SUPREME COURT OF QUEENSLAND

CITATION:	*Burke v Minister for State Development, Infrastructure, Local Government and Planning & Anor* [2022] QCA 248
PARTIES:	**PETER THOMAS BURKE** (applicant) **v** **MINISTER FOR STATE DEVELOPMENT, INFRASTRUCTURE, LOCAL GOVERNMENT AND PLANNING** (first respondent) **PACIFIC VIEW FARM (QUEENSLAND) PTY LTD** ACN 114 561 081 (second respondent)
FILE NO/S:	Appeal No 10471 of 2022 P & E Appeal No 787 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2022] QPEC 23 (Williamson KC DCJ)
DELIVERED ON:	6 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2022
JUDGES:	Mullins P
ORDERS:	**1. Application for the protective costs order sought in paragraph 2 of the application for leave to appeal is dismissed.** **2. The applicant must pay the first and second respondents' costs of the application for the protective costs order.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – COSTS – where the applicant was unsuccessful in appealing the first respondent's decision to approve a change application under the *Planning Act 2016* (Qld) submitted by the second respondent – where the applicant applies for leave to appeal from the Planning and Environment Court – where the applicant asserts that he brings the application in the public interest – where the applicant also has an interest as an adjoining landowner – where the applicant seeks a protective costs order that each party to the appeal bear their own costs irrespective of the outcome – whether a protective costs order should be made

Civil Proceedings Act 2011 (Qld), s 15
Planning Act 2016 (Qld), s 78
Planning and Environment Court Act 2016 (Qld), s 59, s 63
Sustainable Planning Act 2009 (Qld), s 242, s 424, s 425
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 766

Bare v Small (2013) 47 VR 255; [2013] VSCA 204, considered
R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600; [2005] EWCA Civ 192, considered

COUNSEL: The applicant appeared on his own behalf
D P O'Brien KC for the first respondent
L V Sheptooha for the second respondent

SOLICITORS: The applicant appeared on his own behalf
G R Cooper, Crown Solicitor for the first respondent
MinterEllison Gold Coast for the second respondent

[1] **MULLINS P:** Mr Burke was unsuccessful in his application before the learned primary judge in challenging the validity of the first respondent's decision to approve a change application under the *Planning Act 2016* (Qld) (the Act) in respect of the development approval for the second respondent's land at Worongary known as Pacific View Estate (the subject land): [2022] QPEC 23 (the reasons). He has applied for leave to appeal to this Court under s 63 of the *Planning and Environment Court Act 2016* (Qld) (PECA) from the primary judge's decision. An appeal to this Court under s 63 of PECA may only be on the ground of error or mistake in law or jurisdictional error.

[2] Mr Burke seeks an order in the terms set out in paragraph 2 of his application to this Court that each party to the appeal bear their own costs whatever the outcome of the appeal, unless one of the parties to the appeal acts frivolously or vexatiously in the conduct of the appeal. Mr Burke's application for that order is opposed by the respondents and was listed for hearing in advance of the listing of the application for leave to appeal. During the hearing of the application, Mr Burke submitted that, if the Court were not inclined to make that order, the Court should make an order imposing a cap on the costs that the respondents could recover from him in the event his application for leave to appeal ultimately did not succeed. He submitted that the cap should be for an amount the Court considered to be reasonable. Mr Burke foreshadowed in his application for leave to appeal that, if a protective costs order were not made in his favour, he would withdraw the application for leave to appeal.

[3] Mr Burke has sworn three affidavits on 1 September, 25 October and 4 November 2022 in connection with his application for leave to appeal (to which I will refer respectively as his first, second and third affidavits) and all were referred to in submissions on the application for the protective costs order.

Relevant facts

[4] Mr Burke is the owner of a one-eighth interest in land containing 33.94 hectares which has a development approval for 17 lots and adjoins the subject land (the

adjoining land). The remaining seven-eighths interest in the adjoining land is ultimately held for the benefit of discretionary trust with numerous potential beneficiaries including Mr Burke. Mr Burke is a director of the company that is the registered owner (and each of the companies in the ownership of shares chain) in respect of the seven-eighths interest.

