PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Regional Council v Gavin & Anor (No. 2)* [2021] QPEC 2
PARTIES:	**SUNSHINE COAST REGIONAL COUNCIL** (applicant) **v** **MICHAEL IVAN GAVIN** (first respondent) **JDL INVESTMENTS PTY LTD (ACN 611 912 808)** (second respondent)
FILE NO/S:	D125/2019
DIVISION:	Planning and Environment
PROCEEDING:	Application
DELIVERED ON:	12 February 2021
DELIVERED AT:	Gympie
HEARING DATE:	Written submissions received on 14 January 2021, 15 January 2021, 5 February 2021, 8 February 2021
JUDGE:	Cash QC DCJ
ORDERS:	**Orders as appear at paragraph [43] of the judgement**
CATCHWORDS:	ENVIRONMENT AND PLANNING – BUILDING CONTROL – OTHER MATTERS – where the first and second respondents constructed a building and used it as an 'accommodation building' in a zone where this use was not permitted – where respondents accepted they had committed development offences – what enforcements orders are appropriate to secure compliance with the legislative scheme ENVIRONMENT AND PLANNING – OTHER MATTERS – STAY OF ORDERS – where enforcement orders to be made requiring building works to be carried out – where respondents have commenced proceedings in the Court of Appeal – where respondents seek a stay of the orders – whether prejudice to applicant or respondent ENVIRONMENT AND PLANNING – OTHER MATTERS – COSTS – where application for enforcement orders – jurisdiction to award costs – where applicant largely successful – whether respondents should only pay a part of the applicant's costs – whether applicant should have its costs

of briefing senior and junior counsel

LEGISLATION:	*Planning Act* 2016 (Qld), s 180 *Planning and Environment Court Act* 2016 (Qld), s 58, s 59, s 61(1), s 63 *Planning and Environment Court Rules* 2018 (Qld), r 4 *Uniform Civil Procedure Rules* 1999 (Qld), r 680, r 686, r 687, r 702, r 742
CASES:	*Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Anor (No.2)* [2018] QPEC 59; [2019] QPELR 379 *Cook's Construction Pty Ltd v Stork Food Systems Aust Pty Ltd* [2008] 2 Qd R 453, [12] *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No.2)* [2019] QPEC 26; [2019] QPELR 949, [7]-[10] *Hobbs & Anor v Oildrive (No 2)* [2008] QSC 52, [4]-[5] *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26, [84] *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [64]-[66] *Stanley v Phillips* (1966) 115 CLR 470, 478-9 *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors (No 2)* [2020] QSC 174 [2020] 26 QLR, [15]
COUNSEL:	R J Anderson QC with G Barr for the applicant M J McDermott for the respondents
SOLICITORS:	Heiner and Doyle for the applicant Andrew Davis Planning Lawyers for the respondents

Introduction

[1] On 18 December 2020 I published reasons and made some orders in these proceedings.[1] The proceedings were commenced by the Sunshine Coast Regional Council in relation to a building at Birtinya constructed by the respondents on land owned by the second respondent. The first respondent is a director of the second respondent. As I explained in my reasons, the respondents accepted they had each committed development offences contrary to sections 162 and 165 of the *Planning Act* 2016 (Qld) (PA). The respondents also conceded that enforcement orders of some kind should be made pursuant to section 180 of the PA. On 18 December 2020 I made some enforcement orders and also set out in draft other orders I proposed to make. I allowed the parties until 15 January 2021 to submit, if they wished, draft orders to better reflect my intentions as explained in the decision. I also allowed the parties the opportunity to make submissions as to costs.

[2] Other events have occurred in the meantime. On 14 January 2021 the respondents filed in the Court or Appeal a notice of their intention to seek leave to appeal against my decision. The respondents have also filed an application in pending proceedings seeking a stay of any orders I would make requiring changes to be made to the

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1 *Sunshine Coast Regional Council v Gavin and Anor* [2020] QPEC 63.

building until the finalisation of the proceedings in the Court of Appeal. As a result there are three matters left to resolve:

(a) What form should the final orders take?

(b) Should the final orders be stayed pending proceedings in the Court of Appeal? and

(c) What costs orders should be made?

