PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Aesthete No. 15 Pty Ltd & Anor v Council of the City of Gold Coast & Ors* [2023] QPEC 42
PARTIES:	**AESTHETE NO. 15 PTY LTD (ACN 627 545 019)** (first applicant) and **AESTHETE NO. 20 PTY LTD (ACN 627 946 356)** (second applicant) v **COUNCIL OF THE CITY OF GOLD COAST** (first respondent) and **CIELO GROUP PTY LTD (ACN 615 376 237)** (second respondent) and **CIELO PROPERTY GROUP PTY LTD (ACN 644 682 717)** (third respondent) and **ELIZABETH ANN BAGELY** (fourth respondent) and **PETER JOHN CULLEN AND SANDIE PATRICIA JOY CULLEN** (fifth respondents)
FILE NO/S:	1562 of 2023
DIVISION:	Planning and Environment
PROCEEDING:	Application for costs
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	27 October 2023 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2023
JUDGE:	Williamson KC

ORDER:

1. **the application filed 27 July 2023 is dismissed; and**
2. **the applicants pay the third respondent's costs of the application.**

CATCHWORDS: PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – COSTS – where originating application sought declaratory relief – where first and second applicants sought orders to treat a submission as a properly made submission – where identity of applicant for development permit sought to be changed – where originating application dismissed by consent – where development application withdrawn – where first and second applicants brought application for costs, assessed on the indemnity basis – where second and third respondents brought cross-application for costs – whether the power to award costs under s 60(1) of the *Planning and Environment Court Act 2016* is enlivened – whether the costs application was frivolous or vexatious – whether the discretion to make an order as to costs should be exercised – whether there was disentitling conduct on the part of the applicants or respondents

LEGISLATION: *Planning Act 2016*, ss 51, 52, sch 2

Planning and Environment Court Act 2016, ss 10, 11, 37, 60, sch 1

COUNSEL: BG Rix for the first and second applicants

First respondent excused from further participation

B Job KC for the second and third respondents

Fourth and fifth respondents excused from further participation

SOLICITORS: Yates Beaggi Lawyers for the first and second applicants

Connor O'Meara Solicitors for the second and third respondents

[1] On 17 April 2023, the applicants made submissions to Council about an impact assessable development application (**development application**). The submissions were made in relation to land at Pacific Parade, Bilinga. The applicants have an interest in adjoining land.

[2] Public notification for the development application was carried out during the period 15 November 2022 to 9 December 2022. The applicants' submissions were made to Council out of time and were not 'properly made submissions', as defined in schedule 2 of the *Planning Act 2016*.

[3] On 2 June 2023, the applicants commenced this proceeding by way of originating application. The prayer for relief seeks declarations and consequential orders under sections 11 and 37 of the *Planning and Environment Court Act 2016*. It is unnecessary to set out the precise terms of the relief sought for the purposes of this application. It is sufficient to say the relief seeks an indulgence from the Court,

namely, relief that if granted, would have the effect of converting the applicants' out of time submissions into properly made submissions, as defined in the *Planning Act 2016*.

[4] The proceeding was on foot for a period of about six weeks. It was dismissed on 28 July 2023 because it no longer had utility. This is because the development application the subject of the proceeding was withdrawn.

[5] During the period the proceeding was on foot, it was the subject of two reviews before the Court. The applicants, by their application in pending proceeding filed 27 July 2023, now seek an order that the second and third respondents pay the costs of the proceeding and the costs of this costs application.

[6] The applicants' primary case is that any order for costs should be assessed on the indemnity basis. Costs are sought in reliance upon sections 60(1)(c), (d), (e), (f), (g) and (i) of the *Planning and Environment Court Act 2016*.

[7] The material relied upon for this application was voluminous. It filled three lever-arch folders. To progress this application to hearing, it took some three and a-half months, five separate orders and involved the production of affidavit material, five outlines of argument and today's hearing.

[8] In my view, the application for costs can be described as unfortunate. It was a waste of Court time and, in my view, a waste of resources. It can be dealt with quickly.

[9] If it is assumed the Court's power to make an order as to costs is enlivened in this proceeding, for all the reasons advanced on behalf of the applicants – which I do not accept for reasons well-developed by Mr Job KC in writing – there are two compelling reasons that militate against granting the orders sought, let alone assessing costs on an indemnity basis.

[10] In the first instance, the application for costs seemingly ignores the underlying reason for the proceeding. The purpose of the proceeding was to remedy a non-compliance by the applicants in relation to the making of submissions. It was this non-compliance, and a desire to remedy it, that put all parties to expense in this proceeding.

