PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors (No. 2)* [2019] QPEC 2
PARTIES:	**GOLD COAST CITY COUNCIL** (applicant) **v** **ADRIAN'S METAL MANAGEMENT PTY LTD (ACN 616 177 050)** (first respondent) **and** **SARAH MONIQUE GARABED** (second respondent) **and** **CHRIS FULLER INVESTMENTS PTY LTD (ACN 603 284 920)** (third respondent)
FILE NO:	2429/17
DIVISION:	Planning and Environment
PROCEEDING:	Determination of an application for costs
ORIGINATING COURT:	Planning and Environment Court of Queensland at Brisbane
DELIVERED ON:	16 January 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Dealt with on the papers (submissions closed 14 December 2018)
JUDGE:	RS Jones DCJ
ORDER:	**1. The first and second respondents are to pay the applicant's costs of the enforcement proceedings on the standard basis.** **2. Such costs are not to include any of the costs associated with the application to join Mr Yarwood as a party to the proceeding.**
CATCHWORDS:	COSTS – where applicant successful in prosecuting enforcement proceedings against the first, second and third respondents – where applicant substantially successful in pleading for relief – where pursuant to the Planning and Environment Court Act 2016 ordinarily in proceedings in the

Planning and Environment Court each party is to bear its own cost for the proceeding – whether exception to the general rule applied because the conduct of the first and second respondent was frivolous and/or vexatious

INDEMNITY COSTS – whether conduct of the first and/or second respondent was such as to warrant partial indemnity cost orders – whether in circumstances where frivolous and/or vexatious conduct needs to be established before cost orders can be made such conduct would also warrant costs on an indemnity basis – whether conduct of the first and/or second respondent was such as to warrant cost orders in part on an indemnity basis

Environmental Protection Act 1994

Planning Act 2016

Planning and Environment Court Act 2016

Uniform Civil Procedure Rules 1999

Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Ors (No. 2) [2018] QPEC 59

Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors [2018] QPEC 45

Knight v FP Special Assets Ltd (1992) 174 CLR 178

Mackay Resource Developments Pty Ltd v Mackay Regional Council (No. 2) [2015] QPELR 874

Mansfield v DPP for Western Australia (2006) 226 CLR 486

Mudie v Gainriver Pty Ltd (No. 2) [2003] Qd R 271

Nerinda Pty Ltd v Redland City Council & Ors [2018] QCA 196

Oshlack v Richmond River Council [1998] HCA 11

COUNSEL:	Mr K Wylie for the applicant Ms S Garabed in person for the second respondent
SOLICITORS:	McCullough Robertson Lawyers for the applicant

[1] These reasons are concerned with an application for costs brought by the applicant against the first and second respondents. For the reasons set out below, the orders of the court are:

1. The first and second respondents are to pay the applicant's costs of the enforcement proceedings on the standard basis.

2. Such costs are not to include any of the costs associated with the application to join Mr Yarwood as a party to the proceeding.

Background

[2] The first respondent operated an extensive scrap metal business on land owned by the third respondent. The second respondent was at all material times the sole director of the first respondent. The land the subject of the proceedings is located at 24 (Lot 83) and 26 (Lot 84), Barnett Place, Molendinar, a suburb located to the east of the Pacific Highway and to the west of Southport. The land is located in an industrial area and is zoned Low Impact Industry in the applicant's planning scheme. No orders as to costs are sought against the third respondent.

[3] At the outset, both the applicant and the first and second respondents sought the advice of town planners: Mr Ovenden for the applicant and Mr Grummitt for the respondents. In their joint expert report (JER) they described the uses of the land in the following terms:[1]

> "The use carried out on the site is primarily related to the recycling of motor vehicles although recycling of other materials is also undertaken at a significantly lower scale.
>
> In regard to the recycling of motor vehicles, most vehicles are brought to the site on carriers. Once deposited on site, they are stripped of tyres and wheels (for separate recycling) and contaminants removed, including fuels, oils, batteries etc. At this point a decision is made as to whether the vehicle can be resold (a very small number of specialised vehicles), transported elsewhere for dismantling for export, or crushed on site. All of these above activities occur on Lot 84…
>
> Vehicles to be crushed are moved internally within the site to Lot 83…where a large excavator is used to crush those vehicles for transport off site for recycling.
>
> Vehicles awaiting disposal, whether crushed or largely intact, are stored on both Lots 83…and 84…
>
> Other metals brought to the site are sorted into separate containers for transport offsite to renders where the metal is recovered for alternative uses. All this activity occurs on Lot 84…"

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[1] Exhibit 15, para 3.1.3-3.1.7. A more expansive description of the activities on the sight was also set out in the JER of the sound engineers.