Final orders

[3] It is convenient to commence with the question of what form the final orders should take. I have already made orders restraining them from using the building other than as a dwelling house, and from letting or advertising for lease individual rooms, apartments or levels.[2] I have also made an order that attached to the premises limiting its use to that of a dwelling house. The orders I proposed in my decision were directed towards alterations to the building intended to make it less attractive for use as an accommodation building.[3] To this end I set out proposed orders 5, 6 and 7 in paragraph [56] of my decision. Both the Council and the respondents have taken the opportunity to suggest changes to these proposed orders. I will deal with the suggestions as they relate to each proposed order.

[4] Proposed orders 5(a) and (b) require the removal of the doors that sealed off the stairwell from each level of the house. They would also prohibit reinstalling doors in these locations. The respondents do not suggest any change to these orders. The Council suggests that I should include words in the order that would require the removal of the door frames as well as the door. It might be thought the amendment is intended to make it less likely a door will be reinstalled. Removing the door frame would make that harder, but not significantly harder. A person who was minded to ignore the prohibition on reinstalling the doors is unlikely to be stopped by a need to reinstall timber work for a door frame as well. I do not consider the amendment proposed by the Council is necessary.

[5] Proposed order 5(c) is directed toward replacing all solid core internal doors with what I called ‘cavity doors’. The term I should have used was ‘hollow core doors’. A cavity door is something else. I will change the terms of the proposed order to correct my error. The Council do not suggest changes to this order. The respondents suggest amendment to clarify that the order does not require changes to the external entrance door or the door between the garage and the rest of the house. These doors are identified as D102 and D108 on the architectural plans. It is appropriate to make these changes.

[6] No party suggests changes to proposed order 5(d) which is concerned with the removal of keyed door locks.

[7] Proposed orders 5(e) and (f) are concerned with removing and not using the ‘kitchens’ on the first and second floor. The respondents suggest that I identify fixtures that are to be removed in each area, rather than a general requirement to remove the kitchen and decommission plumbing. Their proposed orders would require the removal of cooktops, ovens, range hoods, sinks, taps and plumbing. The Council adopts a similar approach but takes it further, identifying specific fixtures

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2 *Ibid*, [53]-[56].

3 *Ibid*, [51]-[52].

and appliances to be removed and not reinstalled in addition to the general obligation. I prefer the approach of the respondents and will amend these orders accordingly.

[8] Proposed order 5(g) relates to privacy screens on balconies to the first floor. My concern was to remove structures that had the effect of separating the balconies of individual bedrooms, creating a sense of individual units or hotel rooms. I did not intend for the removal of the screen located where there is a change in elevation of the balcony, or to prohibit screens that might be fixed to the rails at the ends of the balconies to provide privacy from neighbouring properties. The Council and the respondents both propose changes to better reflect this intention. Upon reconsidering the evidence it seems there is only one screen that should be removed. That is the screen that splits the balcony which runs between the room marked 'Child Bed 4' and the room marked 'Multi-purpose Room' in the north-west corner of the building. I will adopt the order proposed by the respondents as it reflects my intention, and add a requirement that a screen not be reinstalled.

[9] Proposed order 5(h) relates to areas on the balconies of the first and second floors that were able to be used as laundries. My intention was to prevent this use by requiring the removal of tubs and decommissioning of plumbing. The Council and respondents each propose relatively minor changes to the proposed order. The Council seeks to retain the general prohibition but to add a list of specific items that are to be removed and not installed. The respondents wish to remove reference to 'basins or other facilities' and to allow plumbing for floor wastes to remain. Upon reflection, the words of my proposed order could have been clearer. The reference to 'basins and other facilities' should be qualified by a reference to laundry. That will make clear that the respondents are to remove any laundry tubs, laundry basins, or other laundry facilities. It is appropriate to allow the respondents to retain floor waste plumbing.

[10] Orders 5(i) and (j) require the removal of the water and electricity meters that allowed metering of individual bedrooms. No party suggested changes to these orders.

[11] I had proposed that the works required by order 5 were to be carried out within 30 days of the order being made. The respondents suggest that 60 days should be allowed. The building works required by the orders are not extensive. It would seem to require the services of an electrician and a plumber, and perhaps a carpenter. The respondents have been on notice since 18 December 2020 of the kind of work to be carried out, and my intention that it be completed within 30 days of final orders. On the other hand, it may be that securing the services of qualified tradespeople at the moment is a little more difficult than usual. Instead of 30 days I will allow 45 days within which to complete the works.