[11] Second, in my view, the applicants imprudently rejected an offer to settle this proceeding, which constitutes disentitling conduct. That conduct attracts significant, if not decisive weight, in this application. The offer, if accepted, represented substantial success in that the indulgence the applicants sought to obtain from the Court would not have been opposed by the party that stood to lose the most from it. By not accepting the offer, the applicants unnecessarily prolonged this proceeding.

[12] This proceeding was prolonged by some three and a-half months, to advance this application for costs. The rationale for prolonging the proceeding appeared to be for the purposes of pursuing a point the applicants were aware of before the proceeding was commenced but, despite this, never pleaded. That same point was also the subject of threats of amendment to the originating application. The amendments were never made, let alone the subject of an application to amend.

[13] The issue about which this relates was, in my view, attended with significant risk of failure. This emerges, in my view, from the following matters.

[14] This proceeding was commenced on 2 June 2023. It was the second time an originating application was commenced in this Court seeking the same relief in relation to the same development application and the same submissions made on behalf of the applicants. I make no criticism of the first proceeding and the circumstances surrounding its coming to an end.

[15] On 29 June 2023, eight days after the first return date for the originating application, the third, fourth, and fifth respondents offered to settle the proceeding on the basis that: (1) those respondents would consent to an order converting the applicants' submissions into properly made submissions as defined under the *Planning Act 2016*; (2) the applicants would not take issue with the identity of the applicant seeking the development approval, being an issue raised in correspondence after the first originating application was dismissed but before this proceeding was commenced; and (3) each party bear its own costs of the proceeding. This offer was open for acceptance until 4 July 2023.

[16] On 29 June 2023, the applicants responded to the offer to settle with three questions. The questions were answered in correspondence by the respondents. This correspondence also extended the time for acceptance of the offer to 7 July 2023. The applicants allowed the offer to lapse. They did not respond to the offer on or before 7 July 2023.

[17] Why did the applicants allow the offer to lapse?

[18] By letter dated 8 July 2023, the applicants sent correspondence to the third, fourth and fifth respondents seeking to explain why the offer could not be accepted. Paragraph number 2 of the correspondence states:

> "By our clients accepting the offers made as they are currently framed, and against being on notice of the fundamental failure of the process, would be an aiding or abetting by our clients of what our clients view to be an unlawful undertaking by the applicant and Council."

[19] The unlawful undertaking to which this correspondence refers is a reference to an assertion that the development application could not, and should not, have been accepted in the first instance by Council. This was said to arise because of an alleged defect with the identity of the applicant for development approval. This is asserted to be a defect that could not be cured by changing the name of the applicant. It could only be cured by withdrawing the application and making a fresh one.

[20] Reliance on this point to not accept the offer to compromise the proceeding was imprudent, in my view, having regard to two points. As a starting point, the unlawful undertaking to which reference is made was not an issue in the proceeding. This is so, despite the applicants being aware of the alleged defect some four weeks before the proceeding was commenced, and threatening to amend its pleading to include it.

[21] That the matter was not in issue in the proceeding as filed, or amended to include, was never explained. That it was relied upon to allow the offer to lapse is redolent of a decision to maintain the proceeding to achieve a collateral purpose that could not have been achieved having regard to the pleading in its filed form and as dismissed.

[22] Secondly, the key reason for allowing the offer to lapse assumes the alleged defect with respect to the identity of the applicant, if established, would work invalidity. More particularly, it assumes the alleged defect in the development application was such to render it an application not known to law, or, put another way, *void ab initio*.

[23] Such an assumption was, in my view, not a sound one to rely upon to allow the offer to settle to lapse. The assumption was attended with significant risk of failure. That the assumption was attended with this risk is clear once it is appreciated that invalidity must be established having regard to the *Planning Act 2016* and the need to identify non-compliance with that Act. In oral submissions, I pressed Mr Rix to identify the non-compliance with the Act that would, as a starting position, be examined to determine invalidity. Despite a number of attempts, he could not identify any express non-compliance. At its highest, Mr Rix submitted that the non-compliance was implicit. That is, the importance of the 'applicant' to the process could not be understated, and naming the wrong applicant was defective in that circumstance.

[24] The difficulty, however, is that an examination of the *Planning Act 2016* reveals that any person, including a corporation, can be an applicant for a development approval under the Act. Further, the Act reveals that the requirements for a development application are set out in section 51, including a definition of properly made application. It was not suggested the development application as made was not properly made as defined. It can also be observed that section 51 of the *Planning Act 2016* does not contain any requirement in relation to the identity of an applicant for approval, nor does it define a properly made application by reference to a requirement with respect to the identity of an applicant for development approval.

