PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Karagianis v Body Corporate for Northpoint Carseldine Community Titles Scheme 50962 & Anor (No 2)* [2024] QPEC 20
PARTIES:	**LAZAROS KARAGIANIS~~, ANGELA KARAGIANIS, STANLEY KARAGIANIS & ANASTASIA KARAGIANIS~~** (Applicant) **v** **BODY CORPORATE FOR NORTHPOINT CARELDINE COMMUNITY TITLE SCHEME 50962** (First Respondent) **BRISBANE CITY COUNCIL** (Second Respondent)
FILE NO:	7/21
DIVISION:	Planning and Environment
PROCEEDING:	Application for Costs
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	17 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2023 with further written submissions received 22 and 27 March 2023
JUDGE:	McDonnell DCJ
ORDER:	**The Application for Costs is dismissed**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION FOR COSTS – where the Applicant's Originating Application was dismissed – where the First Respondent subsequently brought an Application for Costs – whether the proceeding was frivolous or vexatious – whether the proceeding was started or conducted primarily for an improper purpose – whether the Applicant introduced or sought to introduce new material – whether the Applicant defaulted in the Court's procedural requirements – whether the Court ought to exercise its discretion to award costs

LEGISLATION:	*Planning and Environment Court Act 2016* (Qld) ss 59, 60, 64(1)
CASES:	*Favero v Council of the City of Gold Coast* [2019] QPEC 61
	Ferreyra v Brisbane City Council (No. 2) [2016] QPEC 13
	Heather & Anor v Sunshine Coast Regional Council & Ors (No. 2) [2023] QPEC 4
	Karagianis v Body Corporate for Northpoint Carseldine Community Titles Scheme 50962 & Anor [2022] QPEC 26
	Mudie v Gainriver Pty Ltd (No.2) 2 Qd R [2003] 271
	Riverside Development Pty Ltd v Brisbane City Council & Ors [2021] QPEC 56
	Robertson & Ors v Brisbane City Council & Ors [2021] QPEC 54
	SDA Property Nominees Pty Ltd v Scenic Rim Regional Council & Ors (No. 2) [2022] QPEC 51
	Sincere International Group Pty Ltd v Council of the City of Gold Coast (No.2) [2019] QPEC 9
	Williams v Spautz (1992) 174 CLR 509
COUNSEL:	The Applicant was self-represented K Buckley for the First Respondent
SOLICITORS:	The Applicant was self-represented K&L Gates for the First Respondent

Introduction

[1] This is an application for costs brought by the Body Corporate for Northpoint Carseldine Community Title Scheme 50962 (Northpoint).

Background

[2] On 22 January 2021, an originating application was filed in this Court by Mr Karagianis.[1] On 5 March 2021, Mr Karagianis filed an amended originating application.[2] On 17 February 2022, Mr Karagianis filed a further amended originating application[3] (Originating Application).[4] The Originating Application sought declarations under the *Planning and Environment Court Act 2016* (Qld) (*PECA*) and enforcement orders under the *Planning Act 2016* (Qld) (*Planning Act*). The hearing of the Originating Application took place before me on 12 and 13 May 2022. On 11 August 2022, I delivered my reasons[5] (Reasons for Judgement), in which I declined to

1 Court Document No. 1.
2 Court Document No. 10.
3 Court Document No. 24.
4 The Originating Application named three other Applicants who were removed for failure to attend the hearing.
5 *Karagianis v Body Corporate for Northpoint Carseldine Community Titles Scheme 50962 & Anor* [2022]

grant the declarations and enforcement orders sought by Mr Karagianis, and made an order dismissing the Originating Application.

