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Planning and Environment

The *Sustainable Planning and Other Legislation Amendment Act (No. 2) 2012*: The costs of litigating in the Planning and Environment Court

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In *Planning Reform in Queensland: The first instalment*, published on 20 September 2012, we touched on proposed reforms to the Planning and Environment Court's power to award costs, noting that the *Sustainable Planning and Other Legislation Amendment Bill 2012*, as it then stood, proposed to alter the costs rules so that costs would "follow the event". We went on to say that:

> *"... the altered cost powers of the Court will undoubtedly make it riskier for developers to engage in litigation in the Court. The prospect of paying three sets of costs, rather than one, increases the financial risks and will cause parties to carefully evaluate the strength of their case before commencing proceedings, or taking them past the ADR steps. The new cost powers will undoubtedly change the way planning cases are run, and will put increased emphasis on the effective use of ADR processes."*

The clauses of the Bill relating to cost powers were amended in committee by the Queensland Parliament, and the *Sustainable Planning and Other Legislation Amendment Act (No. 2) 2012* (SPOLAA) has been passed with some significant changes, in particular removal of the provision that costs "follow the event" unless the Court orders otherwise. The SPOLAA was assented to on 22 November 2012 and the new costs powers came into effect on that date. The changes to the Bill were the result of a substantial body of submissions to the committee that the costs rules as proposed unduly restricted the Court's discretion.

Section 457 of the *Sustainable Planning Act 2009* (SPA) now commences with the proposition that:

> *"(1) Costs of a proceeding or part of a proceeding, including an application in a proceeding, are in the discretion of the Court."*

The discretion afforded by this provision is a "complete" or "full" discretion.[1] Section 457(2) has been amended to include a list of 13 matters to which "the Court may have regard" when making an order for costs. Some of the listed matters reflect considerations relating to the conduct of litigants that have been carried forward from the repealed section 457.

Then, section 457(3) provides:

> *"(3) Subsection (2) does not limit the matters to which the Court may have regard in making an order for costs."*

Overall these provisions invest the Court with a general discretion to award costs. The matters mentioned in section 457(2) are not limiting factors. Whether they are relevant in any case will depend on the evidence placed before the Court. The legal landscape for parties either seeking or opposing the making of orders for costs under section 457 will essentially be the same as the one that formerly applied in the Local Government Court in the late 1980s. The inclusion of the list of matters for the Court's consideration removes the prospect that any one of them might be found to be an irrelevant consideration.

Cases involving conflict with the planning scheme

Section 457(2)(e) allows the Court to consider:

> *"(e) if the proceeding is an appeal against a decision on a development application and the Court decides the decision conflicts with a relevant instrument as defined under section 326(2) or 329(2), whether the matters mentioned in section 326(1) or 329(1) have been satisfied."*

The subsection focuses on the decision rules which bind assessment managers and also the Court, and require development applications to be refused where a decision to approve would conflict with the planning scheme, unless there are sufficient public interest grounds to warrant approval.

[1] *Wyatt v Albert Shire Council* (1986) QPLR 409 at 411F (Supreme Court of Queensland – Full Court) 30 October 1986

Most appeals that are heard by the Court involve assertions that approval would conflict with one or more provisions of the planning scheme, sometimes as a result of the tendency to draft planning schemes in a prescriptive way so as to take advantage of the conflict rule, and thus create a "de facto" prohibition.

In other cases, the alleged conflict arises because the proposed development is said to be inconsistent with a performance criteria, such as, for example, a requirement that development be consistent with the character of the locality. The issue of conflict will touch most appeals, and in deciding whether to award costs, the Court will therefore inevitably be drawn into consideration of section 457(2)(e).

An implication that might be drawn is that a development applicant, who has to overcome conflict with a scheme provision by establishing sufficient grounds, risks having to pay costs if sufficient public interest grounds are not established. While one should not form any pre-conceived notions from what is merely a matter for consideration, it is easy to see the argument that would be put forward on behalf of the assessment manager and submitters in that situation, to the effect that the appellant proceeded with the appeal knowing that the conflict with the scheme needed to be overcome.

Likewise, when the local government approves an application and there is a submitter appeal in which both conflict and absence of sufficient grounds are made out, costs may be awarded to the submitter against the applicant and the Council.

But what of the submitter who appeals against an approval by the Council and successfully raises conflict, but the Court finds that there are sufficient grounds for approval despite the conflict? There is sufficient flexibility in the Court's discretion to allow it to make no order as to costs in those circumstances, particularly where the conflict point involved a matter of public interest.

