PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Baxter v Preston & Ors (No. 2)* [2023] QPEC 37
PARTIES:	**STEVEN JOHN BAXTER** (Applicant) v **ANTHONY STEVEN PRESTON AND KYLIE ANNE PRESTON** (First Respondents) and **GRAYA CONSTRUCTION PTY LTD (ACN 158 362 406)** (Second Respondent) and **BRISBANE CITY COUNCIL** (Third Respondent)
FILE NO/S:	932 of 2021
DIVISION:	Planning and Environment
PROCEEDING:	Application for costs
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	29 September 2023
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2022
JUDGE:	Williamson KC DCJ
ORDER:	**1. The application filed 17 December 2021 is allowed in part.** **2. The applicant pay the first respondents' costs of the proceeding on and from 15 July 2021 up to and including 9 December 2021, assessed on the indemnity basis.** **3. The applicant pay the first respondents' costs of the application filed 17 December 2021.** **4. The applicant pay the second respondent's costs of the proceeding on and from 15 July 2021 up to and including 9 December 2021, assessed on the**

indemnity basis.

5. **The applicant pay the second respondent's costs of the application filed 17 December 2021.**

6. **The balance of the application filed 17 December 2021 is dismissed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – COSTS – where Originating Application seeking declaratory and consequential relief – where Originating Application was opposed by the respondents – where Originating Application dismissed – whether the proceeding was frivolous or vexatious – whether the proceeding was instituted, and maintained, for an improper purpose – whether the applicant introduced new material – whether the power to award costs under s 60(1) of the *Planning & Environment Court Act 2016* is enlivened – whether the discretion to make an order as to costs should be exercised – whether costs should be assessed on an indemnity basis.

CASES: *Baxter v Preston & Ors* [2022] QCA 146
Baxter v Preston & Ors [2023] QPELR 244; [2021] QPEC 69
Mudie v Gainriver Pty Ltd (No. 2) [2003] 2 Qd R 271
Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2) [2019] QPELR 662

LEGISLATION: *Planning Act 2016* s 46
Planning and Environment Court Act 2016 ss 59 & 60
Planning and Environment Court Rules 2018 r 8(1)

COUNSEL: Mr A Skoien with Mr J Moxon for the Applicant/Respondent
Ms S Hedge for the First and Second Respondents/Applicants
No appearance for the Third Respondent

SOLICITORS: Romans & Romans Lawyers for the Applicant/Respondent
Thynne & Macartney for the First and Second Respondents/Applicants
Brisbane City Legal Practice for the Third Respondent

Introduction

[1] By order of 9 December 2021, the applicant's Third Further Amended Originating Application seeking declarations and consequential relief was dismissed.[1]

[2] The first and second respondents, by their application, seek an order that the applicant pay the costs of the proceeding, assessed on the standard basis until 15 July 2021, and thereafter on the indemnity basis.

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1 *Baxter v Preston & Ors* [2023] QPELR 244 (**RFJ**).

[3] The starting position is that the parties must bear their own costs.[2] This is subject to, among other things, section 60(1) of the *Planning & Environment Court Act 2016* (**the Court Act**). This provision confers a power on the Court to make a costs order if a party has incurred costs in one or more nominated circumstances. The first and second respondents contend they have incurred costs in three of the nominated circumstances identified in section 60(1) of the Court Act, namely because:

(a) the proceeding was instituted, and conducted, primarily for an improper purpose;[3]

(b) the proceeding was frivolous or vexatious;[4] and

(c) the applicant introduced new material.[5]

[4] The applicant opposes the application for costs.

Background

[5] Relevant background is set out in the RFJ.[6]

[6] It is necessary to repeat some of the background for this application for costs.

[7] In February 2019, the first respondents applied to Brisbane City Council (**Council**) for development approvals to redevelop their land at Reading Street, Paddington (**the land**). The redevelopment included significant modifications to a dwelling constructed prior to 1947 and the construction of a pool and associated deck. The second respondent was retained by the first respondents to assist with the redevelopment of the land.