[3] Northpoint filed its application for costs (Application for Costs) on 21 October 2022.[6] The Application for Costs seeks orders that Mr Karagianis and/or the originally named applicants pay its costs with respect to various aspects of the proceeding. The Application for Costs also seeks a portion of its costs to be assessed on an indemnity basis. The Application for Costs was heard on 20 March 2023. Brisbane City Council (Council) does not seek to recover its costs in the proceeding. Council has been excused from participating in the Application for Costs.[7]

The Originating Application and Reasons for Judgement

[4] Briefly, the Originating Application related to a development application for a material change of use for multiple dwellings (20 units) on land located at 1547 Gympie Road, Carseldine (Development Application). The Development Application was approved by Council on 19 April 2016, subject to conditions (Development Approval). Conditions 21 and 23 related to the grant or offer of easements for the benefit of, amongst others, land owned by Mr Karagianis at 1545 Gympie Road, Carseldine. The Originating Application sought declarations under the *PECA* and enforcement orders under the *Planning Act* in relation to compliance with and enforcement of Conditions 21 and 23 of the Development Approval.

[5] In dismissing the Originating Application, I made the following key findings in the Reasons for Judgement:

(a) with respect to Condition 21:

(i) Northpoint had complied with Condition 21(ii) by the 24 June 2021 and 11 August 2021 offers; [8] and

(ii) absent acceptance by Mr Karagianis of the two offers, Northpoint could take no further steps in compliance of Condition 21;[9]

(b) with respect to Condition 23:

(i) the 21 June 2016 letter was not an offer which satisfied Condition 23;[10] and

(ii) Northpoint had complied with Condition 23 by the 14 November 2018 and 24 June 2021 offers;[11]

QPEC 26 ('Reasons for Judgement').

6 Court Document No. 44.

7 Court Document No. 45, Order dated 3 November 2022, [1].

8 Reasons for Judgement, [47], [53].

9 Reasons for Judgement, [124].

10 Reasons for Judgement, [75].

11 Reasons for Judgement, [110], [113].

(c) Northpoint was not dilatory in addressing any non-compliance with Conditions 21 and 23;[12] and

(d) the declarations sought by Mr Karagianis had no utility.[13]

The costs regime

[6] The statutory framework relating to costs for proceedings in this Court is found in part 6 of the *PECA*.

[7] The starting point is s 59:

> "**59 General costs provision**
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> Subject to sections 60 and 61, each party to a P&E Court proceeding must bear the party's own costs for the proceeding."[14]

[8] This general costs provision is subject to s 60, which sets out the circumstances in which this Court may make an order for costs:

> "**60 Orders for costs**
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> (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—
>
> (a) the P&E Court considers the proceeding was started or conducted primarily for an improper purpose, including, for example, to delay or obstruct;
>
> Example—
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> A party (the first party) with similar commercial interests to another party started a proceeding. The P&E Court considers the proceeding was started primarily to advance the first party's commercial interests by delaying or obstructing the other party's development approval from taking effect.
>
> (b) the P&E Court considers the proceeding to have been frivolous or vexatious;
>
> Example—
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> The P&E Court considers a proceeding was started or conducted without reasonable prospects of success.
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> (c) a party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;
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> (d) a party is required to apply for an adjournment because of the conduct of another party;

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12 Reasons for Judgement, [123], [127].
13 Reasons for Judgement, [129].
14 *PECA*, s 59.

> (e) without limiting paragraph (d), a party has introduced, or sought to introduce, new material;
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> (f) a party has defaulted in the P&E Court's procedural requirements;
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> (g) the P&E Court considers an applicant for a development application or change application did not give all the information reasonably required to assess the development application or change application;
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> (h) the P&E Court considers an assessment manager, referral agency or local government should have taken an active part in a proceeding and did not do so;
>
> (i) an applicant, submitter, assessment manager, referral agency or local government does not properly discharge its responsibilities in the proceeding.
>
> …"[15]

[9] The broad discretion of this Court to award costs, once a "precondition" in s 60 is established, was explained by Williamson KC DCJ in *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No.2)*[16] (*Sincere*):

> "[24] The starting position with respect to costs is stated in s.59 of PECA. The provision requires each party to a P&E Court proceeding to bear its own costs for the proceeding. This position is, however, subject to ss.60 and 61. These provisions confer a power on the Court to award costs where prescribed preconditions are established. **Once an identified precondition is established, there is an unfettered discretion to award costs**."[17] (emphasis added, footnotes omitted)

[10] Northpoint submits that the Court's discretion to impose an order for costs is enlivened under s 60(1)(b), but if it is determined that the precondition in s 60(1)(b) is not engaged, Northpoint also relies upon ss 60(1)(a), (e) and (f).[18]

Was the proceeding frivolous or vexatious under s 60(1)(b)?

