reasonable prospects of success from its inception;
- (b) the Council's proceeding was productive of serious and unjustified trouble and harassment for Gold Coast Leisure Services Pty Ltd and Mr Menzies; and, as such
- (c) the Court's power to order that the Council pay the First and Second Respondents' costs of and incidental to the proceeding is enlivened under s 60(1)(b) of the *Planning and Environment Court Act 2016*.

- [33] In those circumstances, it is unnecessary to consider the other provisions on which Gold Coast Leisure Services Pty Ltd and Mr Menzies rely in its application for costs. That said, I will make a few observations relevant to s 60(1)(i) of the *Planning and Environment Court Act 2016*.
- [34] Time after time in this proceeding the Council was confronted with new material that highlighted serious inadequacies in its case. The material included, but was not limited to, the Statement of Facts, Matters and Contentions, the affidavit material relied on by Gold Coast Leisure Services Pty Ltd and Mr Menzies' and multiple sets of submissions. In many respects, the contents highlighted inadequacies about which Gold Coast Leisure Services Pty Ltd had already notified the Council prior to the commencement of the proceeding. The material also clearly identified many other fundamental difficulties in the Council's case, including legal difficulties.
- [35] Having read the Council's response submissions and having regard to my exchanges with Counsel for the Council in the original hearing, it seems reasonable to infer that the Council did not properly reflect on:
- (a) the veracity of the evidence and legal arguments advanced by Gold Coast Leisure Services Pty Ltd; and
 - (b) the response that would be appropriate having regard to its obligations under s 10 of the *Planning and Environment Court Act 2016*.
- [36] Instead, the Council elected to ignore all the fundamental difficulties with its case and press on regardless. After Gold Coast Leisure Services Pty Ltd and Mr Menzies filed their Statement of Facts, Matters and Contentions and their affidavit material, the Council's case became so patently untenable that the Council sought to advance a materially different case in its submissions. From my first-hand observation of the cross-examination of Mr Menzies, it seemed to me that the Council had no evidence pointing to guilt to put to Mr Menzies. Rather, the Council appeared to be on a fishing expedition with a desperate hope to hook some answers from Mr Menzies that might enable the Council to establish the offences particularised by it or, alternatively, concoct a different case about the unlawfulness of the use. The Council's conduct did not accord with its obligations under s 10 of the *Planning and Environment Court Act 2016*. Having regard to these matters, I am comfortably satisfied that the Council did not properly discharge its responsibilities in the proceeding.
- [37] Having regard to all the matters to which I have referred, I am comfortably satisfied that:
- (a) the Court's power to order that the Council pay the First and Second Respondents' costs of and incidental to the proceeding is enlivened;
 - (b) it is appropriate that such an order be made to compensate Gold Coast Leisure Services Pty Ltd and Mr Menzies for the unnecessary expense incurred in responding to the serious and unjustified trouble and harassment caused by the proceeding;
 - (c) it is appropriate that the costs be assessed on the standard basis between 20 March 2023 and 22 January 2024 and on the indemnity basis from 23 January 2024 until 21 March 2024; and

- (d) it is appropriate that an order be made that the Council pay the First and Second Respondents' costs of and incidental to the application in pending proceeding filed 5 April 2024, assessed on the standard basis.

[38] Even though the proceeding lacked reasonable prospects of success from its inception, it called for careful and detailed consideration because:

- (a) the form of relief that was sought included declarations about the commission of a criminal offence and enforcement orders;
- (b) the application for declaratory relief and enforcement orders was founded on allegations that:
 - (i) on three separate and distinct occasions, Gold Coast Leisure Services Pty Ltd had undertaken development in the form of a material change of use of the Premises;
 - (ii) each of the three alleged material changes of use was assessable development in the Council's local government area, which allegations called for consideration of:
 - (A) the *Administrative Boundaries Terminology Act 1985* (Qld);
 - (B) the *Integrated Planning Act 1997* (Qld);
 - (C) the *Local Government Act 1993* (Qld);
 - (D) the *Local Government Act 2009* (Qld);
 - (E) the *Local Government (Areas) Regulation 1995* (Qld);
 - (F) the *Local Government (Areas) Regulation 2008* (Qld);
 - (G) the *Local Government (Operations) Regulation 2010* (Qld);
 - (H) the *Local Government Regulation 2012* (Qld);
 - (I) the *Planning Act 2016*;
 - (J) the *Statutory Instruments Act 1992* (Qld);
 - (K) the *Survey and Mapping Infrastructure Act 2003* (Qld); and
 - (L) the *Sustainable Planning Act 2009* (Qld);
 - (iii) Gold Coast Leisure Services Pty Ltd had committed offences under successive planning regimes, namely the *Integrated Planning Act 1997* (Qld), the *Sustainable Planning Act 2009* (Qld) and the *Planning Act 2016* (Qld); and
- (c) one of the enforcement orders sought by the Council required the immediate cessation of an aircraft services use that, even on the Council's case, Gold Coast Leisure Services Pty Ltd and Mr Menzies had been operating in some form from the subject land since 1998. It was only towards the end of the hearing that the Council abandoned that relief in favour of relief that would permit the continued operation of the use while attempts were made to regularise it through a development application made to the Council.

- [39] Taken in combination, these matters demonstrate that it was reasonable for Gold Coast Leisure Services Pty Ltd and Mr Menzies to engage both senior and junior Counsel.
- [40] For the reasons given, I order:
- (a) the Originating Application is dismissed;
 - (b) the Applicant pay the First and Second Respondents' costs of and incidental to the proceeding:
 - (i) assessed on the standard basis between 20 March 2023 and 22 January 2024; and
 - (ii) assessed on the indemnity basis between 23 January 2024 and 21 March 2024; and
 - (c) the Applicant pay the First and Second Respondents' costs of and incidental to the application in pending proceeding filed 5 April 2024, assessed on the standard basis.