Should there be a stay of the orders?

[12] The respondents ask for an order that would stay orders 5, 6 and 7 until 10 business days after the finalisation of the appeal proceedings. The stay would be conditional upon the respondents undertaking not to sell, agree to sell or transfer ownership of the land. This undertaking was offered by the respondents in the affidavit of the first respondent filed on 3 February 2021.[4] The Council opposes the application for a stay

[4] Court Document 57.

but says if one is to be granted it should be conditional upon undertakings to not sell or lease the premises.

[13] The principles underlying an application for a stay of orders were consider by R Jones DCJ in *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No.2)* [2019] QPEC 26; [2019] QPELR 949. I respectfully agree with, and adopt, his Honour's reasons and summary of the principles at [7]-[10] of the decision. In particular his Honour observed:

> (i) Prima facie, the successful party in litigation should not be denied the fruits of its judgment;
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> (ii) While it is no longer necessary to establish special or exceptional circumstances to warrant a stay, some particular feature about the case which would warrant departure from the prima facie position must be established;
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> (iii) Typically, such features would require consideration of:
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> > (a) An analysis of the prospects of a successful appeal (or leave to appeal being granted);
> >
> > (b) Whether a refusal of the stay would render the appeal nugatory;
> >
> > (c) The prospect of remedial harm to the applicant if the stay is refused but the appeal ultimately successful.

[14] It is convenient to commence with the second matter. The orders in issue would require the respondents to carry out building work. None of it is of a kind that could not be undone if the appeal was successful and the orders set aside. Contrary to a submission of the respondents, there is nothing that would make success in the appeal ineffectual. This is an important consideration. As Keane JA stated in *Cook's Construction Pty Ltd v Stork Food Systems Aust Pty Ltd*:[5]

> Generally speaking, courts should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending appeal is to ensure that the orders which might ultimately be made by the courts are fully effective: the power to grant a stay should not be exercised merely because immediate compliance with orders of the court is inconvenient for the party which has been unsuccessful in the litigation.

[15] Where, as here, there is no danger that a successful appeal would be rendered nugatory or futile in the absence of a stay, this 'fundamental justification' for a stay is absent. That is not to suggest a stay cannot be granted unless possible futility has been demonstrated. But an applicant seeking a stay based only upon claims the appeal will succeed and the identification of some prejudice faces a more difficult task than an applicant who can demonstrate a risk of the appeal being rendered meaningless in the absence of a stay.

[16] The point the respondents were seeking to make was perhaps better directed to the third consideration: whether, and to what extent, any party would suffer prejudice as a result of the making, or refusal, of an order for a stay. The respondents would say that if the orders are not stayed, but they succeed in the appeal, they will have been put to unnecessary expense in carrying out the works. The respondents have not attempted to quantify this expense. Instead they gesture in the direction of an

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5 [2008] 2 Qd R 453, [12].

itemised list of costs in evidence at the hearing[6] and which dealt with a long list of possible building work initially sought by the Council. As best as I can determine on this material the cost of the works may be $10,000 to $20,000. But even without a precise assessment of the potential cost, it may be accepted that the respondents would suffer financially if they carry out the works but succeed in the appeal. This is a relevant consideration to take into account.

[17] The Council does not identify any significant prejudice it might suffer if the stay were granted. They worry that there will be difficulties enforcing the orders later, and that the Council might have to deal with complaints from neighbours in the meantime, but these are not weighty matters. The matter that might principally concern the Council – the prospect of the land being sold and the Council having to commence proceedings against a new owner – is addressed by the respondents' undertakings.