[11] The meaning of the phrase **"**frivolous or vexatious", in the context of s 60(1)(b), was relevantly considered by Williamson KC DCJ in *Sincere*:

> "[27] Sincere contends that the Council's defence of the appeal was frivolous. The phrase *'frivolous or vexatious'* as it appears in s.60(1)(b) of PECA is not defined. It is, as a consequence, to be given its ordinary meaning. Williams JA in *Mudie v Gainriver Pty Ltd (No.2)* 2 Qd R [2003] 271 at [59] held that the words '*frivolous or vexatious*' in s.7.6(1A) of the repealed *Local Government (Planning & Environment) Court Act 1990* were used in everyday language, and there was

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15 *PECA*, s 60.

16 [2019] QPEC 9 ('*Sincere*').

17 *Sincere*, [24]. See also *SDA Property Nominees Pty Ltd v Scenic Rim Regional Council & Ors (No. 2)* [2022] QPEC 51, [10] ('*SDA*').

18 Court Document No. 48, First Respondent's Written Submissions on Costs filed 20 March 2023, [21] ('Northpoint's Costs Submissions').

> little doubt as to their ordinary meaning. His Honour held that frivolous meant '*of little or no value or importance, paltry*'; '*having no reasonable grounds*', and '*lacking seriousness or sense, silly*'. McMurdo P and Atkinson J in the same decision held that the ordinary meaning of '*frivolous*' was '*of little or no weight, worth or importance', and 'not worthy of serious notice*'."[19] (footnotes omitted)

[12] His Honour went on to emphasise the "high standard" which is required to establish this precondition:

> "[28] The onus of proving frivolity lies with the applicant for costs. **It is a high standard to be met**, and will turn on matters of fact and degree, including public policy considerations and the interests of justice. Relevantly, **something much more than lack of success needs to be shown** to engage s.60(1)(b) of PECA.
>
> …
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> [30] The phrase 'without reasonable prospects of success' has been held to equate its meaning with 'so lacking in merit or substance as to be not fairly arguable'. A case which is not fairly arguable is one that is regarded as 'bound to fail'. This is a concept that falls appreciably short of 'likely to succeed'. **A lack of success does not mean that a proceeding had no reasonable prospects, or lacked merit**."[20] (emphasis added, footnotes omitted)

[13] R S Jones DCJ in *Robertson & Ors v Brisbane City Council & Ors*[21] (*Robertson*) endorsed this approach:

> "[29] On balance, I agree with the approach adopted by Judge Williamson in *Sincere*. In this jurisdiction, even when a party's case is unsuccessful and could be described as weak does not mean, without more, that costs ought necessarily be awarded to the successful party."[22] (footnote omitted)

[14] I respectfully adopt and rely upon Williamson KC DCJ's above observations in *Sincere*.

[15] I now turn to Northpoint's submissions. Northport submits there are three main reasons as to why the proceeding was frivolous or vexatious:

(a) First, Northpoint submits that as a result of the interactions between the parties prior to the proceeding being commenced on 22 January 2021, Mr Karagianis was aware that the proceeding in respect of Condition 23 had no reasonable prospects of success;[23]

(b) Second, Northpoint submits that by reason of two 24 June 2021 letters, included in which were further offers to remedy any suggestion of non-compliance with

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19 *Sincere*, [27] citing *Mudie v Gainriver Pty Ltd (No.2)* 2 Qd R [2003] 271, [35], [59] ('*Mudie*'). See also *SDA*, [12]–[13]; *Robertson & Ors v Brisbane City Council & Ors* [2021] QPEC 54, [9]–[15] ('*Robertson*').

20 *Sincere,* [28], [30].

21 [2021] QPEC 54.

22 *Robertson*, [29].