[5] The second respondent had applied on 24 December 2010 for a preliminary approval for material change of use under s 242 of the *Sustainable Planning Act 2009* (Qld) (SPA) to vary the effect of the Gold Coast Planning Scheme (the planning scheme) in respect of the subject land. The approval was sought for a master planned residential estate with a maximum of 3,500 dwellings delivered in a wide range of housing products for a residential population in the range of 8,000 to 10,000 persons along with retail, commercial and industrial uses. The Minister administering the SPA exercised the power in s 424 and s 425 of the SPA to call in the application on 17 December 2014.

[6] The development approval granted in March 2015 for the subject land by the Minister had the effect of varying the planning scheme. The development approval incorporates by express reference the SkyRidge Development Code (the Code) which identifies how the development approval varies the effect of the planning scheme. The development approval facilitates the staged development of 324 hectares.

[7] The Code divides the land into eight precincts. On 6 October 2021 the second respondent applied to the Minister under s 78 of the Act to change the approval by amending the Code by altering the code assessable density for the land designated in the Code as RDpve2 (which applies to precinct 7 and part of precinct 6) from "one dwelling/700m^2 nett site area (up to 14.3 dwellings per/nett Ha)" to "one dwelling/500m^2 net residential density (up to 20 dwelling per/net Ha)". The change sought was characterised in the application as a "minor change" which is a defined term in schedule 2 to the Act. The application identified the Minister as the responsible entity for the change application. The relevance of the change is explained by the primary judge at [19]-[20] of the reasons. In summary, the yield plan for stages 1-9 of the second respondent's development showed that the approved code assessable development yield under the development approval was in the order of 2,922 dwellings which was below the 3,500 dwellings referred to in the decision notice for the development approval. The change involved an increase in 493 dwellings that would still be within the existing 3,500 dwellings cap under the development approval.

[8] As the application was seeking a minor change, Mr Burke had not been notified of the application. He became aware of it, before it was approved, and made a written submission to the Minister dated 28 November 2021. The gist of the submission was that the change application should be used by the Minister as an opportunity to review the current approval and "its PVE Indicative Road Network plan". The complaint was made that the current approval failed to provide a satisfactory network of streets that connect the subject land to the suburbs it adjoins, does not have necessary appropriate external connections, and does not facilitate connections for future development. On 31 December 2021 the Minister made the decision to approve the change application. Mr Burke applied to the Minister for a statement of reasons which were provided on 14 February 2022. The Minister set out in the statement of reasons that, having regard to the material with which the Minister was

briefed, the Minister was satisfied that the proposed change application met the statutory requirements and the proposed change was a minor change. The Minister set out in paragraph 2.8 of the statement of reasons that in assessing the change application, he had regard to the information included with the application, the Department's summary of the affected entity responses from the Council, Powerlink and Energex and other matters the Minister considered relevant pursuant paragraphs (d) and (e) of s 81(2) and s 105 of the Act. In setting out the reasons in paragraph 2.9 for why the Minister decided to approve the change application, the Minister noted that the proposed change may facilitate approximately 500 additional dwellings on the site and assist in achieving the original intended yield of 3,500 dwellings for the site and was not considered to alter the development materially, result in new or increased impacts or require changes to infrastructure provision.

[9] Mr Burke then commenced the proceeding in the Planning and Environment Court to challenge the Minister's decision on the grounds, first, the Minister failed to take into account mandatory considerations (which were set out at [43] of the reasons) and, second, the Minister's decision was legally unreasonable. Both grounds were unsuccessful before the primary judge. In respect of the first ground, the primary judge disposed of the "mandatory" considerations put forward by Mr Burke at [53]-[55], [60]-[62], [64], [68], [74] and [78] of the reasons. The primary judge disposed of the second ground at [81]-[82] of the reasons.

