# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

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| CITATION: | *Redland City Council v Canaipa Developments Pty Ltd & Ors* [2021] QPEC 62 |
| PARTIES: | **REDLAND CITY COUNCIL**<br>(Applicant)<br>v<br>**CANAIPA DEVELOPMENTS PTY LTD**<br>(First Respondent)<br>and<br>**IAN ROBERT LARKMAN**<br>(Second Respondent)<br>and<br>**TLC JONES PTY LTD**<br>(Third Respondent) |
| FILE NO/S: | 4703 of 2019 |
| DIVISION: | Planning and Environment |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Brisbane |
| DELIVERED ON: | 5 November 2021 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 20 May 2021 |
| JUDGE: | DP Morzone QC DCJ |
| ORDER: | **1. The first and second respondents pay the applicant's costs of the proceeding, including the application for the interim enforcement orders and reserved costs, to be assessed on the standard basis.** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – APPLICATION – COSTS - final enforcement orders compelling compliance with a lawful and functioning on-site sewage and wastewater treatment system - whether the first and/or second respondents ought pay the applicant council's costs of the |

enforcement proceeding pursuant to s 60(1)(b) and/or 61(1) of the *Planning and Environment Court Act 2016* – whether respondents' conduct in the proceeding frivolous or vexatious - whether costs be assessed on the standard or indemnity basis.

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| LEGISLATION: | *Environment Protection Act 1994* (Qld)<br>*Planning and Environment Court Act 2016* (Qld) ss 59, 60, 60(1)(b) & 61(1) |
| CASES: | *Altitude Corporation Pty Ltd v Isaac Regional Council (No 2)* [2015] QPELR 139<br>*BHP Coal Pty Ltd v O & K Orenstein & Coppell AG (No. 2)* [2009] QSC 64<br>*Latoudis v Casey* (1990) 170 CLR 534<br>*Oshlack v Richmond River Council* (1988) 193 CLR 72<br>*Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPELR 662 |
| COUNSEL: | K Wylie for the Applicant |
| SOLICITORS: | Gadens for the Applicant<br>Second respondent for himself and as officer of the first respondent. |

**Summary**

[1] In the wake of a favourable judgment delivered on 15 December 2020 for enforcement orders against the first and second respondents, the applicant council applies for costs of the proceeding to be assessed on the indemnity basis, or alternatively, on the standard basis.

[2] The council seeks costs against both respondents on two bases:

1. that the respondents' defence of the proceeding was frivolous or vexatious, in that it was defended and maintained without reasonable prospects of success pursuant to s 60(1)(b) of the *Planning and Environment Court Act 2016*; and

2. that the council was successful in obtaining enforcement orders, which enlivened the broader discretion as to costs pursuant to s 61(1) of the *Planning and Environment Court Act 2016*.

[3] Whilst the respondents accepted that the system was non-compliant and needed replacement, they contended that the council unfairly and precipitously progressed the matter. They asserted that they used their best efforts to maintain and replace the system, albeit modified and noncompliant in the wake of the manufacturer's bankruptcy, they were delayed and frustrated by the lapse of one application and council intervention with other applications. They also disputed any consequential environmental nuisance.

[4] The council was successful in the enforcement proceeding. I found that the subject treatment plant was grossly deficient, unfit for purpose and non-compliant, and caused environmental nuisance. Enforcement orders were necessary to require a timely and concerted effort to replace the system with one approved and suitable for the purpose to regularise the noncompliance and avert the environmental harm or nuisance.

[5] The respondents oppose the costs application on various grounds, including, the parties' interaction about the broader issues during this and other related proceedings, feeling victimised by council's prosecution of the respondents variously in this court and the Magistrates Court, subversion of better alternative courses of resolution, and that the council's conduct has been duplicitous, vexing, and frivolous.

[6] Whilst parties ordinarily bear their own costs of P&E proceedings,[1] this proceeding is in a different category which enlivens the court's discretion to award costs.[2] Firstly, it is an enforcement proceeding. Secondly, the circumstances were that the litigation was unnecessarily prolonged and vexed by the respondent's recalcitrant attitude, misconceived righteousness, and groundless contentions.