[8] Between February 2019 and the end of October 2020, the first respondents sought multiple development approvals to facilitate the redevelopment of the land. They relied upon consultants for, among other things, advice about the approvals necessary to lawfully carry out the redevelopment. Evidence led at the hearing before the trial judge established that the first respondents intended to proceed with development on the land in accordance with the approvals they obtained.

[9] The applicant has an interest in adjoining land. It is located downhill from the land. He submitted an objection to Council about the redevelopment of the land. It was asserted the redevelopment would adversely affect: (1) the amount of direct and indirect sunlight over the applicant's lawn and pool; and (2) the natural light and ventilation to the applicant's property.

[10] In August, October, and November 2020, building approvals were granted by the Council and a private certifier under the *Building Act 1975* to facilitate the redevelopment of the land. Each application required code assessment. The applicant had no right of appeal to this Court against any decision to grant a building approval that would attach to the land.

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2 *Planning & Environment Court Act 2016* s 59.
3 Court Act, s 60(1)(a).
4 Court Act, s 60(1)(b).
5 Court Act, s 60(1)(e).
6 See RFJ, [9]-[39].

[11] Construction works commenced on the land in about November 2020. By that time, the first respondents had the benefit of a number of development approvals authorising the carrying out of assessable development under the *Planning Act 2016* and the *Building Act 1975*. After works commenced, on 18 November 2020, the applicant's town planning consultant wrote to Council. The correspondence alleged that unlawful development was being carried out on the land. It was alleged that assessable development, namely filling and excavation, was being carried out in the absence of an operational works approval. The first respondents, in direct response to this allegation, made a development application to Council for an operational works permit. This occurred on 11 March 2021.

[12] For reasons that are not clear from the material before me, this proceeding was listed for an *ex parte* hearing on 21 April 2021. Leave was sought for the applicant to file and read his Originating Application. The pleading for which leave was sought alleged, among other things, that the first respondents were committing a development offence. It was alleged they commenced assessable development without necessary and effective development approvals. The assessable development said to have been unlawfully commenced was:

(a) filling and excavation; and

(b) building work associated with the construction of a swimming pool and associated support structures at the rear of the dwelling, a deck between the rear of the dwelling and the eastern and southern boundaries, and stairs adjacent to the deck (**the pool works**).

[13] The prayer for relief in the Originating Application set out declarations and consequential orders. The latter were orders that, if made, would restrain the first and second respondents from carrying out assessable development on the land unless and until all necessary development approvals had been obtained.

[14] Leave was granted on 21 April 2021 for the applicant to file his Originating Application. An interim enforcement order was also made in the absence of the other parties. The ambit of the interim enforcement order was expansive. It required the first and second respondents to cease works involving filling, excavation, and the construction of retaining walls, and the construction of the pool works. The order also enjoined them from resuming those works. No undertaking as to damages was given by the applicant to secure the interim enforcement order.

[15] The interim enforcement order was the subject of a contested hearing on 28 April 2021. The Court confirmed the interim enforcement order would stand. No undertaking as to damages was required, or given, by the applicant.

[16] After the proceeding had been on foot for some weeks, two significant events occurred.

[17] First, on 7 June 2021, Council's delegate decided to give an Exemption certificate under section 46 of the *Planning Act 2016*, obviating the need for the first respondents to obtain a building permit in relation to the pool works.

[18] Second, on 13 July 2021, Council's delegate granted an operational works approval, authorising the filling and excavation the subject of the proceeding. This permit was given on 13 July 2021. The applicant was advised of the decision on 15 July 2021.

[19] If the background is paused on 15 July 2021, it can be observed that the applicant had, *prima facie*, achieved what his proceeding had sought at the time of filing. The proceeding sought restraining orders, which would apply in the absence of effective development approvals or authority to carry out assessable development (filling and excavation and the pool works). The first respondents responded directly to this. They applied for, and obtained, authority under the *Planning Act 2016* to carry out the assessable development on the land that was the subject of the applicant's proceeding.