[4] The parties also sought the advice of engineers to address the issue of noise: Mr King for the applicant and Mr Temelkoski for the respondent. They identified that the on-site activities occurred between 7:00am to 4:00pm, Monday to Friday, and that the main activities included:[2]

- Weighing of inbound scrap metal on a weigh bridge;
- The relocation (movement) of scrap metal and skip bins with a fork lift;
- Removal of fluids and parts form cars prior to crushing;
- Crushing and stacking of cars with an excavator; and
- Loading of scrap metal onto semi-trailers for removal.

[5] As was identified in my substantive reasons,[3] proceedings were brought against the respondents on two bases. First, the use of the land was an unlawful use in that it had no relevant approvals in place and was not otherwise an existing lawful use. Second, that the use of the land, in particular the use of the on-site excavator, was creating an environmental nuisance for the purposes of the *Environmental Protection Act* 1994 (EPA). For reasons it is unnecessary to go into at this stage, it was necessary to make an interim enforcement order on 1 March 2018. That order was primarily directed to ensuring that noise levels did not exceed set parameters.

[6] The enforcement proceedings occupied five days, with evidence heard on 19 and 20 February and 7 and 8 June, and submissions were heard on 12 July 2018. During the proceedings, the applicant was represented by Mr K Wylie of Counsel. The respondents were represented by one Mr Yarwood and, to a much lesser extent, Ms Garabed. More will be said about the role of Mr Yarwood below.

[7] The relief sought included declarations pursuant to the *Planning and Environment Court Act* 2016 (PEC Act) and enforcement orders under the *Planning Act* 2016. The

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2 Exhibit 16, page 2.
3 *Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors* [2018] QPEC 45.

relief sought pursuant to the PEC Act and the *Planning Act* was directed to alleged offences pursuant to ss 161, 163 and 165 of the *Planning Act.* Section 163 is concerned with carrying out assessable development without a permit, and s 165 is concerned with the unlawful use of premises. Relief was also sought under the EPA to restrain an unlawful environmental nuisance from occurring as a consequence of the noise emanating from the site.

[8] While the applicant was unsuccessful in obtaining relief under s 163 of the *Planning Act* and certain declaratory relief directed towards an historical permit over Lot 83, it was otherwise successful. In my substantive reasons, after discussing a number of conclusions and the potential negative consequences for the employees of the first respondent, I stated by way of summary that I was satisfied that:[4]

1. Declaratory relief largely of the type identified by the applicant ought be granted;
2. Enforcement orders requiring the first respondent to cease its unlawful use of the land be made, but that the effect of that order be stayed for a period of not less than 90 days; and
3. The question of costs be adjourned to a date to be fixed.

[9] It was also indicated that, having regard to the reasons for judgment, it would be appropriate for the applicant to circulate a draft of the final relief sought consistent with those reasons, and that a date be set to formalise the final declarations and orders. Again, for reasons it is not necessary to go into, that process was somewhat delayed. However, on 7 November 2018, declaratory relief of the type agitated for on behalf of the applicant was made and, more importantly, an order was made pursuant to s 180(2) of the *Planning Act* ordering that by 28 January 2019:

(a) The first respondent must cease operating the motor vehicle and metal recycling business being conducted on the land; and
(b) The second respondent must ensure the first respondent, and any other corporation of which he is an executive officer (as that term is defined in the *Planning Act*) that is carrying out the said use of the land, cease to such use.

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4 At para 132.

[10] The ongoing use of the land was also declared to be an unlawful use and consequential orders were made pursuant to s 505 of the EPA.

[11] When the matter did come back on for the finalisation of the relief sought, there was no real issue taken with the proposed declarations and orders to be made by Ms Garabed.

[12] Finally, by way of background, there was an application to join Mr Yarwood as a party to the proceedings, but for the reasons given in the substantive judgment, that was refused.

Relevant statutory provisions

[13] The applicant is seeking costs orders to the following effect:[5]

(a) Costs up to and including 10 November 2017 to be assessed on the standard basis; and
(b) Costs subsequent to 10 November 2017 to be assessed on the indemnity basis.