[18] The third matter to consider is an assessment of the prospects of a successful appeal. The respondents have not assisted in this regard. They submit they 'will not be drawn into making submissions about prospects of success in circumstances where this application is made to the primary judge'.[7] An analysis of the prospects calls for an examination of the merits of the application for leave and the proposed appeal, at least in the sense that it must be apparent after a preliminary assessment that the appeal is arguable and its prospects are not hopeless.[8] There is no appeal by right from a decision of the Planning and Environment Court. An appeal can only proceed with the leave of the Court of Appeal and only 'on the ground of error or mistake in law or jurisdictional error'.[9]

[19] The application for leave to appeal and the proposed grounds of appeal are referred to in material filed by the respondents.[10] They do not identify technical legal points in a way that would be readily cognisable as an error of law or jurisdiction. They do not seem to raise any questions of construction or legal principle concerning matters that were in dispute in the hearing before me. The main complaint appears to be that the Court exceeded its power in ordering that the building must only be used as a dwelling house unless there is an effective development permit authorising a change of use. In the absence of argument it is difficult to make any real assessment of the prospects of this complaint. It is relevant, however, to note that this qualification to the orders was an obvious concession to allow for changing circumstances. If not for that qualification the orders would, unless they were set aside, permanently limit the use of the land to use as a dwelling house.

[20] On the material before me, I do not think the proceedings in the Court of Appeal have promising prospects. The appeal faces the hurdles of the need for leave and the limited jurisdiction to entertain an appeal from the Planning and Environment Court. Carrying out the orders may cause some financial detriment to the respondents, but it would not render the appeal nugatory. In the circumstances, and having regard to the important principle that a judgement given after trial should not be treated as merely provisional, I decline to stay the orders that would require the respondents to carry out building works.

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6 Affidavit of Rodney Neil Took, filed 17 April 2020, Court Document 33.
7 Respondents' submissions dated 5 February 2021, received 8 February 2021.
8 *Croney v Nand* [1999] Qd R 342, 349 [38]; *Drew v Makita (Australia) Pty Ltd* [2008] QCA 312.
9 Section 63, PECA.
10 Affidavit of Andrew Craig Davis, filed 15 January 2021, Court Document 53.

[21] One other matter that I would note is that the respondents have recently entered into an agreement to lease the whole building to a group of tenants who are said to constitute a single family group. The respondents have not suggested this is a relevant consideration in deciding the application for a stay of orders.

Costs

[22] The Council seeks fixed costs of $21,666.51 as the costs of the investigation. They also ask for their costs of the proceedings on the standard basis, including the cost of briefing senior and junior council. The respondents agree they should pay the amount claimed by the Council as its costs of the investigation. The respondents also agree they should pay the Council's costs of the proceedings but say, because of the relative success of the parties, they should only pay 80 to 90% of the costs. They also resist the Court certifying or directing that it was appropriate for the Council to brief senior and junior counsel. It is appropriate to commence with a consideration of the power of this Court to award costs.

[23] The power to award costs is found in the *Planning and Environment Court Act* 2016 (Qld) (PECA). The general provision in PECA is for parties to a Planning and Environment Court proceeding to bear their own costs.[11] An exception exists where, in an enforcement proceeding like the present, the court makes an enforcement order against a person. In such cases the court may also award costs against the person.[12] Such costs may include the costs that the other party reasonably incurred in investigating or gathering evidence for the offence.[13] It follows from this that PECA confers a discretion to order costs. The discretion is not constrained by express words in the legislation, nor are costs addressed in the *Planning and Environment Court Rules* 2018 (Qld).[14] Where these rules are silent as to a matter, rule 4 operates to pick up and apply, with necessary changes, the rules that would apply in the District Court. The rules that would apply to the award and assessment of costs in the District Court are those found in the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR'). It follows that the rules of the UCPR dealing with costs, changed to the extent necessary to reflect the nature of these proceedings and of the Planning and Environment Court, govern the question of costs. It will be necessary to return to the significance of the application of the UCPR to the assessment of costs when dealing with the Council's submission that I should 'certify' that it was appropriate to brief senior and junior counsel in this matter.

[24] So far as the award of costs is concerned the discretion to be exercised is a familiar one. It is to be exercised judicially and in accordance with well-established principles.[15] The relevant considerations include:

(a) the discretion is to be exercised consistent with the subject matter, scope and purpose of the legislation;[16]

(b) the discretion is to be exercised without any presumption that costs should follow the event;[17]

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11 Section 59, PECA.
12 Section 61, PECA.
13 Section 58, PECA.
14 The making of rules is authorised by section 13 of PECA.
15 *Caravan Parks Association of Queensland v Rockhampton Regional Council & Anor (No. 2)* [2018] QPEC 59; [2019] QPELR 37, [8].
16 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 81 [21].
17 *Ko v Brisbane City Council (No. 2)* [2018] QPEC 49; [2019] QPELR 197 [33].