[7] Accordingly, this is an appropriate case to order that the first and second respondents pay the applicant council's costs of the proceeding (including costs of interlocutory steps and interim relief) and that the costs be assessed on the standard basis.

**Should the first and/or second respondents pay the applicant council's costs of the enforcement proceeding?**

[8] The council relies upon the successful enforcement orders to enliven the court's discretion as to costs pursuant to s 60(1)(b) and/or s 61(1) of the *P&E Court Act*.

[9] The relevant provisions are in these terms:

> ***58 Definitions for part***
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> ***enforcement proceedings*** *means proceeding for an enforcement order or interim enforcement order under the Planning Act.*
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> ***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 — ...*
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> *(b) the P&E Court considers the proceeding to have been frivolous or vexatious;*
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> ***61 Orders for costs in particular proceedings***

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1 *Planning and Environment Court Act 2016* s 59.
2 *Planning and Environment Court Act 2016* s 61.

> *(1) If, for an enforcement proceeding, the P&E Court makes an enforcement order or interim enforcement order against a person, it may award costs against the person . …"*

[10] The general discretion by virtue of s 61 of the Act is obviously enlivened in this case. I will deal further with matters subject of s 60(1)(b) later, but suffice it to say at this juncture, those matters also support the exercise of the discretion in favour of the council.

[11] This statutory conferral of jurisdiction to award costs gives this Court the widest possible power and discretion in the allocation of costs. The discretion must be exercised judicially, that is to say, not arbitrarily, capriciously or so as to frustrate the legislative intent.[3] It follows that costs must necessarily be awarded on principle, not according to whim or private opinion.

[12] The Court should not lose sight of the fundamental principle that costs orders serve a compensatory function, not a punitive one. This fundamental principal was explained by Mason CJ in *Latoudis v Casey*,[4] as follows:

> "If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings."

[13] Similarly, in the same case, McHugh J said:[5]

> "An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connection with the litigation: *Kelly v Noumenon Pty Ltd* (1988) 47 SASR 182 at 184. The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory. Thus, in civil proceedings an order may, and usually will, be made even though the unsuccessful party has nearly succeeded or has acted reasonably in commencing the proceedings. It may, and usually will, be made even though the action has failed through no fault of the unsuccessful party. In *Cilli v Abbott* (1981) 53 FLR 108, Keely, Toohey and Fisher JJ pointed out (at 111) that "the object of costs is not to penalise; it is to indemnify the successful party in regard to expense to which he has been put by reason of legal proceedings"; see also *Anstee v Jennings* [1935] VLR 144 at 148."

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3 *Oshlack v Richmond River Council* (1988) 193 CLR 72.

4 *Latoudis v Casey* (1990) 170 CLR 534.

5 *Latoudis v Casey* (1990) 170 CLR 534 at 567 per McHugh J; see also *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 per McHugh J at [65] – [70].

[14] Therefore, the court should act with a degree hesitancy and in an unusual[6] or exceptional case[7] before depriving a successful party of costs, or ordering a successful party to pay costs.

[15] The council was successful in the enforcement proceeding in relation to the on-site sewage and wastewater treatment system serving a shopping centre owned by the first respondent company, of which the second respondent is the sole director.

[16] The council maintained that the system was being operated unlawfully and was otherwise wholly inadequate and in need of immediate replacement to avoid further environmental nuisance by effluent escaping the property. On 28 February 2020 the respondents consented for interim enforcement orders to stop the use of all on-site permanent toilets, and to require the provision of portable toilets. This interim enforcement order remained in effect until final determination.

[17] Whilst the respondents generally accepted that the system was non-compliant and needs replacement, they contended that the council unfairly progressed the matter, and they disputed any environmental nuisance and relied upon their best efforts to maintain and replace the system in the wake of the manufacturer's bankruptcy and the council's lapsing of one application and intervention with applications to the DES.