The issue of conflict is, unfortunately, ubiquitous nowadays. It is so pervasive that it may be tempting to treat it as a "neutral" consideration. Arguments about performance-based outcomes seem to inevitably raise questions of conflict. It would be unfortunate if the costs rules prevented resort to the Courts in those circumstances.

Consideration of applicable case law

The Full Court of the Supreme Court of Queensland said of the costs power that was in force in the mid to late 1980s:

> *"... the reason for referring (to) these provisions is to remove any expectation that in exercising its jurisdiction under s.31 of the Act the Local Government Court may be bound by any preconception or presumptive rule or principle governing the award of costs in the Supreme Court, such as that costs follow the event."*[2]

The Full Court went on to say that the only constraint on the exercise of discretion is that it must be exercised "judicially" and not in an arbitrary manner.

In *Wyatt*'s case, the Local Government Court had allowed an objector appeal against the development of a service station, largely based on traffic engineering evidence. However, the primary Judge decided not to award costs against the developer or the Council, essentially because he thought the fact that the successful objector was a commercial competitor of the developer was a disqualifying factor. The Full Court held that the objector had succeeded on a substantial ground involving the safety of users of a major and busy highway, which was clearly a matter of public concern, and that, accordingly, the discretion to refuse a costs order had miscarried. An order was made that the Council pay the objector's costs of the appeal. The objector did not seek an order for costs against the developer.

The Full Court in *Wyatt*'s case considered a number of decisions of Courts in other jurisdictions, together with a submission by Counsel to the effect that where the Court is considering matters of "public interest", the normal rules with respect to costs did not apply. The Court was referred to a practice adopted by the Local Government Administrative Tribunal in New South Wales, to the effect that parties should meet their own costs in the absence of some exceptional circumstance. The Full Court's response was as follows:

[2] *Wyatt v Albert Shire Council* op cit at 411E

> *"We do not think these decisions from other jurisdictions are a safe guide to the exercise of the discretion as to costs conferred by s.31 of the Act in Queensland. Having regard to the recency of that provision in its present form, as well as the previous legislative history, we do not consider there is any 'general rule' or settled practice that can be called in aid of exercising the full discretion now conferred by s.31. We would, in any event, have grave doubts about the correctness of an approach that required 'some exceptional circumstance' to be established before a discretion of the width of that conferred by s.31 could be exercised. So to require would in effect be to deny the very discretion that the section sets out to invest. Equally, however, for the reasons already given, we do not consider that it would be right to start with the common law preconception that costs follow the event ... The matter is essentially one for the proper exercise of a judicial discretion."*[3]

The Full Court discussed its decision in *Wyatt* in *Solomon Services Pty Ltd v Woongarra Shire Council*.[4] Justice Dowsett, who delivered the Court's judgment, said:

> *"I consider that, at the hearing of this appeal, there was a tendency to over-state the significance of the issue of competition in Wyatt. As a result of such over-statement, that issue in this case was also over-stressed. No doubt, once it is conceded that the discretion is at large, the fact of commercial interest may in some circumstances be a relevant consideration in exercising the discretion. However there is nothing in the 'Local Government Act' or in the 'City of Brisbane Town Planning Act' which leads to the categorisation of parties in the Local Government Court as either having a commercial motivation or not. Indeed, one might well say that the requirement contained in the s.33(18)(g) for the provision of an economic impact assessment in certain circumstances suggests that the possibility of impact upon trade competitors is meant to be a relevant consideration..."*[5]

Contrary to the position that existed under the two Acts referred to by the Full Court, section 457(2) of the SPA now makes the commercial interests of the parties to a proceeding a relevant factor. It will be a matter for the Court to decide what weight to give to that factor where it is present.

In *Solomon Services*, the primary Judge had made the observation that "generally speaking", an objector should be permitted to bring a properly arguable case "without the sanction of costs". The Full Court said, in relation to that statement:

> *"His Honour, in making those observations, was responding to an assertion by Mr. Ure that costs should follow the event where the objector was in commercial competition. Mr. Ure was clearly wrong in making that submission. It may be that the form in which His Honour responded to that assertion was, with hindsight, capable of more felicitous expression, but I do not think this leads to the conclusion that he failed to exercise the discretion conferred upon him. Where the section conferring the power gives no guidelines, there will always be difficulties in expression, and unless great care is taken, it will often be possible to argue that imprecise language suggests that there has been some failure to consider a relevant consideration or a consideration of an irrelevant consideration..."*[6]