[14] Costs are being sought on an indemnity basis because, after 10 November 2017, the respondents were in possession of the advice of both the town planners and noise experts which made it abundantly clear that the activities being conducted on the land were unlawful and, further, that noise emanating from the site was creating an environmental nuisance. In this context, it was submitted that the cost orders were being sought on two bases:[6]

(a) First, pursuant to s 60(1)(b) of the PEC Act, on the basis that the proceeding was frivolous and vexatious, and in the circumstances that it was both started (sic) and maintained without reasonable prospects of success; and
(b) Secondly, pursuant to s 61(1) of the PEC Act, on the basis that the applicant was successful in obtaining enforcement order against the respondents.

[15] Section 59 of the PEC Act provides:

"**General costs provision**

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5 Written submissions on cost, para 20.
6 Ibid at para 5.

> Subject to sections 60 and 61, each party to a P&E Court proceeding **must** bear the party's own costs for the proceeding." (Emphasis added)

[16] Section 60 relevantly provides:

> "**Orders for costs**
> (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—
> (a) the P&E Court considers the proceeding was started or conducted primarily for an improper purpose, including, for example, to delay or obstruct;…
> (b) the P&E Court considers the proceeding to have been frivolous or vexatious;
> *Example—*
> *The P&E Court considers a proceeding was started or conducted without reasonable prospects of success.*
> (c) …"

[17] Pursuant to s 61 of the PEC Act "*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.*"

[18] Sections 59 and 60 of the PEC Act reflect a significant philosophical shift from those provisions dealing with costs under its predecessor, the *Sustainable Planning Act* 2009 (SPA). Pursuant to s 457 of that Act, *"costs of a proceeding or part of a proceeding, including an application in a proceeding, are in the discretion of the court".* Sub-section 2 of s 457 thereafter set out a number of matters that the court may have regard to in determining whether or not to make costs orders. These included, by way of some examples, the relative success of the parties, whether a party commenced or participated in the proceedings for an improper purpose, and where a party commenced or participated in the proceeding without reasonable prospects of success.

[19] It is clear that the discretion given to this court to award cost under the SPA was a much wider discretion than that now prescribed. Of particular significance for the outcome of this application is that proceedings brought for an improper purpose

and/or that had no reasonable prospects of success might have well led to costs being awarded on an indemnity basis under s 457 of the SPA, whereas under ss 59 and 60 of the PEC Act, such frivolous or vexatious conduct is but a circumstance which, either of itself or in combination other matters, might trigger the making of adverse cost orders simpliciter.

[20] In my view, for costs to be awarded on an indemnity basis under ss 59 and 60 of the PEC Act, a higher order of misconduct than might otherwise have attracted costs on an indemnity basis in other civil litigation would be required. Without meaning to be in any way exhaustive, such conduct might include blatant dishonesty such as fraud, a flagrant breach of court orders (including interim orders), and continuing a blatant course of conduct involving the potential for serious environmental harm.

[21] As already identified though, the general costs provision in s 59 of the PEC Act is subject not only to the operation of s 60 of that Act but also s 61. As Williamson QC DCJ identified in *Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Anor (No.2),*[7] s 61 of the PEC Act confers a power to award costs where two preconditions are satisfied. First, the relevant proceeding must be an "*enforcement proceeding*"[8] for the purposes of the Act. Second, that as a consequence of that proceeding, an enforcement order has been made.

[22] Both of those preconditions are met in this case. Of particular significance though is that in an enforcement proceeding there are not, in my view, the same limitations on ordering costs on an indemnity basis that are likely to arise when exercising the discretion to award costs pursuant to ss 59 and 60 of the PEC Act. The wording of

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7 (2018) QPEC 59 at [4].
8 Defined in s 58 of the PEC Act.

s 61(1) is to be construed in accordance with ordinary principles. In this context, Gaudron J observed in *Knight v FP Special Assets Ltd:*[9]

> "…Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

[23] Before descending into the details of this application, it is important to bear in mind that, generally speaking, the purpose of cost orders is not to punish, but to compensate. In *Oshlack v Richmond River Council*[10] McHugh J, after observing that ordinarily, in civil litigation, costs would follow the event absent some disentitling conduct.[11] However, his Honour then went on to say:[12]

> "…costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought or defended, by the unsuccessful party, the successful party would not have incurred the expense in which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."