[18] I found that the subject treatment plant was grossly deficient, unfit for purpose and non-compliant with the changed development permit MC010476. Even though I was generally sympathetic that the respondent's ongoing maintenance and parts replacement was frustrated by the manufacturer's bankruptcy, their contentions were misconceived and lacked merit, and their defence wholly failed.

[19] I have also found that the state of the treatment plant was likely to cause serious or material environmental harm or environment nuisance, being an offence against the *Environment Protection Act 1994* (Qld). It was necessary to regularise the use of the land by a replacement system suitable for the purpose. In the meantime, with an eye on the community need, the shopping centre was permitted to remain open and continue to be serviced by temporary measures, infrastructure and effluent removal services.

[20] In those circumstances in my view, council's enforcement process and the proceedings were entirely appropriate for a local authority. The council neither improperly intervened nor otherwise acted to unduly impede the respondent's compliance. The council were awarded final enforcement orders compelling the first and second respondent to comply with conditions relating to the system, and to undertake interim measures pending compliance and/or take all necessary steps to install a lawful and functional system to service the shopping centre.

[21] The responsibility for currency of those remedial steps fell at the feet of the respondents, not the council. The respondents' made unconventional and untimely efforts to remedy the non-compliance, but they were distracted in their effort and engagement in the proceeding by ongoing collateral disputation with, and their

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[6] *BHP Coal Pty Ltd v O & K Orenstein & Coppell AG (No. 2)* [2009] QSC 64 at [8] per McMurdo J (as his Honour then was), citing Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 423 at [4]; *Kilvington v Grigg & Ors (No. 2)* [2011] QDC 37 at [34] per McGill DCJ.

[7] *Oshlack v Richmond River Council* (1988) 193 CLR 72 per McHugh J (with whom Brennan CJ agreed).

perceived victimisation by, the council. The 2014 permit to facilitate a replacement system lapsed as a matter of law as a consequence of the respondents' inaction. And a more recent application lodged on 27 February 2020 and subject of an information request has since been abandoned and also lapsed. However, in recognition of the necessary pathway to regularisation, the timing permitted for the respondents under the enforcement orders was set to maximise a realistic transition to compliance. This was longer than that contended by the council.

[22] I think this is an appropriate case where the applicant council should be paid their costs of the proceeding including costs of interlocutory steps and interim relief.

[23] It seems to me that both the first and second respondents ought to be liable for those costs. Both respondents were necessary parties to the proceeding, and both were subjected to the final orders. Further, the second respondent was the sole director and controlling mind of the first respondent company. The second respondent represented both respondents throughout the proceeding both in his personal capacity and as an officer of the first respondent company.

**Should the applicant council's costs of the enforcement proceeding be assessed on the standard or indemnity basis?**

[24] The council seek costs to be assessed on an indemnity basis because the respondents were frivolous or vexatious having defended and maintained contentions without reasonable prospects of success.

[25] In addition to the general discretion under s 61 of the Act, s 60(1)(b) of the Act empowers the court to may make an order for costs for a proceeding as it considers appropriate if a party has incurred costs, inter alia, in circumstances where the Court considers the proceeding to have been frivolous or vexatious. However, the legislation does not otherwise provide guidance on the level of assessment.

[26] Costs of proceedings are ordinarily assessed on the standard basis, unless the rules or a court order requires assessment on an indemnity basis.[8] Circumstances warranting the exercise of the discretion to award indemnity costs include unnecessary allegations or groundless contentions that unduly prolong the case. Relevantly here, for s 60(1)(b) the legislation provides the following example of frivolous or vexatious conduct as follows:

> *"Example—*
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> The P&E Court considers a proceeding was started or conducted without reasonable prospects of success."

[27] In *Altitude Corporation Pty Ltd v Isaac Regional Council (No 2)*,[9] Rackemann DCJ identified that a "*case is without reasonable prospects of success if it is so lacking in merit or substance as to be not fairly arguable"*. The nature of frivolous or

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[8] UCPR rr 360 (formal offer by plaintiff), 361 (formal offer by defendant), 701 (standard), 703 (indemnity).