23 Northpoint's Costs Submissions, [25]–[27], [37].

Condition 21 or 23, Mr Karagianis ought to have known that the proceeding was bound to fail;[24] and

(c) Third, Northpoint submits that Mr Karagianis filed a request for subpoena in a proceeding where there is no right to disclosure,[25] and persisted seeking the documents despite notice from Northpoint that the duty of disclosure was not applicable to the proceeding.[26]

[16] In addition, Northpoint also submits that s 60(1)(b) is enlivened because:

(a) by not accepting the offers, Mr Karagianis' own conduct was the cause of the real issue in dispute in the proceeding;[27]

(b) there was found to be no utility in the relief sought in the Originating Application;[28]

(c) there is no evidence that Mr Karagianis suffered loss or prejudice;[29]

(d) Mr Karagianis persisted despite the position of Council, who was the enforcement authority for the Development Approval;[30] and

(e) Mr Karagianis did not keep his position under review throughout the course of the proceeding, and in particular after receiving the two letters on 24 June 2021.[31]

[17] I reject these submissions for the reasons that follow.

[18] Mr Karagianis, during the course of the proceeding, made arguable submissions to the Court. That is, Mr Karagianis' submissions were not "lacking [in] seriousness or sense".[32] For example, Mr Karagianis argued that when construing the Development Approval, the Court ought to have regard to submissions in relation to the Development Application and Council's intention for imposing Conditions 21 and 23.[33] Despite rejecting this submission, the Court was required to consider the relevant principles relating to the construction of development approvals and conditions. Similarly, Mr Karagianis, not unreasonably, argued that there had been a failure by Northpoint to comply with both Conditions 21 and 23.[34] Again, despite rejecting these submissions, the Court was required to construe and interpret each Condition.[35] In this process, the finding was made that Condition 21 required an "offer to grant an easement", and not a "grant of easement".[36] The Court was also required to consider, in

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24 Northpoint's Costs Submissions, [28]–[32], [37].
25 *Riverside Development Pty Ltd v Brisbane City Council & Ors* [2021] QPEC 56, [14] citing *Uniform Civil Procedure Rules 1999* (Qld) r 209(1).
26 Northpoint's Costs Submissions, [33]–[35], [37].
27 Northpoint's Costs Submissions, [39(a)].
28 Northpoint's Costs Submissions, [39(b)].
29 Northpoint's Costs Submissions, [39(c)].
30 Northpoint's Costs Submissions, [39(d)].
31 Northpoint's Costs Submissions, [39(e)].
32 *Sincere*, [27] citing *Mudie*, [59].
33 Reasons for Judgement, [17].
34 Reasons for Judgement, [33], [54].
35 Reasons for Judgement, [38]–[41], [54]–[62].
36 Reasons for Judgement, [38]–[41].

depth, whether or not each letter and offer satisfied the Conditions.[37] Importantly, not all the offers were found to satisfy Condition 21.[38] Further, in my view, it was not axiomatic that Northpoint would be successful in the proceeding once the offers were made because the proper construction of the Conditions was required.

[19] This is to say that although the Originating Application was ultimately dismissed, and the Court found that Northport had made valid offers in compliance with Conditions 21 and 23, the case was not so unreasonable that it could be described as vexatious or frivolous. The Court was required to analyse the merits of Mr Karagianis' case. There is no question that Mr Karagianis' case, especially after the 24 June 2021 offers, was difficult. However, I infer that by amending the Originating Application twice, on 5 March 2021 and 17 February 2022, Mr Karagianis was keeping his position under review. I do not find that the proceeding, or the submissions advanced by Mr Karagianis, was so lacking in merit that it was "bound to fail".[39] Especially considering the "high standard" which is required to satisfy the precondition,[40] in my view, the proceeding was not vexatious or frivolous. I do not find that s 60(1)(b) is established.

Was the proceeding started or conducted primarily for an improper purpose under s 60(1)(a)?

