PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Moramou2 Pty Ltd v Brisbane City Council (No 2)* [2019] QPEC 22
PARTIES:	**MORAMOU2 PTY LTD** (appellant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	4926/17
DIVISION:	Planning and Environment
PROCEEDING:	Application for costs
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	21 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Everson DCJ
ORDER:	**1. The respondent is to pay the appellant's costs thrown away as a consequence of the adjournment of the hearing of the appeal on 10 December 2018 on the standard basis.** **2. The respondent is to pay half of the balance of the appellant's costs of and incidental to the appeal including the costs of the application for costs on the standard basis.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – COSTS – appeal against enforcement notice – whether the discretion of the court to make an order for costs has been enlivened because of the respondent being frivolous or vexatious, an adjournment was necessary as a consequence of the introduction of new material; and it not properly discharging its responsibilities in the proceeding
LEGISLATION:	*Planning and Environment Court Act 2016* (Qld)
CASES	*Moramou2 Pty Ltd v Brisbane City Council* [2019] QPEC 18 *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No 2)* [2019] QPEC 9

Warwick Shire Council v Wall & Anor [2006] QPELR 786

COUNSEL: ANS Skoien for the appellant

SOLICITORS: Milne Legal for the appellant
Brisbane City Legal Practice for the respondent

Introduction

[1] This is an application for costs brought by the appellant consequential upon the judgment in *Moramou2 Pty Ltd v Brisbane City Council*.[1]

[2] The judgment was in respect of an appeal against the decision of the respondent to give an enforcement notice to the appellant concerning its use of premises located at 47 Brighton Road, Highgate Hill ("the premises") as a backpacker hostel. Only one issue remained for determination in disposing of the appeal, namely whether there had been an unlawful increase in the intensity or scale of the use of the premises in terms of the number of people accommodated there. In dismissing the appeal and setting aside the enforcement notice I found that the current use lawfully complies with both the development approval and the relevant legislative requirements which regulate this type of use and that there is therefore no unlawful increase in the intensity or scale of the use of the premises as a consequence of the number of people accommodated there.

[3] This application is brought pursuant to s 60 of the *Planning and Environment Court Act 2016* ("PECA") which relevantly provides the following exceptions to the general provision that each party must bear their own costs of a proceeding in this court:

> "**60 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—
> …
> (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.
> …
> (d) a party is required to apply for an adjournment because of the conduct of another party;
> (e) without limiting paragraph (d), a party has introduced, or sought to introduce, new material;
> …
> (i) an applicant, submitter, assessment manager, referral agency or local government does not properly discharge its responsibilities in the proceeding.
> …"

1 [2019] QPEC 18.

Discussion

[4] At the outset it must be emphasised that the right of appeal conferred upon the appellant in the circumstances before me is a right to appeal against the decision to give an enforcement notice.[2] The appeal was instituted against an enforcement notice dated 30 November 2017 ("the enforcement notice"). It asserted that the appellant was both carrying out assessable development without a permit, having regard to the intensity or scale of the use of the premises and further that unlawful building work had also been undertaken to a pre-1946 building. The appellant was required to in each instance lodge a properly made development application by 20 March 2018 and "do all things necessary to progress that application". Significantly, the enforcement notice asserted that the unlawful increase in the intensity or scale of the use of the premises arose having regard to an approval granted on 13 July 1987.[3]

[5] When the appeal came on for hearing before His Honour Judge Williamson QC in December 2018, it was adjourned by agreement between the parties to permit the respondent to substitute a fresh enforcement notice ("the substituted enforcement notice"). An order was subsequently made by Judge Williamson QC on 11 December 2018 setting out a timetable to allow for the ultimate hearing of the appeal. The substituted enforcement notice fundamentally re-pleaded the allegations concerning the alleged unlawful increase in the intensity or scale of the use of the premises and significantly, asserted noncompliance with an approval dated 27 February 1987. There was no reference to the approval dated 13 July 1987. The allegations of unlawful building work were maintained, although pleaded differently. There was no change in the essential allegation that the building work in question was assessable development because it involved building work to a pre-1946 building.[4]

[6] The allegations concerning unlawful building work remained in issue at the commencement of the hearing of the appeal. When I inquired as to whether there were any concessions in this regard, Mr Skoien, for the appellant, responded that development application to regularise the building work had been made in circumstances where it was conceded that this was necessary.[5] Thereafter, Mr Fynes-Clinton, on behalf of the respondent, submitted that while an application to regularise unlawful building work to a pre-1946 building had been lodged with the Council it appeared to "have gone into abeyance as a result of these proceedings".[6] Mr Fynes-Clinton subsequently conceded that in the circumstances I need not trouble myself with this aspect of the appeal.[7] As a consequence, I deleted the relevant paragraphs of the substituted enforcement notice. Mr Skoien then tendered the list of disputed issues on behalf of the of the Appellant which included paragraph 4 which raised the prospect of setting aside the requirement of the enforcement notice that the appellant make an application for a development permit for building work, on discretionary