The appeal in *Solomon Services* was unsuccessful, and the primary Judge's decision with respect to costs was left undisturbed. In the course of the Court's judgment, His Honour Justice Dowsett said:

> *"His Honour's short reasons make it clear that he considered the fact that the Appellant's case was properly arguable. That cannot be an irrelevant consideration. It may be that if the case is properly arguable, and there are no other circumstances compelling an order for costs one way or the other, then a possible consequence is that no order will be made. In referring, as His Honour did, to his understanding of the proper principles, His Honour was generalising rather than indicating that he considered his discretion to be fettered. I would think it inappropriate for this Court to interfere in those circumstances."*[7]

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[3] *Wyatt v Albert Shire Council* op cit at 416A-D
[4] (1987) QPLR 256
[5] Ibid at 259F
[6] Ibid at 262B
[7] Ibid at 262E

Section 457(2) now makes "reasonable prospects of success" a relevant consideration, and doesn't mention whether a case or issue is properly arguable.

The following points can be taken from the cases discussed above:

- Under section 457 of the SPA, the discretion of the Planning and Environment Court with respect to costs is complete or unfettered.
- The discretion must be exercised judicially and not in an arbitrary manner.
- The Court must start with no pre-conceptions as to the exercise of discretion, save that it must be exercised judicially, which means that it must be exercised for reasons that can be considered and justified.

In 1987, after the Full Court's decision in *Wyatt*, Judge Quirk sitting in the Local Government Court refused an application for costs against a party who withdrew an appeal on receiving an unfavourable expert witness report from a town planner. His Honour was satisfied that the objection was originally made on grounds that did not lack substance, and that the withdrawal upon receiving unfavourable town planning advice was reasonable. His Honour said:

> *"It would seem to me that the reasonableness or otherwise of the conduct of a party who has invoked this Court's jurisdiction unsuccessfully is an important consideration in the decision whether an order for costs should be made against that party."* [8]

His Honour's statement, in my respectful view, holds good today, but it must be seen against the background of the changes which have been made to the Court's procedures, in particular the importance attached to participation by the parties in the Court's alternative dispute resolution (ADR) processes. The conduct of parties in various respects is now expressly a relevant consideration for the Court under sections 457(2)(c), (d), (h), (i) and (l).

Sections 457(4) and (5) relating to ADR impose an important limitation on the Court's general discretion. The discretion is not enlivened where the parties participate in ADR early in the proceedings, and the proceedings are resolved during or soon after the ADR process has been finalised. Failure to reach resolution carries a penalty in that the costs of the ADR process itself become part of the costs of the proceeding, which are then subject to the Court's general discretion.

As a matter of impression, and remembering that the Court has an unfettered discretion, exposure to adverse costs orders would seem to increase in the following situations:

- Prosecuting proceedings without regard to their realistic prospects of success
- Pursuing proceedings without advice from appropriate experts
- Failing to engage meaningfully in the Court's ADR processes at an early stage
- Pursuing issues which are not sustainable either in fact or in law
- Not clearly articulating the issues to be pursued in proceedings
- Not complying with the Court's procedural requirements
- Taking a scattergun approach rather than limiting the issues to those which are essential for determination of the proceeding
- Not discontinuing or failing to agree to appropriate orders that will resolve the case when faced with adverse expert opinion

[8] *Faden Pty Ltd v Goondiwindi Shire Council* [1987] QPLR 250 at 253B

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It cannot be said with any confidence that merely running a fairly arguable case will be sufficient to avoid an adverse costs order. There is a difference between an arguable case and one which has "reasonable prospects", which is the term used in section 457(2)(d). Each case will be different but it now seems likely to be incumbent on a party to make a proper effort to determine whether its prospects are reasonable, and to be in a position to ultimately demonstrate to the Court that it has done so when confronted with an application for costs, or if making a submission, that there should be no order as to costs.

The new costs rules will undoubtedly cause litigants in the Planning and Environment Court to carefully evaluate the strength of their case at an early stage and to actively participate in the ADR process. There will now be less scope for submitter appeals to be used to cause delay through the tactic of discontinuing a week or two before trial. If such conduct is engaged in, then costs orders, which have previously been difficult to obtain, are likely to be granted against the offending party.

It will be interesting to observe how the Court exercises the new costs powers and to re-assess the observations made in this paper in a year or so, when there is an accumulated body of decisions about costs orders.