[20] Section 60(1)(a) was recently considered by Cash DCJ in *Heather & Anor v Sunshine Coast Regional Council & Ors (No. 2)*.[41] I respectfully agree with his Honour's analysis:

> "[8] Subsection 60(1)(a) is not as commonly invoked. For this provision to be engaged the court must be satisfied that a party brought or conducted the proceeding for an improper purpose. There is little judicial consideration of the phrase in the context of section 60 of PECA and the parties did not cite any authority directly touching upon this provision. Kent QC DCJ mentioned subsection 60(1)(a) in *Favero v Council of the City of Gold Coast*, but that was only in the context of setting out the submissions of the applicant in that case. An analogy seems to have been drawn to cases concerning an abuse of the process of the court. While his Honour did not expressly endorse this idea, it has, I think, merit. *Williams v Spautz* remains the leading authority on abuse of process where it is alleged the proceeding was brought or maintained for an improper or collateral purpose. What emerges from the decision is that to establish an abuse of process in this sense
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> > the existence of an unworthy or reprehensible motive for bringing the action is not enough and that it must appear that the purpose sought to be effected by the litigant in bringing the proceedings was not within its scope and was improper.
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> [9] The plurality in that case also endorsed a statement to the effect that it is necessary to show that the predominant purpose was to use legal process for some outcome outside the scope of the proceeding.

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37 Reasons for Judgement, [42]–[53], [63]–[113].
38 Reasons for Judgement, [75].
39 *Sincere*, [30].
40 *Sincere*, [28].
41 [2023] QPEC 4 ('*Heather*').

> [10] This application is not concerned with an alleged abuse of process. But some guidance may be found in the consideration of what is an improper purpose when abuse of process is alleged. In my view there is no reason to regard this phrase, where used in subsection 60(1)(a) of PECA, as having some different meaning to that set out above. That view is also consistent with the example provided in the legislation, which speaks of a proceeding started primarily to advance a party's commercial interests by delaying or obstructing another party from taking advantage of a development approval. As such, to engage subsection 60(1)(a), the Moseleys must show that the predominant purpose of the Heathers was to obtain some collateral advantage outside of the purpose for which the legal proceeding was designed."[42] (footnotes omitted)

[21] Northpoint submits that the proceeding was started or conducted for two improper purposes, these being:

(a) to seek a review of Council's decision to grant the Development Approval;[43] and

(b) to attempt to compel Northpoint to grant or offer easements required by Conditions 21 and 23 on more acceptable terms for a commercial benefit.[44]

[22] Northpoint submits that these improper purposes are evidenced by:

(a) Mr Karagianis' attempts to introduce both evidence and issues in the hearing which were not pleaded in the Originating Application;[45] and

(b) Mr Karagianis' statement in correspondence that the *'uncontrolled situation has only come due to BCC's corrupt methodology'* and accused Council of being '*culpable for this mess*'.[46]

[23] I reject these submissions for the reasons that follow.

[24] First, I do not accept that Mr Karagianis' attempts to introduce evidence and issues in the hearing evidences that the proceeding was started or conducted for an improper purpose. This may evidence s 60(1)(e), but it does not evidence s 60(1)(a). I have therefore addressed this point in [26]. Second, Northpoint points to Mr Karagianis' accusatorial statements in correspondence to Council. In my view, this tends to establish that Mr Karagianis was frustrated with Council and the potential of having to commence time consuming and expensive litigation. I do not accept that this evidences that the proceeding was started or conducted for an improper purpose. Mr Karagianis brought the Originating Application to seek declarations under the *PECA* and enforcement orders under the *Planning Act*. This is a purpose within the scope of this Court. I am not satisfied that Mr Karagianis, by seeking these declarations and enforcement orders, was attempting to review Council's decision and/or compel Northpoint to grant or offer easements on more commercially beneficial terms. I am

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42 *Heather*, [8]–[10] citing *Favero v Council of the City of Gold Coast* [2019] QPEC 61, [17]; *Williams v Spautz* (1992) 174 CLR 509, 525.
43 Northpoint's Costs Submissions, [47(a)].
44 Northpoint's Costs Submissions, [47(b)].
45 Northpoint's Costs Submissions, [48(a)].
46 Northpoint's Costs Submissions, [48(b)].

also not satisfied that the proceeding amounts to an "abuse of process".[47] I do not find that s 60(1)(a) is established.

Did Mr Karagianis introduce, or seek to introduce, new material under s 60(1)(e)?