[20] Despite the steps taken by the first respondents to regularise development on their land, the applicant elected to press on with his proceeding. He did so by amending the pleading to raise new allegations. This, in turn, prompted the first respondents to seek, and obtain, further approvals. Not to be outdone, the applicant, in response, again elected to amend his proceeding to raise new allegations. Regrettably, by the conclusion of the hearing, the applicant had amended his pleading several times, including twice during the three day hearing. The final version of the pleading was the '*Third Further Amended Originating Application*'. I have reviewed the Third Further Amended Originating Application. It is impenetrable. The amendments it contains, as would be expected, are identified by underlining or strikethrough. The extent to which it was amended is alarming. The original pleading is lost in a sea of red tracked changes.

[21] The amendments made to the Originating Application reveal the applicant's case shifted, repeatedly. By the end of the hearing, all that remained was a challenge to the validity of the Exemption certificate given by Council and the validity of two development approvals given by a private certifier. These points were the subject of detailed consideration by the trial judge.

[22] A threshold difficulty for the applicant can be identified in relation to the points taken about approvals granted by the private certifier. It was alleged the decisions were invalid. For reasons that are unexplained, the private certifier was not joined as a party to the proceeding, nor given an opportunity to be heard before the Court. This sits uncomfortably with rule 8(1) of the *Planning & Environment Court Rules 2018*. It also gives rise to a significant, if not fatal, discretionary consideration that works against granting the relief sought. In my view, the failure to join the private certifier as a party meant this part of the applicant's case is fairly characterised as being '*doomed to fail*'.

[23] The RFJ were delivered on 9 December 2021. They are comprehensive, totalling 116 pages plus an annexure. A careful review reveals the trial judge examined each issue raised by the applicant in considerable detail. The applicant was wholly unsuccessful. The trial judge recorded she was '*more than comfortably satisfied*'[7] the proceeding should be dismissed.

[24] Considered overall, the RFJ paint an unfavourable picture of the applicant's proceeding. As a matter of impression, the trial judge, after a very careful and detailed examination, regarded the proceeding as lacking particularity, lacking precision, unmeritorious, misconceived, and futile. That the proceeding could be characterised in this way after a full hearing was a genuine risk for the applicant. The risk was a very significant one, in my view, because the proceeding did not

[7] RFJ, [39].

enjoy reasonable prospects of success. This is clear from the following parts of the RFJ.

[25] It was uncontroversial the applicant was required to demonstrate: (1) an entitlement to the relief sought in the Third Further Amended Originating Application; and (2) the discretion to grant the relief sought should be exercised in his favour.[8]

[26] The task confronting the applicant in relation to item (1) was described in the RFJ as a '*herculean task*'. Paragraphs [24] and [25] of the RFJ state (footnotes omitted):

> "[24] Mr Baxter has the onus of demonstrating that the relief he seeks should be granted. This is a herculean task. That is evident from considering the nature of just one of the declarations sought. Mr Baxter seeks a declaration that the exemption certificate is invalid because the Council failed to consider relevant considerations when exercising a discretionary statutory power and the decision was one that no reasonable decision-maker could make. That declaration is sought in circumstances where there are no prescribed mandatory considerations in the legislation.
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> [25] Mr Baxter's task is made none the easier by the form of the declarations that he has chosen to seek. Some of the declarations are unattractively expressed. They are more than a page in length, contain multiple allegations that are expressed in cumulative terms, and include statements that are non-sensical."

[27] The RFJ also make clear that numerous discretionary considerations did not favour the applicant's case. Paragraph [26] states:

> "[26] … it must be remembered that the relief that Mr Baxter seeks is discretionary. Even if Mr Baxter establishes all his allegations about unlawful works and invalid decision-making, the Court must still ask itself whether, in the exercise of the discretion, the declarations and orders should be made. Here, that question is to be answered in a context where there are many discretionary considerations that militate against the grant of the relief. They include the following eight considerations." (emphasis added)

[28] Eight considerations are set out in paragraphs [27] to [39] of the RFJ. Three considerations are of particular note (footnotes omitted):

> [29] Third, the extent of deficiencies now alleged are technical in nature. Even if the allegations were correct, they are such that they are unnoticeable other than to a person well-versed in the legal quagmire that is the regulation of building work under the *Planning Act 2016* and the *Building Act 1975* and the sub-ordinate legislation and statutory instruments that they bring into play.
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> …
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> [31] Fifth, even if Mr Baxter was correct about the need for an operational works permit and authorisation from the Council with

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8 RFJ, [24].

