SUPREME COURT OF QUEENSLAND

CITATION:	*Loader v Moreton Bay Regional Council* [2013] QCA 308
PARTIES:	**HEATHER LORRAINE LOADER** (applicant) **v** **MORETON BAY REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 1099 of 2013 P & E Appeal No 237 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act* – Further Order
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	11 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Muir and Fraser JJA and Applegarth J Judgment of the Court
ORDER:	**No order as to costs in the Planning and Environment Court.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the applicant was granted leave to appeal and the appeal was allowed with costs – where the parties were given leave to make submissions as to the appropriate orders concerning costs of the appeal to the Planning and Environment Court – where the applicant submitted that the respondent should pay her costs of the appeal to that court as the proceedings were frivolous or vexatious and the respondent had not properly discharged its responsibilities – where the respondent opposed an order as to costs of that appeal – whether there should be an order as to costs of the appeal to the Planning and Environment Court *Integrated Planning Act* 1997 (Qld), s 4.1.23 *Loader v Moreton Bay Regional Council* [2013] QCA 269, related
COUNSEL:	No appearance by the applicant, the applicant's submissions were heard on the papers No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Butler McDermott Lawyers for the applicant
Thomsons Lawyers for the respondent

[1] **THE COURT:** On 20 September 2013 the Court granted the applicant's application for leave to appeal, allowed the appeal with costs, set aside orders made in the Planning and Environment Court, and instead allowed the appeal to that Court and set aside an enforcement notice issued by the respondent to the appellant under the *Integrated Planning Act* 1997.[1] Leave was granted to the parties to make submissions in accordance with the Practice Direction about the appropriate orders, if any, concerning costs of the appeal to the Planning and Environment Court. The applicant submitted that the respondent should pay her costs of that appeal. The respondent opposed such an order.

[2] It is not in issue that the costs of the appeal to the Planning and Environment Court are regulated by s 4.1.23 of the *Integrated Planning Act* 1997, notwithstanding the repeal of that Act. Subsection (1) provides that "[e]ach party to a proceeding in the court must bear the party's own costs for the proceeding." Subsection (2) sets out a list of circumstances in respect of which "the court may order costs for the proceeding … as it considers appropriate". The paragraphs upon which the applicant relies are (b) ("the court considers the proceeding (or part of the proceeding) to have been frivolous or vexatious") and (i) (a "… local government … does not properly discharge its responsibilities in the proceedings").

[3] The applicant argued that the respondent should have consented to an order setting aside the enforcement notice, rather than relying upon "technical arguments" about the effect of an environmental authority obtaining for the subject use, in circumstances where:

> "(i) the technical arguments were inconsistent with the operation of the subject use;
>
> (ii) the technical arguments were inconsistent with the Respondent's own dealings in respect of the subject use (involving audits and inspections of the entire land on which the subject use had always been conducted, including the slipway);
>
> (iii) the technical arguments relied upon an assumption that the Respondent (through its officers) had negligently discharged its responsibilities in issuing the environmental authority to the Applicant in April 2002;
>
> (iv) the Respondent did not adduce any direct evidence in respect of either the subject use or the circumstances surrounding the original issue of the environmental authority or the amendment of the environmental authority in April 2002;
>
> (v) the technical arguments were first raised by the Respondent more than five years after the issue of the environmental authority to the Applicant in April 2002;
>
> (vi) there was no suggestion that the Respondent would not have expressly made a record of the slipway land on the environmental authority if it had then realized its error;
>
> (vii) the Respondent made no attempt to deal with the effect of the transitional provisions introduced in 2004 and 2005

[1] [2013] QCA 269.

concerning development approvals and existing environmental authorities (after the Applicant had obtained the environmental authority for the subject use, which, on its face, authorized the subject use on both Lot 20 and Lot 1);

(viii) on any basic understanding of the legislation, the raising of such technical arguments was clearly inconsistent with the intent of the legislative regime that existing lawful uses would be protected (both after the introduction of the IPA in 1998 and after the changes to the IPA in 2004 and 2005)."[2]

[4] That argument suggests that the respondent's case in the Planning and Environment Court was and should have been known to be hopeless. That cannot be accepted. This Court accepted the premise of the primary judge's reasons that the environmental authority issued by the respondent to the applicant's predecessor in title in 1996 did not comprehend the land described in the enforcement notice ("Lot 1" or "the slipway land").[3] Whilst the Court found an error of law in relation to the primary judge's findings that the omission to refer to Lot 1 in the 1996 authority was not an error and its inclusion in an authority issued to the applicant in 2002 was a mistake, there was some evidence which favoured those findings[4] and this Court made the contrary findings only after a detailed analysis of extensive evidence.[5] The respondent's arguments about those factual matters in the Planning and Environment Court which the primary judge accepted could not be characterised as unreasonable.

[5] This Court's findings on those issues then informed its conclusion (concerning the effect of the transitional provisions referred to in (vii) of the applicant's argument) that the 2002 authority remained effective as a development approval for Lot 1 despite the issue in 2007 of an amended registration certificate and environmental authority which excluded Lot 1.[6] It was not necessary for the Court to consider the question whether the 2002 authority would have remained effective as a development approval for Lot 1 if the respondent's not unreasonable arguments about the factual matters were accepted.

[6] The arguments on both sides could rightly be described as "technical", but the respondent's conduct in defending the appeal in the Planning and Environment Court should not be characterised as frivolous, vexatious, or a failure properly to discharge its responsibilities. It follows that there should be no order as to costs in the Planning and Environment Court.

---

2 Applicant's submissions on costs, paragraph 3(d).
3 [2013] QCA 269 at [27].
4 [2013] QCA 269 at [25].
5 [2013] QCA 269 at [28] – [38].
6 [2013] QCA 269 at [40].