[25] Northpoint submits that s 60(1)(e) is enlivened, that is, Mr Karagianis introduced, or sought to introduce, new material, because he sought to introduce new issues at the hearing, including new and unsworn evidence from the bar table.[48]

[26] It is in the public interest for there to be accountability in decision-making processes, that the conditions of development approvals are complied with, and for self-represented litigants to not be deterred from litigating in this Court because of fear of adverse costs orders.[49] It is true that Mr Karagianis sought to introduce new and unsworn evidence from the bar table. However, when the evidence was objected to, Mr Karagianis acted appropriately and did not persist.[50] As this occurred in the course of the hearing, it did not have the effect of delaying a procedural step. Nor did it delay the proceedings. Northpoint was not required to adduce evidence to address any new evidence. For these reasons, I am not persuaded that this conduct warrants an order for costs.

Did Mr Karagianis default in this Court's procedural requirements under s 60(1)(f)?

[27] Northpoint submits that s 60(1)(f) is enlivened, that is, Mr Karagianis defaulted in this Court's procedural requirements, because he sought disclosure of document which were not relevant to the issues in the proceeding and persisted with disclosure in the face of objections.[51]

[28] I reject this submission for the reasons that follow.

[29] Northport accepted that the Court should proceed on the basis that if it was determined that there was a development offence, it started on or about 3 January 2018.[52] In setting aside the subpoena, I reasoned that "in light of the acceptance by [Northpoint] that if there is a development offence found, it commenced on the 3rd of January 2018, I do not consider the documents to be relevant".[53] Because of this, Northpoint's submissions regarding the subpoena is not clear-cut. The subpoena was set aside on the basis of the acceptance by Northpoint. Therefore, Mr Karagianis was not required to establish the point in time at which Northpoint had the requisite knowledge. I do not find that s 60(1)(f) is established.

Other discretionary factors

[30] I am not persuaded that the general rule is displaced. In any event, included in s 60 is the word "may". The consequence of this is that even if one or more of the matters

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47 *Heather*, [8]–[10].
48 Northpoint's Costs Submissions, [49(a)].
49 *Ferreyra v Brisbane City Council (No. 2)* [2016] QPEC 13, [13].
50 Originating Application Hearing T1-72, l 15.
51 Northpoint's Costs Submissions, [49(b)].
52 Application for Costs Hearing T1-67, ll 1–5.
53 Originating Application Hearing T2-25, ll 14–20.

listed in s 60 were established, the Court may, in the exercise of its discretion, decline to make an order for costs.[54] If the exercise of discretion was required, two factors which I would broadly take into account in that exercise follow.

[31] First, there was a substantial delay in the filing of the Application for Costs. It is uncontroversial that the Application for Costs was filed more than 10 weeks after the Reasons for Judgement were delivered. Counsel for Northport explained that the reason for this delay was because the body corporate was required to pass a resolution to approve the Application for Costs.[55] I do not accept this. There was no evidence to support this explanation.[56] While this explanation may explain some delay, in circumstances where the appeal period for the Originating Application had well and truly expired,[57] a delay of more than 10 weeks is significant, and potentially prejudicial to Mr Karagianis.

[32] Second, Northpoint provided an offer which complied with Condition 21 only after the proceeding had commenced, and once the proceeding was on foot for some period of time. Northpoint first complied with Condition 21 by the letter dated 24 June 2021, this being approximately 5 months after the proceeding was commenced by Mr Karagianis on 22 January 2021.

Discretion to award costs

[33] In my view, no precondition in s 60 is established which would warrant an order for costs, and in combination with the other discretionary factors considered in [31] and [32], I am not satisfied that an order for costs is appropriate in the present circumstances. Nor am I persuaded that there is sufficient cause to depart from the usual course. For these reasons, I dismiss the Application for Costs.

Indemnity costs

[34] As I have declined to make an order for costs, it is unnecessary to address Northport's submissions regarding the award of indemnity costs.

Order

[35] I order that the Application for Costs be dismissed.

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54 *Sincere*, [24], [109]; *SDA*, [10].
55 Application for Costs Hearing T1-8, ll 36–39.
56 Application for Costs Hearing T1-8, ll 43–45.
57 *PECA*, s 64(1).