[9] *Altitude Corporation Pty Ltd v Isaac Regional Council (No 2)* [2015] QPELR 139 at [25], citing *Degiorgio v Dunn* (No 2) (2005) 62 NSWLR 284, *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 and *Keddie v Stacks* (2012) 293 ALR 764

vexatious conduct was also considered in *Sincere International Group Pty Ltd v Council of the City of Gold Coast*[10] when Williamson QC DCJ said:

> "[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 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*'.
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> [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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> [29] Sincere allege that the conduct of the Council's defence, or resistance to the appeal, was frivolous because it had no reasonable prospects of success. This allegation seeks to take up the example that follows s 60(1)(b) in PECA, which speaks of a proceeding that was started, or conducted without reasonable prospects of success.
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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."

[28] The respondents dispute that they were frivolous and vexations in defending the proceedings but instead they contend that the council was vexatious in the conduct of the proceeding by delaying and preventing the earliest implementation date of a replacement system, by imposing a double penalty through pursuing prosecution in the Magistrates Court for 'exactly the same issues' and then bringing this 'Costs Action' in the P&E Court. The respondents further argue that the council improperly acted to frustrate the approval of a replacement performance-based solution, now subject of appeal to the Development Tribunal on 20 April 2021. In that regard, they hypothesise that if that appeal is successful it will show that council was vexatious by refusing to approve or even negotiate a settlement, and that a replacement system could have been installed and commissioned in February 2020 without the need for this proceeding.

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[10] *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPELR 662 at [27]-[30].

[29] I have already found that the council's enforcement process and the proceeding was entirely appropriate for a local authority. The council neither improperly intervened nor otherwise acted to unduly impede the respondent's compliance. Despite acknowledging that the non-complainant system needed attention and replacement with a more robust and serviceable system as soon as practicable, and despite the supervision of the court, it seemed to me that the respondents distracted themselves, feeling victimised by the council and developing somewhat of a siege mentality because of the pressures of time sought to be imposed by the council and contended at the hearing. Much of the respondents' focus has been on collateral issues as evidenced by the affidavit material and replete in their written submissions, somewhat akin to some commercial negotiation. Instead, these were enforcement proceedings brought to the appropriate court by the responsible local authority.

[30] In those circumstances, the council retained the onus of proof in the proceeding, with the burden of proof being the standard, subject to the *Briginshaw* sliding scale. It was put to strict proof in relation to the nature and extent of non-compliance as a development offence & consequential environmental nuisance to warrant the exercise of the courts discretion to impose enforcement orders to restrain and remediate.

[31] On my assessment, the respondents' contentions of collateral matters were plainly frivolous in the sense of being of little or no weight, worth or importance, and not worthy of serious notice as to the degree of gross non-compliance with the existing approval or the consequential impact. At best, such matters were relevant to the exercise of the discretion in making enforcement orders.

[32] I do not accept that the council was distracted by the collateral matters so as to incur greater costs than those necessitated to discharge the onus for enforcement proceedings, nor do I think that the collateral matters vexing the respondents' unreasonably prolonged the hearing. I accept that for the council's case, the witnesses' examination-in-chief and re-examination took about one hour and 41 minutes, in contrast to their cross examination exceeding 11 hours. This is largely explicable by the trial proceeding by way of written evidence in chief with supplementary questions. It also seems to me that the council's evidence involved unnecessary duplication which could have been reduced or eliminated by cross referencing to the principal witnesses' evidence containing that material. Further, the court was disinclined to the shortened timeframe contended by the council, and favoured the respondents' circumstances in setting 9 months as being a reasonable time for them to undertake this significant regularisation process pursuant to the enforcement orders.

[33] Therefore, I am not persuaded that the circumstances justify an assessment of costs on the indemnity basis. Accordingly, costs will be assessed on the standard basis.

**Order**

[34] For these reasons, I will order that the first and second respondents pay the applicant's costs of the proceeding, including the application for the interim enforcement orders and reserved costs, to be assessed on the standard basis.

**Judge DP Morzone QC**