The applicant's submissions

[24] The substance of the applicant's case is set out in paragraph 8 of its written submissions:

> "Having regard to the subject proceeding, the Court would, it is submitted, find the following maters would be tend toward a determination that the proceeding was defended by the Respondents frivolously, and without any real prospects of success:
>
> (a) The fact that proceedings were resisted, and a development application not lodged, despite the Second Respondent being told by Ms Rachel Jones, solicitor for the Applicant, in as early as December

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9 (1992) 174 CLR 178 at 205. Also, *Mansfield v DPP for Western Australia* (2006) 226 CLR 486 at [10].

10 [1998] HCA 11; 193 CLR 72.

11 At [69]; see also r 689 of the *Uniform Civil Procedure Rules* 1999.

12 At [67].

2015 in no uncertain terms that a development permit was required for the on-site metal recycling business;

(b) The fact that the Respondents retained Mr Noel Grummitt to assist the Court by giving town planning advice in this appeal, and in the joint report produced in collaboration with Mr Ovenden, in which, unusually, there were no areas of disagreement, Mr Grummitt confirmed that:

(i) There was no existing lawful use rights for a salvage yard over 24 Barnett Place that would afford benefit to the use;

(ii) There had been a material intensification of the on-site uses occurring on 24 and 26 Barnett Place; and

(iii) The on-site use requires a code assessable development permit for a material change of use for medium impact industry (scrap metal yard) and environmentally relevant activity (metal recovery)."

[25] It was also submitted that I should proceed on the basis that "*wittingly or unwittingly, a purpose of the progression of this proceeding to trial was to delay as much as was reasonably practicable…"*[13] While there might well be good reason to be suspicious that this was the case, absent substantive evidence to substantiate such an assertion, it would be an error to proceed on that basis. I was not taken to any such evidence.

[26] It was also asserted that the fact that the first and second respondent failed to comply with the interim enforcement order made on 1 March 2018 was an "*exacerbating*" matter that worked in favour of making the orders sought. While I can accept that there is evidence that the first respondent had failed to comply with that interim enforcement order, I do not consider it to be a circumstance that would materially affect the final outcome of this application. At the time, the respondents were, by their own initiative, trying and resolve the noise issues, albeit unsuccessfully, and, in the event that the breaches were considered to warrant further involvement of the court, it would have been open for the applicant to seek to enforce those interim orders by way of injunctive relief or otherwise. It did not.

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13 Written submissions at para 9.

The respondents' submissions

[27] The respondents' written submissions identify the following reasons why they say there should be no orders as to costs.

[28] First, that when looked at objectively, no final enforcement orders have been made by the court and that the orders made were merely "*contingent enforcement order(s)*".

[29] Second, that it was not them that "*started*" the proceedings and they who were forced into having to defend the proceedings brought by the applicant.

[30] Third, and associated with the second point, that the litigation was unwarranted and could have been avoided had the applicant been prepared to negotiate with and/or accept various offers made by the respondents.

[31] In respect of this aspect of the respondent's submissions it was asserted:[14]

> "Indeed evidence at trial which was uncontroverted was that the Respondent sought to resolve the issues in dispute by meeting with Council officers which Council refused.
>
> In relation to the assertion that proceedings were maintained without reasonable prospects of success, the Respondent submit that they were forced by the Applicant to defend the proceedings as the Council would not accede to the offers made by the Respondents to resolve the proceedings in the manner ultimately determined by the court."

[32] In support of that assertion reliance was placed on two affidavits of the second respondent. The first sworn 7 December 2018 and the second an earlier affidavit dated 25 September 2017. In the most recent affidavit, reference was made to the previous affidavit and the "*constant discussions*" between the respondents and the applicant. Reference was also made to offers being made on 8 and 21 February 2018 and 13 and 26 March 2018. The affidavit also identifies that all those offers were rejected and that the respondents are now "*in the process of attending to those matters*

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14 Paras 8 and 9 of the respondent's written submissions.

and have engaged Grummit Planning Pty Ltd for that purpose".[15] The matters being "*attended to*" are those identified in the orders made by the court giving the respondents until 28 January 2019 to regularise the use of the land.

Discussion

[33] As to the first matter raised by the respondents, it is unsustainable. The relief granted by this court as a consequence of the substantive proceeding clearly incorporated enforcement orders. That the effect of those orders was delayed to give the respondents an opportunity to address the issues underlying the making of those orders is of no consequence.