> respect to the construction of the pool, by 13 July 2021 the Prestons had the additional authorisations from the Council. Despite that, they were still restrained from progressing the redevelopment of the subject land.
> …
> [38] Finally, there is no apparent public interest to be served in requiring the Prestons to make yet further development applications to the Council and the private certifier. To the extent that I am incorrect in my assessment of the matters of statutory construction, the resultant deficiencies relate to matters of form, not substance. Further, even if the correction of the alleged deficiencies resulted in the Prestons being denied the ability to proceed with the pool, this would not be likely to result in a materially different outcome for Mr Baxter. The potential impacts on character, sunlight, and privacy about which Mr Baxter is concerned are a by-product of the location where he lives. A degree of impact, such as that occasioned by the proposed development, is within reasonable expectations. The impacts are not unacceptably exacerbated by the aspects of the proposed development about which Mr Baxter complains." (emphasis added)

[29] Paragraphs [29], [31] and [38] of the RFJ convey, in my view, that the applicant's decision to press on with the proceeding after 15 July 2021 was productive of serious and unjustified trouble and harassment.

[30] The eight considerations referred to above were held to weigh '*strongly against the grant of relief*'. Paragraph [39] of the RFJ states:

> "[39] Ultimately, even assuming Mr Baxter were able to establish the factual and legal foundation for each of the declarations and orders he seeks, I am of the view that the discretionary considerations weigh strongly against the grant of the relief. Mr Baxter's position is compounded by the lack of merit to his allegations. As such, for the reasons detailed below, I am more than comfortably satisfied that his application should be dismissed." (emphasis added)

[31] The applicant's case was founded on six (6) contentions at trial. The contentions can be identified as follows:[9] (1) assessable operational work was commenced between the house and pool in the absence of an effective development permit; (2) assessable development for the pool works was commenced in the absence of an effective development permit; (3) future filling works, if carried out, would be unlawful; (4) the Exemption certificate given by Council was invalid; (5) the second building approval granted by the private certifier was invalid; and (6) the third building approval granted by the private certifier was invalid.

[32] The applicant was wholly unsuccessful in relation to each of the six contentions. The RFJ are replete with statements that reflect poorly on the merit of the six contentions advanced.

[33] With respect to item (1), the trial judge made the following findings:

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9 Helpfully stated in Ms Hedge's written submissions at paragraph 16.

(a) the applicant had not provided sufficient particularity about the allegation; and

(b) the evidence relied upon to prove the contention was insufficient to demonstrate the dirt said to be '*fill*' was in a permanent position or was not incidental to the development approval granted for building works (to construct the house).

[34] With respect to item (2), the trial judge made the following findings:

(a) the applicant had not provided sufficient particularity about the allegation;

(b) the development the subject of the allegation was not assessable development; and

(c) assuming the development allegation was assessable development, an Exemption certificate was obtained for the works prior to trial, rendering the relief sought a futility.

[35] With respect to item (3), the trial judge made the following findings:

(a) the redevelopment would proceed in accordance with the approvals granted, which did not involve the filling work the subject of the allegation; and

(b) given (a), the relief sought was futile.

[36] With respect to item (4), the trial judge made the following findings:

(a) the contention assumed the pool works were assessable development;

(b) the pool works were not assessable development; and

(c) the applicant did not, in any event, establish jurisdictional error on the part of the delegate who decided to give the Exemption certificate – he asked himself the right question.