Jurisdiction to make a protective costs order

[10] The respondents urge the Court to exercise its discretion against making a protective costs order. The respondents' submissions proceed on the assumption that this Court has jurisdiction in an appropriate case to make a protective costs order. The current source of the jurisdiction of the Supreme Court to award costs is s 15 of the *Civil Proceedings Act 2011* (Qld) (CPA) which provides that a court may award costs in all proceedings unless otherwise provided. Rule 681 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that the costs of a proceeding, including an application in a proceeding, are in the discretion of the Court but follow the event unless the Court otherwise orders or the *UCPR* provides otherwise. Rule 766(1)(d) of the *UCPR* confers a wide discretion on the Court of Appeal to make an order as to the whole or part of the costs of an appeal. It is therefore convenient to proceed on the assumption that there is jurisdiction to make a protective costs order in the absence of an express statutory provision, such as s 49(1)(e) of the *Judicial Review Act 1991* (Qld).

[11] The relevant considerations for making a protective costs order were considered in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 where s 51 of the *Supreme Court Act 1981* (UK) conferred a similar jurisdiction to that found in s 15 of the CPA to award costs in the discretion of the Court, subject to the provisions of any Act or the Rules. It was noted (at [68]) that the Secretary of State conceded there was nothing in s 51 of the *Supreme Court Act 1981* or the relevant rule that precluded the Court from making a protective costs order as to costs that affected the parties to the case and that it considered necessary in the interests of justice.

[12] The Court in *Corner House Research* noted (at [72]) that the jurisdiction to make a protective costs order should be exercised in only the most exceptional

circumstances and set out (at [74]) the governing principles for making a protective costs order, referred to as a "PCO", as follows:

> "(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

[13] In *Bare v Small* (2013) 47 VR 255, the Victorian Court of Appeal was concerned with an application for a protective costs order for an appeal by Mr Bare on a question of law which the Court considered was of public importance where an adverse costs order would make Mr Bare bankrupt. Section 65C(1) of the *Civil Procedure Act 2010* (Vic) specifically provided that a court may make any order as to costs it considers appropriate to further the overarching purpose and, without limiting subsection (1), s 65C(2)(d) provided that the order may fix or cap recoverable costs in advance. The overarching purpose of the Act set out in s 7 of the same Act is "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute". (The latter provision is similar to r 5(1) of the *UCPR*.) The fact that the Victorian Act has a specific provision on the Court's power to fix or cap recoverable costs in advance does not preclude *Bare v Small* being of some assistance in identifying factors relevant to the exercise of the general discretion in relation to costs under s 15 of the CPA in making a protective costs order. The Court in *Bare v Small* referred to factors relevant to the exercise of the discretion to make a protective costs order considered in other Australian cases and noted (at [29]) the particular relevance of an applicant's ability to pay costs.

[14] Neither *Corner House Research* nor *Bare v Small* bind this Court on the manner in which it should exercise its discretion in considering whether to make a protective costs order. Those decisions and the other decisions referred in *Bare v Small* are useful in suggesting relevant considerations in exercising the Court's power to make an order in the nature of that sought by Mr Burke.

Should the discretion to make a protective costs order be exercised in Mr Burke's favour?

[15] Without being prescriptive as to what factors will always be relevant to the making of a protective costs order, the authorities referred to above indicate that inability for an applicant to pay the costs of the other parties, if the applicant fails in the appeal,

and whether the appeal involves a matter of public importance should be considered.

[16] Mr Burke describes his occupation as project manager in each of his three affidavits. In paragraph 1 of his second affidavit, he referred to working in the property development industry for over 30 years. He gives no details of his current employment or income. Mr Burke accepted in paragraph 44 of his first affidavit that he was "a person of some means". The respondents' outlines for the purpose of the application for a protective costs order were filed on 2 November 2022 in advance of the hearing of the application. On the same date the second respondent filed an affidavit to which were exhibited the title search for the adjoining land and the company search for each of the companies connected to the seven-eighths interest in the adjoining land. Mr Burke was on notice that both respondents were relying on the fact that he had not detailed his financial position. His response in his third affidavit was to detail the ownership of the adjoining land that had already been outlined in the second respondent's solicitor's affidavit without providing any evidence of market value of the adjoining land and to accept in paragraph 6 of that affidavit that he is "a person of some but not significant financial means".