[34] As to the second matter, it can be accepted that the respondents did not commence the proceedings. That said, as the reasons given in the substantive judgment identify, the use being made of the land was clearly an unlawful use and, in addition, was creating an environmental nuisance. To put it bluntly, the proceedings brought by the applicant were well justified. The submission made on behalf of the respondents on this point is misconceived. It is not necessarily the party that "*starts*" proceedings with no prospect of success who is at risk of adverse cost orders. The same consequences might also be open in respect of a party who seeks to defend proceedings with no prospect of success. That is the situation here.

[35] For the reasons given in the substantive judgment, it was abundantly clear from the outset that the operations being conducted on the land were being conducted unlawfully and were creating an environmental nuisance through the noise caused by the use of the excavator. That the use of the land was unlawful and that no lawful user rights existed was identified by the town planner retained by the respondents

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15 At para 10.

prior to the matter proceeding to hearing. The same situation existed in respect of the noise issue. In this regard, Mr Temelkoski even went so far as to report that, notwithstanding a number of steps taken by the respondents to address the issue, satisfactory noise levels were still not being met.

[36] In this context, a particularly puzzling aspect of the respondents' case was that through its own admissions and conduct it, by necessary implication, accepted that it was creating an environmental nuisance. The admissions came via the evidence of Mr Temelkoski and through their own conduct in trying to address the issue.

[37] In my substantive reasons, I made the following observations:[16]

> "[76] As already mentioned, following the commencement of this proceeding, AMM and Ms Garabed introduced a number of measures designed to reduce the noise levels emanating from the site. They included:[17]
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> - A quieter type of excavator used to move and crush car bodies;
> - Rubber claws fitted to the excavator;
> - Training operators to use the excavator in a quieter manner; and
> - Limiting the use of the excavator to only 1 hour per day (previously up to 3-4 hours per day).
>
> [77] Other changes included the stacking of containers filled with tyres along a section of the north western boundary of the land and limiting operation of a significant part of the excavator to the base of a cutting in the north western corner of the land."

[38] Put bluntly, absent overwhelming discretionary reasons, the prospects of the first and second respondent successfully defending the enforcement proceedings were all but zero. The evidence of their own witnesses made it abundantly clear that they had no reasonable prospects of success. In *Mudie v Gainriver Pty Ltd (No.2)*,[18] the Court of Appeal was concerned with the cost provisions of the then *Local Government*

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16 At paras [76] and [77].
17 Exhibit 33, attached report of Mr Temelkoski dated 27/02/2018, page 5.
18 [2003] Qd R 271; [2002] QCA 546.

(*Planning and Environment) Act* 1990. Relevant to the question of what constitutes frivolous or vexatious conduct McMurdo P and Atkinson J relevantly said:[19]

> "The words 'frivolous or vexatious' are not defined in the Act and should be given their ordinary meaning, unfettered by their meaning in the very different context of striking out or staying proceedings for an abuse of process. By the time an application for costs is made, the court knows the issues which have been litigated whilst in interlocutory applications, the court must to some extent speculate and must necessarily be cautious to ensure a deserving claimant is not unjustly deprived of the opportunity of a trial of the action. The Macquarie Dictionary defines 'frivolous' as 'of little or no weight, worth or importance; not worthy of serious notice … characterised by lack of seriousness or sense' and 'vexatious' as 'causing vexation; vexing, annoying …'.
>
> Unquestionably, something much more than a lack of success needs to be shown before a party's proceedings are frivolous or vexatious. Although in a different context, some assistance can be gained from the discussion of the meaning of these words in *Oceanic Sun Line Special Shipping Co Inc v Fay*, where Dean J states that 'oppressive' means seriously and unfairly burdensome, prejudicial or damaging and 'vexatious' means productive of serious and unjustified trouble and harassment … those meanings are apposite here.
>
> Whether proceedings are vexatious or oppressive will turn on the circumstances of the case but will include public policy considerations and the interests of justice." (Footnotes deleted)

[39] More recently in *Mackay Resource Developments Pty Ltd v Mackay Regional Council (No.2)*[20] Dorney QC DCJ, also referring to the *Oceanic Sun Line* case said:

> "With respect to the meaning of 'vexatious' it has been stated that the term applies to a proceeding which is 'productive of serious and unjustified trouble and harassment'; see, for instance, *Oceanic Sun Line Special Shipping Co Inc*…consequentially – picking up the aspect of 'frivolous' – it does not mean that, for example, merely because of successful parties frustrated at being put to the expense of responding to the proceeding…well because the proceeding showed a 'lack of success, or the prospect of it' the proceeding ought be characterised as 'frivolous or vexatious'…"

[40] There is no doubt in my mind that not only did the first and second respondent have no prospects of successfully defending the proceedings, they could quite properly be described as being frivolous in the sense of having little or no weight or worth, and were also vexatious in the sense of causing the applicant unwarranted and

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19 At paras [35]-[37].
20 [2015] QPELR 874 at [9].

unnecessary trouble by having to suffer the time and expense of prosecuting an indefensible case.