[37] With respect to item (5), the trial judge made the following findings:

(a) the contention assumed the decision maker erred in relation to a jurisdictional fact;

(b) the question to be asked and answered by the decision maker was not a jurisdictional fact, it was a matter of fact and degree;

(c) the applicant failed to join the private certifier who made the impugned decision in any event;

(d) the first respondents did not, nor need to, rely on the second approval granted by the private certifier to authorise assessable development; and

(e) the relief sought was futile.

[38] With respect to item (6), the trial judge made the following findings:

(a) the contention assumed, in part, inconsistency between the private certifier's approval and the operational works approval;

(b) the inconsistency alleged was not established; and

(c) the alleged inconsistency was characterised as a misunderstanding of the operational works approval.

[39] The order dismissing the Third Further Amended Originating Application was the subject of an application for leave to appeal to the Court of Appeal.[10] The application was refused on 12 August 2022. The reasons for judgment were those of Dalton JA, with whom Morrison JA and Flanagan J agreed. Whilst her Honour's reasons reveal a different construction was preferred in relation to that adopted by the trial judge for table 5.3.4.1 of City Plan,[11] the reasons find no error of law material to the exercise of the discretion had been established. Further, it can be observed that no findings made by the trial judge in relation to discretionary considerations were doubted, or the subject of correction.

Discussion

[40] A proceeding, including any part thereof, found to be '*frivolous'* or *'vexatious*' may engage section 60(1)(b) of the Court Act. The words, and the phrase in which they appear, are not defined. The words are to be given their ordinary meaning.[12]

[41] Vexatious has been held to mean '*causing vexation*', '*vexing*', '*annoying*' and '*productive of serious and unjustified trouble and harassment*'.[13] Whether a proceeding is vexatious turns on, among other things, the circumstances of the case. The onus of proving frivolity and vexation lies with the applicant for costs. It is a high bar to be met. Something more than a lack of success needs to be shown.[14]

[42] The matters traversed in paragraphs [40] and [41] were not the subject of controversy between the parties. With these uncontroversial matters in mind, I am satisfied the applicant's proceeding was productive of serious and unjustified trouble and harassment. This is clear when the proceeding is examined by reference to two discrete periods, split either side of 15 July 2021. This is the date when the applicant should have been aware that the first respondents had obtained an operational works approval and an Exemption certificate for development that was alleged to be unlawful.

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10 *Baxter v Preston & Ors* [2022] QCA 146.
11 At paragraphs [47] to [48].
12 *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No.2)* [2019] QPELR 662, [27].
13 *Mudie v Gainriver Pty Ltd (No.2)* [2003] 2 Qd R 271, [35]-[37] and [61].
14 *Mudie v Gainriver Pty Ltd (No.2)* [2003] 2 Qd R 271, [35]-[37].

[43] Focusing on the period from 21 April 2021 to 14 July 2021, the Originating Application alleged the first respondents were committing a development offence. The applicant sought to restrain the first and second respondents from doing so unless and until all necessary development approvals had been obtained. The primary purpose for the proceeding is clear from affidavit material sworn by the applicant. The affidavit material reveals the applicant, as an adjoining neighbour, was concerned about the extent of development on the land and its lawfulness. He was concerned the development may adversely impact on the amenity of his residence. To commence the proceeding in this context was understandable once it is appreciated the applicant could only object to Council about the development on the land. He did not have a right of appeal to this Court about any decision made in relation to the development. For this reason, I am satisfied the proceeding was not commenced for an improper purpose as alleged by the first and second respondents. I am also satisfied that the applicant's proceeding in this first period was not frivolous or vexatious.

[44] The difficulty for the applicant is that the first respondents elected to respond to the proceeding as filed, by obtaining an operational works approval and an Exemption certificate. The purpose of this step was to authorise the development that was alleged to be unlawful. The former was applied for, and obtained on 13 July 2021. The Exemption certificate was obtained on 7 June 2021.

[45] With knowledge of the operational works approval and Exemption certificate, the applicant was required to carefully examine his prospects of success, and the utility, of his proceeding. There is no direct evidence he conducted such an examination or received advice on prospects of success.