[17] When it was pointed out to Mr Burke during the hearing of this application that he had not disclosed his financial position, he asserted that the only asset he owned was his one-eighth interest in the adjoining land and asserted that the adjoining land was valued at $2.242m on the Queensland Globe website, so his entitlement was $310,000, and he also was a potential beneficiary of the remaining seven-eighths interest, but as a director of the corporate trustee, he had obligations to all beneficiaries of the discretionary trust. This assertion of value was given in a vacuum without any indication of how the value was affected by the development approval applying to the adjoining land and the anticipated progress of the development on the adjoining land. A party who seeks a protective costs order is seeking an advantage in the conduct of litigation which is not usually afforded to a party. It is for the party who seeks such an advantage to make full disclosure to the Court of information relevant to the exercise of the discretion to make a protective costs order.

[18] One of the inherent controls for regulating the volume of civil litigation in courts is the prospect that the losing party is at risk of paying the costs of the other parties. It assists in ensuring that the finite resources of the courts are not abused by those who on a whim pursue a matter which may have little prospect of success. In most jurisdictions, the interests of justice are served in civil litigation by an order that costs usually follow the event. One exception is public interest litigation. That is consistent with the approach in *Corner House Research* that specifies a condition for making a protective costs order that the issues raised are of general importance, the public interest requires those issues to be resolved and the applicant has no private interest in the outcome of the case.

[19] Mr Burke's affidavits and submissions (both written and oral) repeatedly asserted that he was bringing this application for leave to appeal in the public interest. His perspective on his motives can be discerned from paragraph 36 of his third affidavit:

> "Despite acknowledging my interest as an adjoining landowner, I have no doubt I am undertaking my appeal in the public interest as there will be significant adverse impacts on the community caused

> by SkyRidge without changes being made to the connections and significant upgrades to the transport network that will service the site and an attendant reconsideration of the conditions currently imposed on that development."

[20] I have no doubt that Mr Burke believes that he is acting only in the public interest. Viewed objectively, however, that is not the case, as his substantial complaint in the submission to the Minister was about the traffic plan for the subject land which affected the adjoining land. As he acknowledges in paragraph 34 of his amended outline of argument "he also has a personal interest in the matter due to the lack of access".

[21] It is not irrelevant that Mr Burke's application to the Planning and Environment Court was made to a jurisdiction where generally, in accordance with s 59 of PECA, each party bears the party's own costs for the proceeding and that statutory constraint does not apply to the application for leave to appeal to this Court from the decision of the Planning and Environment Court.

[22] It is not necessary to embark on a consideration of Mr Burke's prospects of succeeding with his application for leave to appeal, in order to dispose of his application for a protective costs order. It is of note, though, that at least two of his reasons for justifying the grant of leave set out in his application for leave to appeal put in issue the statutory framework pursuant to which the Minister made the decision to approve the change application which is not the purpose of an appeal against the primary judge's decision.

[23] On the basis that Mr Burke has not made full disclosure to the Court relative to his financial position and that his pursuit of the application may benefit his private interest, in addition to the public interest which he believes he is pursuing, it is not appropriate to exercise the discretion in favour of making a protective costs order in any form in favour of Mr Burke.

Orders

[24] Both respondents sought an order for costs against Mr Burke, if he did not succeed in obtaining the protective costs order. Mr Burke submitted that it was "manifestly unfair" for him to be ordered to pay the respondents' costs, when he applied for leave to appeal in the public interest. The reasons for which he has not succeeded on his application for a protective costs order also are relevant to the exercise of the discretion in relation to the costs of the application.

[25] There is no reason therefore why costs should not follow the event. The orders are:

1. Application for the protective costs order sought in paragraph 2 of the application for leave to appeal is dismissed.

2. The applicant must pay the first and second respondents' costs of the application for the protective costs order.