(c) the discretion is to be exercised without any presumption there is qualified protection against an adverse costs order;[18] and

(d) the primary purpose of an award of costs is to indemnify the successful party, and not to punish an unsuccessful party.[19]

[25] It is in this context that the disputed issues between the parties are to be resolved. As noted above, the respondents agree they should pay $21,666.51 as the costs of the investigation. The issues in dispute are whether they should only pay part of the Council's costs of the proceedings and whether I should 'certify' that it was appropriate for the Council to brief senior and junior counsel.

Partial award of costs

[26] The argument of the respondents is that while the council largely succeeded, they did not persuade me to make enforcement orders as extensive as those sought by the Council. As I explained in my decision of 18 December 2020, I did not think the substantial structural alterations or conditional entry order proposed by the Council were appropriate and I declined to make orders of this kind.[20] Based upon this, the respondents submit that the Council was only partially successful in the proceedings and that they should pay only 80 to 90% of the Council's costs.

[27] The respondents' argument overlooks at least two significant matters. The first is the extent to which the respondents contested the Council's application and its effect upon the scope of the litigation. Both respondents denied they had committed development offences until shortly before the hearing. In the case of the first respondent, he denied liability until closing submissions.[21] The respondents also contested more than just the orders I decided were not appropriate. They resisted practically all of the orders I intend to make, with the exception of the removal of water submeters. The late concessions of the respondents did little to reduce the scope of the proceedings. While two engineers testified in relation to matters that were principally directed toward the structural work proposed by the Council, this was not the main focus of the proceedings.

[28] The second matter is that the respondents adopt an approach that seeks to identify discrete issues in the proceedings and apportion costs according to the relative success of each party. Such an approach may at times be permissible but is not to be encouraged.[22] Failure on a particular issue does not mean that a party should be deprived of some of its costs. One factor relevant to deciding if an issues-based approach should be taken as to costs is whether an issue was clearly dominant or separable in the proceedings.[23] The question of the more substantial structural changes sought by the Council was not the dominant issue in the proceedings. It was part of the respondents' overall opposition to enforcement orders that would require changes to the building. It is also relevant that the Council were not unjustified in seeking substantial structural changes. As I have stated, there was much in the conduct of the first respondent to suggest strong terms would be necessary to ensure

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18 *Ko v Brisbane City Council (No. 2)* [2018] QPEC 49; [2019] QPELR 197 [33].
19 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [67].
20 [2020] QPEC 63, [46] – [47].
21 *Ibid*, [2].
22 *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26, [84]; *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors (No 2)* [2020] QSC 174 [2020] 26 QLR, [15].
23 *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15, [64]-[66].

compliance with the PA.[24] The Council's failure on this issue was the result of my conclusion that the partial demolition and remodelling of a building that was not itself constructed contrary to planning requirements was not appropriate to secure compliance. The fact that I came to a different conclusion on an issue that was not unreasonably raised should not deprive the Council of part of its costs.

[29] In these circumstances the respondents should pay all of the Council's costs of the proceedings on the standard basis.

Costs of briefing two counsel

[30] The council asks for 'certification that the retainer of two counsel was appropriate with the costs of the same to be included in the applicant's standard costs'.[25] The written submissions of the parties focus on the merits of the Council's request without addressing its legal basis. Before deciding whether an order of this kind should be made, it is necessary to consider whether it could be made.

[31] The notion of certifying for counsel has its origins in long superseded rules of court.[26] Before the commencement of the UCPR, the *District Court Rules*, in its Schedule of Scales of Fee and Costs, provided that in some cases:

> 85. Where more than one Counsel is employed for a party and the Judge certifies that such employment was reasonably necessary, having regard to the difficulty or importance of the case the fee of the senior of the Counsel is to be a fee not exceeding the appropriate fee for the relevant item in this Schedule increased by 50%, and the fee of the other Counsel is not to exceed two thirds of the fee allowed to the senior Counsel.