[46] In conducting an examination of prospects, there can be little doubt the force of the discretionary considerations loomed large. They alone were, in my view, more than sufficient to suggest the proceeding did not enjoy reasonable prospects of success. The proper course was for the proceeding to be brought to an end shortly after 15 July 2021.

[47] Rather than bring the matter to an end, the applicant elected to press on with the proceeding. The reason for doing so, I infer, was to insist on strict compliance with the '*law*', as it was as contended to be by the applicant. His insistence on compliance with the law was misplaced and pursued with unnecessary belligerence. This proposition is made good once it is appreciated the applicant, among other things, pursued points described by the trial judge as: (1) matters of form rather than substance; (2) technical; and (3) unnoticeable other than to a person well-versed in planning law.

[48] I am satisfied the maintenance of the proceeding on and from 15 July 2021 represents the type of egregious conduct intended to engage section 60(1)(b) of the Court Act. The extent to which the conduct is egregious is exacerbated, in my view, by the fact that the applicant amended his pleading late in the hearing. Leave was given during the trial to amend the Originating Application on the second and third day. The amendments were late, and prolonged the trial. The amendments also had the effect of introducing new material, which itself engages section 60(1)(e) of the Court Act.

[49] The egregious nature of the applicant's conduct in the proceeding after 15 July 2021 is further exacerbated having regard to the circumstances surrounding the interim enforcement order. The applicant opposed an application to cancel the interim enforcement order during the hearing before the trial judge. His opposition was based, in the first instance, on an unmeritorious application to adjourn the application. This was followed by the applicant spending considerable time advancing unmeritorious arguments resisting the cancellation of the order itself. Opposition to the cancellation of the interim enforcement order did not involve the applicant giving an undertaking as to damages. No undertaking was offered.

[50] While the conduct of the applicant's proceeding after 15 July 2021 was vexatious for the reasons given above, I am not persuaded the primary purpose for commencing and maintaining the proceeding was an improper one. In my view, the proceeding was commenced for a proper purpose. That it was maintained after 15 July 2021 is best explained by the applicant's misguided insistence on strict compliance with the law (as advanced in his case), irrespective of the utility in doing so. The applicant's insistence on strict compliance, despite being misguided, is not to be regarded here as an improper purpose.

[51] The applicant opposed the application for costs.

[52] For reasons given above, the applicant's opposition in relation to an alleged improper purpose was well founded.

[53] The same cannot be said for the arguments advanced on his behalf in relation to section 60(1)(b). The arguments failed to come to grips with the impact discretionary considerations had on the prospects of success. Indeed, there was no reference I could find in the applicant's submissions to the discretionary considerations and their force, let alone their impact on the prospects of success. Silence in this regard was telling.

[54] Specific submissions were made in writing on behalf of the applicant about section 60(1)(b) of the Court Act and the circumstances of this case.

[55] It was submitted the proceeding was commenced as a result of a reasonable, albeit erroneous concern, which involved propositions in law and fact that were reasonably arguable. This can be accepted to a point. I accept this submission is correct up to the receipt of the operational works approval on 15 July 2021. From this point onwards, there was a material change in circumstance which, in my view, colours the decision to continue with the proceeding. The decision to continue was productive of serious and unjustified trouble and harassment.

[56] I also accept the point made that support can be found, to a limited extent, for the applicant's case in the Court of Appeal's reasons for judgment. It was submitted those reasons '*doubt the correctness*' of a point of planning scheme construction in the RFJ. This is correct. The difficulty for the applicant however, is that doubting the correctness of one point of construction does not save him from criticism. As the same reasons for judgment reveal, findings made by the trial judge in relation to discretionary reasons militating against the relief sought were not disturbed, let alone questioned by the Court. It is the presence of these discretionary considerations, in conjunction with the existence of the operational works approval

and the Exemption certificate, that persuade me the proceeding did not enjoy reasonable prospects of success on and after 15 July 2021.