[41] For the sake of completeness, it is also clear from the substantive reasons that there were no discretionary grounds which would militate against granting relief of the type sought.[21]

[42] As to the third argument advances by the respondents, it may well be accepted that they were in "*constant discussions*" with the applicant. However, what is tolerably clear is that notwithstanding any such discussions, the respondents continued their unlawful use of the land and the creation of an environmental nuisance. At no time had any meaningful steps been taken, or a reasonable process identified, to regularise the use of the land or to address the noise issue. While attempts were made to address the noise issue, it was clear from the evidence of the engineers and by Ms Sotera that what had been done had not rectified the problem.

[43] For the reasons given the applicant is entitled to favourable cost orders under s 61 of the PEC Act. No further discussion of the operation of ss 59 and 60 of that Act is necessary.

Indemnity costs

[44] While I have some sympathy for the applicant's case for indemnity costs, I am not prepared to make such orders. It seems to me that the first and second respondents were, to a very significant extent, acting on the advice of Mr Yarwood. During the course of the proceedings, Ms Garabed appeared to be a practical and intelligent woman, save for the fact that she seemed to be proceeding on the basis that Mr

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21 See at paras 118-125.

Yarwood knew how best to conduct the case on behalf of the respondents. That was a grave mistake on her part. Mr Yarwood's performance at the bar table was far from impressive and, in my view, at times involved conduct that could only be described as concerning.

[45] First, there was Mr Yarwood's involvement with the first respondent and other affiliated companies. His involvement or role within those companies seemed to involve what could only be described as a fluid relationship that seemed to vary, depending on the circumstances that existed from time to time. This was a matter discussed in the substantive reasons for judgment.[22]

[46] Also on topic, in an affidavit filed on his behalf on 11 June 2018, Mr Yarwood described himself as a "*commercialist and the principal of the business consultancy firm registered as Michael Yarwood Management*". In that same affidavit, he described himself and his firm as providing commercial business advice and management services to a number of businesses and individuals including the first, second and third respondents in this proceeding.[23] It would appear that from at or about February 2017, regardless of whatever office Mr Yarwood might have held or not held, insofar as the first and third respondents were concerned, he was acting as their advisor and, in particular, providing advice on how to best conduct these proceedings. [24] As already mentioned above, Mr Yarwood clearly played the major role during the course of the hearing, with Ms Garabed playing a much less significant part.

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22 *Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors* [2018] QPEC 45 at [14], [15] and [108] to [112].

23 At para 4.

24 At para 6.

[47] The second matter of concern was the way he conducted himself during the cross-examination of a number of witnesses. Despite the overwhelming evidence against the first respondent insofar as the question of noise was concerned, a matter that must have been within the knowledge of Mr Yarwood, he persisted in challenging a number of witnesses about the matter. By way of examples, he put to a number of witnesses[25] the proposition that the source of the noise might have been caused by, or in some other way influenced by, one of the other businesses being operated within the industrial estate.[26] Not only was such a challenge inconsistent with the evidence of the expert witness, it was otherwise completely groundless. To put it bluntly, he must have known that this proposition was unsustainable.

[48] Despite the clear evidence of Ms Sotera, Mr Ovenden and Mr King and indeed the evidence of their own expert witness, Mr Temelkoski, Mr Yarwood persisted with this contention to the very end. In the respondents' outline of argument it was asserted:[27]

> "In this regard the evidence is not differentiated between noise emanating from the two lots in question and the other noise from surrounding operations including but not limited to TNT, Southport Timbers and Gold Coast Excavations.
>
> Further, unsatisfactory elements of the evidence adduced were:
>
> (a) The inability of the applicant's expert to explain the similar noises attributed to the first respondent, identified during monitoring at times the first respondent as not operating;
>
> (b) The failure of the applicant's expert to investigate the noise referred to in the preceding paragraph;
>
> (c) The inconsistency between the operational logs of the first respondent and the noise log relied on by the applicant's expert witness."