[32] Under the old rules it was for a party to persuade a Judge to certify that the case justified two counsel in order for the costs of counsel to be allowed in a higher amount than the scale. There is no equivalent provision in the UCPR or its schedules.[27]

[33] Part 2 of Chapter 17A of the UCPR deals with costs. Rule 680 provides that a party 'can not recover any costs of the proceeding from another party other than under these rules or an order of the court' (my underlining). Under the current rules, if an order for costs is made, they may be assessed without an order for assessment having been made.[28] The assessor must assess the costs on the standard basis unless 'an order of the court provides otherwise'.[29] If no such order is made the assessor 'must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed'.[30] In the usual case, it would be for the assessor to determine if the costs of senior and junior counsel should be allowed under this rule. A party dissatisfied with the decision could apply to the Court for it to be reviewed.[31]

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24 [2020] QPEC 63, [43].

25 Applicant's written submissions on costs, filed 15 January 2021, at [11].

26 *Hobbs & Anor v Oildrive (No 2)* [2008] QSC 52, [4]-[5].

27 The Scale of Costs for Magistrates Court proceedings of up to $50,000 in Schedule 2, Part 2 of the UCPR contains the only current reference to certification for counsel. It provides amounts to be allowed for counsel's fees on the second and subsequent days of a hearing if 'the appearance is certified for by the court'.

28 Rule 686, UCPR.

29 Rule 702,(1), UCPR.

30 Rule 702(2), UCPR.

31 Rule 742, UCPR.

[34] There remains, however, substantial flexibility in the rules permitting the Court to order a different approach to costs. Rule 687 allows the Court to award costs on a basis other than costs to be assessed. The relevant part of the rule (with my underlining) is set out below:

> (2) However, instead of assessed costs, the court may order a party to pay to another party—
> (a) a specified part or percentage of assessed costs; or
> (b) assessed costs to or from a specified stage of the proceeding; or
> (c) an amount for costs fixed by the court; or
> (d) an amount for costs to be decided in the way the court directs.

[35] In a similar vein, rules 680 and 702 make allowance for an order for costs that diverges from the usual process under the UCPR. There is scope in the rules for an order that has the effect of indicating the assessor is to allow the costs of two counsel in a matter. Such an approach has been adopted on at least three occasions in the Supreme Court.[32] In each instance an order was made that 'the assessment of … costs be made on the basis that, except so far as they are of an unreasonable amount, the fees of senior counsel and junior counsel should be regarded as costs necessary and proper.' An order of this kind would have rule 687(2)(d) as the source of its authority.

[36] In my view this Court has the authority to make an order that would have the effect of 'certifying' for two counsel. The next question is whether such an order is appropriate in this case.

[37] Both the Council and the respondents point to the principle stated by Barwick CJ in *Stanley v Phillips*.[33] The Chief Justice considered that the question to be answered is whether the nature and circumstances of the case were such that the services of two counsel was reasonably necessary. The Council points to the volume and complexity of the material, noting that it was not until very late in the proceedings that concessions were made by the respondents that permitted a more efficient disposition of the matter. The material included many affidavits and a large number of planning documents that governed the use of the land. The Council submits that the litigation was important as it sought to resolve an issue about the use of land in a heavily regulated master planned area where the respondents' use was said to have detrimental impact upon amenity in the neighbourhood.

[38] For the respondents it is said that matter did not involve complex or difficult questions of law, there was a 'limited' volume of material, and when the case was presented in court it was done so efficiently, taking only three of the allotted four days.

[39] I do not accept the submission of the respondents that the matter was not complex or voluminous. As I noted at paragraph [14] of my decision of 18 December 2020, the planning provisions were complicated. The relevant provisions exhibited in the trial ran to some 300 pages. A consideration of the provisions occupied a substantial portion of the Council's written submissions. As far back as October 2019 the

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32 *Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 128; *Hobbs & Anor v Oildrive (No 2)* [2008] QSC 52; *Kerle v BM Alliance Coal Operations Pty Ltd & Ors (No 2)* [2017] QSC 7. I note that in *Quality Corp (Aust) P/L & Ors v Millford Builders (Vic) P/L & Ors* [2003] QCA 550 the Court of Appeal (Davies JA with whom McPherson JA and Wilson J relevantly agreed) indicated that '[i]t is not the practice of this Court to certify for two counsel.'