[57] As to the operational works approval obtained on 13 July 2021, it was submitted this approval was irrelevant because it was not challenged by the applicant. I do not accept the existence of the approval is irrelevant. The approval, and the development it authorised, was materially relevant to the applicant's case, namely whether the filling and excavation on the land was lawful. The applicant's case on this point was criticised by the trial judge for a range of reasons, including that it lacked particularity; the filling works had not been proven; and the relief sought was, in any event, a futility. That the force of the approval in this regard was sought to be brushed aside as irrelevant was further evidence, in my view, the applicant has, and remains, unwilling to recognise the strength of the points against his case.

[58] As to the Exemption certificate, it was submitted the challenge to the validity of this document was not foredoomed to failure. It was correctly pointed out that the decision maker conceded he had misdescribed the works the subject of the certificate and had not strictly followed the statutory prescription in section 46 of the *Planning Act 2016*. The difficulty for the applicant's case, however, is that the Exemption certificate was only required if it was established the pool works were assessable development. This point failed. It failed for a number of reasons, including that it was not properly particularised. And again, discretionary considerations strongly militated against granting the relief sought in relation to this aspect of the applicant's case in any event.

[59] On balance, the matters traversed in the applicant's submissions are unpersuasive.

[60] For reasons given above, the power to make an order as to costs in this proceeding is enlivened. This power is not, however, engaged in relation to costs incurred prior to 15 July 2021. The application, to the extent it seeks such costs, is dismissed.

[61] It does not necessarily follow that a costs order will be made where the costs power is enlivened. The power to make such an order is discretionary. In this regard, the applicant was critical of the case conducted on behalf of the first and second respondents. Even accepting those criticisms, I am satisfied there is no disentitling conduct that militates against making an order as to costs. In my view, the first and second respondents were put to considerable and unnecessary expense by a proceeding that lacked reasonable prospects of success on and from 15 July 2021.

[62] The applicant will be ordered to pay costs on and from 15 July 2021 up to and including the date the RFJ were published.

[63] I will also order that the applicant pay the costs of the costs application.

Assessment of costs

[64] The first and second respondents submit costs should be assessed on the indemnity basis on and from 15 July 2021. I accept this submission, in part.

[65] Costs incurred from 15 July 2021 to the date of the RFJ will be assessed on the indemnity basis. This is because, in my view, the case has a combination of unusual features, which justify a departure from the usual course. The features emerge from the background and discussion above. They are:

(a) the applicant's pleading, in its various amended forms, contained allegations that did not have reasonable prospects of success;

(b) allegations made by the applicant to change tack in response to approvals obtained by the first respondents prolonged the litigation, were of a serious nature (allegations that development offences had been committed), were not properly particularised and were groundless;

(c) the applicant maintained the proceeding on and from 15 July 2021 in the face of compelling discretionary considerations militating against the relief sought;

(d) the applicant did not join a private certifier to the proceeding in circumstances where decisions made by that certifier were the subject of an allegation of invalidity – that he did not join the private certifier meant the relief sought in this regard was fairly regarded as '*doomed to fail*'; and

(e) the applicant opposed the cancellation of the interim enforcement order in reliance upon unmeritorious grounds, which resulted in the prolongation of the hearing before the trial judge.

[66] I am not persuaded the costs of this costs application should be assessed on the indemnity basis. The applicant was correct to oppose the application, in part. The application alleges the proceeding had been instituted, and maintained for, an improper purpose. This is a serious allegation. It was not made out. There is no basis, in my view, to depart from the usual course for the assessment of costs for the application in such circumstances.

Disposition of the application for costs

[67] For reasons given above, it is ordered that:

1. The application filed on 17 December 2021 is allowed in part.

2. The applicant pay the first respondents' costs of the proceeding on and from 15 July 2021 up to and including 9 December 2021, assessed on the indemnity basis.

3. The applicant pay the first respondents' costs of the application filed 17 December 2021.

4. The applicant pay the second respondent's costs of the proceeding on and from 15 July 2021 up to and including 9 December 2021, assessed on the indemnity basis.

5. The applicant pay the second respondent's costs of the application filed 17 December 2021.

6. The balance of the application filed 17 December 2021 is dismissed.