

SUPREME COURT OF QUEENSLAND

CITATION: *Save Surfers Paradise Inc v Gold Coast City Council* [2018] QSC 214

PARTIES: **SAVE SURFERS PARADISE INC**
(applicant)
v
GOLD COAST CITY COUNCIL
(respondent)

FILE NO/S: SC No 810 of 2018

DIVISION: Trial Division

PROCEEDING: Orders and costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 4 September 2018

DELIVERED AT: Brisbane

HEARING DATE: 16 May 2018, 9 August 2018
Further submissions received: 17 August 2018, 21 August 2018, 24 August, 26 August 2018, 28 August 2018

JUDGE: Boddice J

ORDERS:

- 1. paragraphs 1(a), 1(d) and 1(e) of the originating application filed 23 January 2018 be set aside;**
- 2. pursuant to rule 14 of the Uniform Civil Procedure Rules 1999, paragraphs 1(b) and 1(c) of the applicant's originating application continue as if started by claim;**
- 3. the applicant file and serve a statement of claim in accordance with rule 22 of the Uniform Civil Procedure Rules with 28 days of the date of this order;**
- 4. the applicant pay the respondent's costs of the application filed 1 March 2018 in relation to paragraphs 1(a), 1(d) and 1(e) of the originating application, to be assessed on the standard basis, in any event;**
- 5. the costs of the application filed on 1 March 2018 otherwise be each party's costs in the continuing proceeding.**

CATCHWORDS: LOCAL GOVERNMENT – LEGAL RELATIONSHIPS AND PROCEEDINGS – PROCEDURE RELATING TO LEGAL PROCEEDINGS BY AND AGAINST COUNCILS

– COSTS – where the applicant, a community organisation incorporated as an association under the *Associations Incorporation Act 1981*, opposed the sale of a carpark by the respondent Council – where judgment was made on 9 August 2018 determined the applicant did not have standing to bring proceedings – where the applicant was, however, successful on one ground of its originating application – whether costs should be awarded against the applicant – whether discretion should be exercised to refuse a costs order against the applicant – whether the proceedings brought were in the public interest – whether the successful respondent Council ought incur costs to public funds

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant was successful on only one ground of its originating application – whether costs should follow the event – whether discretion should be exercised in the awarding of costs – whether the proceedings brought were in the public interest – whether the successful respondent Council ought incur costs to public funds – whether each party ought to bear its own costs of and incidental to the application

COUNSEL: D Kelly (of Save Surfers Paradise Inc.) for the applicant
A L Wheatley for the respondent

SOLICITORS: The applicant was self-represented
Clayton Utz for the respondent

[1] **BODDICE J:**

- [2] On 9 August 2018, reasons were delivered in respect of the respondent’s application, filed 1 March 2018, seeking orders that the applicant’s originating application, filed 23 January 2018, be set aside.
- [3] At the time of the delivery of those reasons, the parties were given leave to file written submissions as to the formal orders and costs. The parties have agreed on the form of orders. No agreement has been reached in respect of costs.
- [4] The respondent submits the applicant ought to be ordered to pay its costs of the application, to be assessed. The respondent submits that apart from one aspect of the

applicant's originating application, namely, the misleading and deceptive conduct claim, it was successful in setting aside that originating application. That success represented substantial success as the misleading and deceptive conduct claim did not occupy a substantial amount of the hearing time or of the filed material.

- [5] Further, it has been agreed that that relief ought to proceed as a claim. The respondent submits that relief should not have been sought by way of originating application. Its continuation should not disentitle the respondent from its costs of the application.
- [6] The applicant submits the respondent ought not to be the beneficiary of a costs order in its favour. Instead, the Court ought to order that each party bear its own costs of and incidental to the application, or alternatively, reserve those costs until the final hearing of the applicant's claim.
- [7] The applicant submits the respondent's success on the ground of standing must be viewed in the context of the applicant having applied for the fiat of the Attorney-General and the nature of the relief sought in the originating application, namely, the enforcement of public law obligations rather than private rights. Such a proceeding is in the public interest. Those types of proceedings justify a departure from the general rule that costs follow the event. Further, the applicant submits a positive costs order against the applicant would have the practical consequence of causing financial hardship, thereby preventing access to justice.
- [8] The application to set aside the originating application relied on two bases. First, a lack of standing. Second, that the claimed misleading and deceptive conduct did not occur in trade and commerce. The respondent was completely successful in respect of standing. It failed in respect of the claim for misleading and deceptive conduct on the ground that it was not so clear that the conduct did not arise in trade and commerce so as to justify a grant of relief on the summary basis.
- [9] Whilst the respondent, to that extent, did not excused in its application, the respondent did enjoy substantial success. Most of the material and the hearing time was devoted to the question of standing. That substantial success justifies an order for costs in favour of the respondent, at least in respect of that aspect of the application, unless the

particular circumstances of the case warrant, in the exercise of the Court's discretion, a different order.

- [10] In that respect, it is a relevant factor that the relief sought in the originating application relates to matters pertaining to public rights and obligations, rather than individual private rights. Litigation of that type can found a proper basis for a Court, in the exercise of its discretion, to not impose a costs order on the losing party, particularly if a positive costs order in favour of the successful party works in unfairness in all of the circumstances.¹
- [11] Whilst those matters are relevant considerations, other relevant considerations include that the respondent is an elected City Council whose funds are derived in substantial part from rates and other payments obtained from members of the public in the performance of its statutory obligations. To deprive such a successful respondent of a positive costs order impacts upon the use of those public funds.
- [12] Balancing those competing considerations and having considered all of the circumstances, including the consequences of a positive costs order on the applicant, I am satisfied it is not appropriate, in the exercise of my discretion, to deprive the respondent of the benefit of a positive costs order. However, that costs order should be limited to the costs of and incidental to the application in relation to paragraphs 1(a), 1(d) and 1(e) of the originating application.
- [13] The potential impact upon the applicant as a consequence of the positive costs order can be appropriately ameliorated by having those costs payable at the conclusion of the proceeding.
- [14] Having regard to the basis upon which the balance of the application did not succeed, I am satisfied, in the exercise of my discretion, that the balance of the costs of the application should be each party's costs in the proceeding continued as a claim in accordance with the agreed orders.

[15] I order:

¹ *Ruddock v Vardarlis* (2001) 115 FCR 229 at 235 [13].

- (1) paragraphs 1(a), 1(d) and 1(e) of the originating application filed 23 January 2018 be set aside;
- (2) pursuant to rule 14 of the Uniform Civil Procedure Rules 1999, paragraphs 1(b) and 1(c) of the applicant's originating application continue as if started by claim;
- (3) the applicant file and serve a statement of claim in accordance with rule 22 of the Uniform Civil Procedure Rules with 28 days of the date of this order;
- (4) the applicant pay the respondent's costs of the application filed 1 March 2018 in relation to paragraphs 1(a), 1(d) and 1(e) of the originating application, to be assessed on the standard basis, in any event;
- (5) the costs of the application filed on 1 March 2018 otherwise be each party's costs in the continuing proceeding.