33 (1966) 115 CLR 470, 478-9

Council asserted the planning documents limited the use of the land to use as a dwelling house.[34] The respondents did not admit this assertion[35], though by the end of the hearing they had not challenged the interpretation proposed by the Council. As such it was necessary for the Council to consider a large volume of complicated planning provisions to determine the lawful use of the land. It is also the case that the matter was prepared on the basis that almost everything was in contest. It was not until very late in the proceedings that concessions were made by the respondents. Until then, the Council had to proceed on the basis of a four day hearing with many witnesses. While the hearing itself was able to be truncated, this is not a determinative factor. As all advocates know, the time spent in preparation usually far exceeds the time spent in court.

[40] It is also relevant that in bringing the proceedings the Council were acting as the 'proper guardians of public right'.[36] This serves to highlight the importance of the litigation and explain why the Council, acting prudently, came to court with two counsel.[37] I also have regard to the common practice in this Court to brief senior and junior counsel.[38] While the practice is not universal, it is certainly not uncommon. The decision to brief two counsel in this matter was not inconsistent with the general practice.

[41] In the circumstances I am satisfied that it was reasonably necessary for the Council to brief senior and junior counsel in this matter. I will order that the Council's costs are to be assessed on the basis that, except so far as they are of an unreasonable amount, the fees of senior counsel and junior counsel should be regarded as costs necessary and proper.

Orders

[42] The four orders I made on 18 December 2019 remain in force. Today I will make the further orders set out below. For the sake of clarity, I will retain and continue the numbering of the proposed orders of 18 December 2019.

[43] The further orders will be:

5. Within 45 days the respondents must:

   (a) Remove and not reinstall the stairwell doors on the first floor identified as D213 on Jamin Architecture drawing 111FP ('111FP') and second floor identified as D313 on Jamin Architecture drawing 112FP ('112FP');

   (b) Remove and not reinstall the door to the ground floor 'Lounge' identified as D106 on Jamin Architecture drawing 110FP ('110FP');

   (c) Remove all other solid-core doors in the Premises, except for the front entrance door (identified as D102 on 110FP) and the garage to kitchen door (identified as D108 on 110FP), and replace with

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34 Ground 11 of Court Document 17, filed 4 October 2019.
35 Court Document 20, filed 29 October 2019.
36 Cf *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 340.
37 *Kroehn v Kroehn* (1912) 15 CLR 137, 141.
38 *ChongHerr Investments Ltd v Titan Sandstone P/L* [2007] QCA 278, [8].

standard domestic hollow-core doors, and not reinstall solid-core doors;

(d) Remove and not reinstall keyed internal locks to all doors except for:

(i) The front entrance door, identified as D102 on 110FP;

(ii) The garage to kitchen door, identified as D108 on 110FP;

(iii) Two other doors on each level of the Premises as chosen by the respondents;

(e) Permanently discontinue the use of and remove any range hood, sinks, taps and plumbing in the 'kitchen' on the first floor (the area marked as 'Rumpus' on 111FP);

(f) Permanently discontinue the use of and remove any cooktop, oven, range hood, sinks, taps and plumbing in the 'kitchen' on the second floor (the area marked as 'Bar' on 112FP;

(g) Remove, and not reinstall, the privacy screen separating the balcony adjacent to 'Child Bed 4' from the balcony adjacent to 'Multi-purpose Room' as identified on 111FP;

(h) Permanently discontinue the use of and remove any laundry tubs, laundry basins or other laundry facilities on the first and second floors and cap-off and decommission all associated plumbing, other than any floor wastes;

(i) Remove and not reinstall electricity sub-meters to all rooms in the Premises such that electricity supply to the Premises is measured by a single meter;

(j) Remove and not reinstall all water sub-meters such that water supply to the premises is measured by a single meter

6. Within seven days of the completion of the work required by order 5, but in any event within 52 days, the respondents must give written notice to the Co-ordinator of the applicant's Development Audit and Response Unit that the work has been completed;

7. The respondents must within seven days after such notice is given arrange and facilitate the inspection of the Premises by the Co-ordinator of the applicant's Development Audit and Response Unit or the Co-ordinator's nominees;

8. The application for a stay of orders filed on 15 January 2021 is dismissed;

9. Within 30 days the respondents pay the applicant's investigation costs in the fixed sum of $21,666.51;

10. The respondents pay the applicant's costs of the proceedings on the standard basis;

11. The assessment of the applicant's costs is to be made on the basis that, except so far as they are of an unreasonable amount, the fees of senior counsel and junior counsel should be regarded as costs necessary and proper.