[25] Two final points demonstrate the difficulty confronting an allegation that the defect in relation to the identity of the applicant worked invalidity, let alone rendered the development application *void ab initio*. Section 52 of the *Planning Act 2016* permits, among other things, a development application to be changed, including the identity of the applicant for approval. This provides a vehicle to cure the very defect about which attention was given. The second point in relation to this can be seen in section 37 of the *Planning and Environment Court Act 2016*. This provision confers a broad power on the Court to excuse non-compliance with, among other things, the *Planning Act 2016*. That provision, on its face, was a substantial answer to the defect raised in relation to the identity of the applicant, even assuming the defect could be said to have worked invalidity.

[26] It can be observed that, in oral argument, Mr Rix was unable to establish that, as a matter of law, it was sound to proceed on the footing that the alleged defect with respect to the identity of the applicant worked invalidity, let alone rendered the development application one not known to law. That is not to say relevant factual context could not inform reliance upon this particular point by the applicants. There

was context to support a contention that the technical difficulty was not easily remedied. The problem, however, is that the correspondence rejecting the offer proceeded on the footing that it was a defect that could not be cured. To do so was, in my view, misguided.

[27] This had the consequence that the applicants missed an opportunity to bring the proceeding to an early end. Rather, they elected to maintain it to pursue something that was not in issue in the proceeding – that is, to pursue a collateral purpose. In doing so, they put the other parties to additional expense which could, and should, have been avoided. This, in my view, flows from the implied undertaking each party in this proceeding has taken to have given to each other, and the Court, under section 10 of the *Planning and Environment Court Act 2016*.

[28] Returning, briefly, to the background, after the offer to settle was allowed to lapse, on 14 July 2023 the parties were informed that instructions had been given to a town planning consultant to withdraw the development application the subject of the proceeding. I accept this was motivated by pragmatic considerations rather than any acceptance of the relative strength, or merit, of the applicants' case as pleaded. The inference to be drawn is that the development application was withdrawn to bring the proceeding to an end without the need to engage further with the applicants, who insisted on maintaining the proceeding to pursue a collateral purpose.

[29] At a further review of the proceeding on 19 July 2023, the proceeding was adjourned by consent to 28 July 2023 to allow for confirmation that the development application had, in fact, been withdrawn. On this date, the proceeding was dismissed. The proceeding was ended, in my view, in a timely way.

[30] Having regard to the matters discussed above, I accept Mr Job's submission that the applicants have engaged in disentitling conduct. That conduct is of decisive weight in the exercise of the discretion. I decline to make the orders sought by the applicants for costs.

[31] A cross-application has been made by the second and third respondents for the costs of the costs application. The power to make such an order in relation to part of a proceeding arises if section 60(1) of the *Planning and Environment Court Act 2016* is engaged, read with the definition of 'P&E Court proceeding' in schedule 1 of the same Act. The definition makes clear that the power can be engaged in relation to either the whole, or part, of a proceeding.

[32] I am satisfied section 60(1)(b) of the *Planning and Environment Court Act 2016* is engaged here. This costs application was frivolous; it was not worthy of serious notice. This is because the application was pursued in circumstances where the applicants: (1) seemingly forgot that the purpose of the proceeding of which they seek costs was to obtain an indulgence in relation to their non-compliance with the *Planning Act 2016*; (2) adopted, as Mr Job KC correctly submitted, a scatter-gun approach to the identification of grounds on which the costs power under section 60 of the *Planning and Environment Court Act 2016* was engaged; (3) sought indemnity costs, but did not identify a feature or features of the proceeding that warranted such an order in any event; and (4) ignored that an impediment to the success of this application was a compelling discretionary consideration, namely,

that they could have brought the proceeding to an early end, but elected to continue to pursue a collateral purpose.

[33] The election to pursue this application for costs, in my view, sits uncomfortably with the implied undertaking given by the applicants under section 10 of the *Planning and Environment Court Act 2016*. This represents a strong discretionary consideration to make an order for costs in the favour of the third respondent. I intend to make such an order.

[34] I will, however, not make an order in favour of the second respondent. It has its own difficulties in this proceeding. It was late to enter an appearance. Indeed, it did not enter a notice of appearance until the 19th of July. It has, as Mr Job KC correctly submitted, engaged in disentitling conduct. The dilatory nature of its conduct is such as to weigh against making an order as to costs in its favour.

[35] Given what I have said, I will order that: (1) the application filed 27 July 2023 be dismissed; and (2) the applicants pay the third respondent's costs of the application.

[36] To remove any doubt, costs are to be assessed on the standard basis.