[49] That submission has to be seen in the context of not only the evidence of their own expert witness but also in the context of the first respondent, having finally accepted

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25 Ms Sotera, Mr Ovenden and Mr King.
26 See generally at T3-26-T3-29; T3-45 ll 8-30; T3-51 ll 36-38.
27 At paras 66 and 67.

its responsibility for the noise emissions on the site, taking a number of steps to address that issue. In a somewhat contradictory manner the respondents' written submissions also contended:[28]

> "Therefore the relief sought by the applicants is that the respondents comply with the provisions of *Environmental Protection Act (Qld)* in regard to noise.
>
> It is the respondents' position that they should comply with the provision of the *Environmental Protection Act (Qld)* in regards to noise. It does not necessarily follow that any source of the noise is to be completely shut down.
>
> In this regard the first respondent's submissions are that it should be allowed to continue to use the excavator provided that appropriate steps are taken in respect of noise emissions."

[50] In addition to the groundless challenges made to the evidence of Ms Sotera, Mr Ovenden and Mr King about the source of the noise, Mr Yarwood also challenged witnesses on the bases of completely unrealistic and spurious arguments. By way of examples, that the source of the complaints about noise from the Peppers Hill Estate was a consequence of the applicant's inappropriate approval of residential development.[29] This assertion completely ignores the fact that the applicant was entitled to proceed on the basis that all activities conducted within the industrial estate to the east would be conducted in a lawful manner. Another component to Mr Yarwood's approach to dealing with the issue of noise, at least as far as I was able to understand it, was that noise amelioration works could be, or should have been, carried out by someone else within the unused road reserve to the west of the subject land.[30]

[51] Finally on this topic, Mr Yarwood, by necessary implication, sought to impugn Mr King's professionalism by suggesting that he had done little more than arbitrarily

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28 At paras 63, 64 and 65.
29 T3-57 to T3-58.
30 T3-61.

selected the first respondent as the culprit,[31] as a part of a "*witch hunt*" against the respondents.[32]

[52] That the first and second respondents, most unfortunately for them, seemed to be acting on the advice of Mr Yarwood would not of itself deprive the applicant of an entitlement to costs on an indemnity basis. However, in my view, it is a relevant consideration. Also, as I understand it, Mr Yarwood no longer has any connection with the affairs of the first and/or second respondent who, with the assistance of a town planner and a sound engineer, are now seeking to regularise their use of the land. While I have no direct evidence about the last matter I am prepared to proceed on the basis of what Ms Garabed told me on 7 November 2018.

[53] Finally, while not of itself a determinative matter, it is of some relevance that the applicant was not entirely successful in respect of the relief sought concerning the 2001 permit. This situation can be, in my respectful view, distinguished from that where a party is wholly successful in achieving the relief sought even though it did not succeed on every issue raised in seeking to achieve that outcome.[33]

[54] As can be readily appreciated from the above discussion, there is a strong case for awarding indemnity costs in the form advanced on behalf of the applicant. However, with a degree of hesitation, I have decided not to take that course but instead order costs on the standard basis.

[55] By way of summary, and in descending order of importance, the reasons for reaching that conclusion are: first, the unfortunate involvement of Mr Yarwood in the conduct of the matter. Secondly, while admittedly unsuccessful, this was not a case where no

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31 T3-43.

32 T3-51 ll 45-48. Assertions of this kind were also made by Mr Yarwood on 8 February 2018. See Exhibit SMG1 the affidavit of Ms Garabed sworn 7 December 2018.

33 Contrast *Nerida Pty Ltd v Redland City Council & Ors* [2018] QCA 196.

effort was made to address the matters in issue. At least some attempt was made to address the noise problem. Third, but much less importantly, the applicant's absence of success in respect of the relief sought concerning the 2001 permit.

[56] Before going on to make final orders, I agree that having regard to the circumstances surrounding the first respondent and a number of its previous corporate entities that it would be appropriate to include the second respondent in any cost orders to be made. In any event Ms Garabed was, in her own right, a party to these proceedings.

[57] For the reasons given the orders of the court are:

1. The first and second respondents are to pay the applicant's costs of the enforcement proceedings on the standard basis.
2. Such costs are not to include any of the costs associated with the application to join Mr Yarwood as a party to the proceeding.