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2 *Planning Act 2016*, Schedule 1, Table 1.
3 Certificate of Colin Jensen filed 14 September 2018 Ex "A".
4 Exhibit 1.
5 T1-7 ll 15-40.
6 T1-10 ll 5-10.
7 T1-10 ll 15-20.

grounds.[8] Given the exchange which had just occurred, with the concurrence of Mr Skoien, I indicated that I would delete paragraph 4 as it was no longer relevant.[9]

[7] In these circumstances it is surprising that in his prolix and repetitive submissions in support of this application, Mr Skoien asserts that this development application (which I am satisfied had been indeed placed in abeyance at the request of the appellant) "would obviously be necessary to vary any building work in which the approved use was being carried out".[10] At paragraph 2.7 of the submissions on costs Mr Skoien states:

> "At the outset of the consideration of the question on costs, the Appellant notes that there can be no suggestion that the Appeal otherwise necessary (sic), due to the additional requirement of the Original Enforcement Notice, maintained in the Revised Enforcement Notice, that the Appellant should make application for approval for the Building Works. That issue was dealt with properly, and expeditiously, by the Appellant by the making of the Change Application. There really was no need for such a contention to form part of the Original Enforcement Notice, let alone the proceeding generally, or the Revised Enforcement Notice."[11]

[8] This is not a fair submission given what in fact occurred. As noted above, the enforcement notice required the appellant to lodge a properly made development application relating to the unlawful building work and further "do all things necessary to progress that application" by 5pm on 30 March 2018. The requisite development application was placed in abeyance at the request of the appellant pending the outcome of the appeal in circumstances where the list of disputed issues tendered by the appellant sought relief from this obligation on discretionary grounds.

[9] The first basis upon which costs are sought is that set out in s 60(1)(b) of the PECA, that the court considers the proceeding to have been frivolous or vexatious. Mr Skoien does not even attempt to articulate how this provision relates to the successful proceeding which was instituted by the appellant. However, I note that in Schedule 1 to the PECA, "P&E Court proceeding" is relevantly defined to include "a part of a proceeding and an application in a proceeding…" Applying the comprehensive analysis of this provision in *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No 2)*,[12] I adopt the view of Williamson QC DCJ that the term includes a defence to an appeal by a local government.[13] I further adopt His Honour's analysis of the term "frivolous or vexatious" in the context of the example given in s 60(1)(b) of the PECA. Relevantly, I note that the term "frivolous" has been found to mean, inter alia, having no reasonable grounds.[14] His Honour went on to state:

> "The phrase '*without reasonable prospects of success*' has been held to equate its meaning with '*so lacking in merit or substance as to be not fairly arguable*'. A case which is not fairly arguable is one that is

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8 Exhibit 2, para 4.
9 T1-12 ll 20-26.
10 Submissions on costs on behalf of the appellant, para 1.8.
11 Ibid, para 2.7.
12 [2019] QPEC 9.
13 Ibid at [26].
14 Ibid at [27].

> regarded as '*bound to fail*'. This is a concept that falls appreciably short of '*likely to succeed*'. A lack of success does not mean that a proceeding had no reasonable prospects, or lacked merit."[15]

[10] On the facts before me, the respondent decided to issue an enforcement notice alleging an unlawful use of the premises in circumstances where it is uncontentious that a development approval will be read in a way which favours the grantee in the event that ambiguity arises.[16] The enforcement notice failed to identify the correct development approval for the premises. The substituted enforcement notice, while identifying the applicable development approval, failed to disclose any basis for an *unlawful* increase in the intensity or scale of the use of the premises. For the reasons set out in the judgment allowing the appeal, I am of the view that the defence of the part of the enforcement notice, which essentially alleged an unlawful use of the premises as a consequence of an exceedance of some implied occupancy cap, was frivolous and bound to fail.

[11] Furthermore, I find that the conduct of the respondent in this regard in maintaining allegations of an unlawful use of the premises on such tenuous grounds despite the onerous evidentiary burden it carried, amounted to the respondent not properly discharging its responsibilities in the proceeding pursuant to s 60(1)(i) of the PECA.

[12] As the circumstances enlivening the exercise of my discretion pursuant to s 60(1) of the PECA are confined to only the defence of the allegations in the enforcement notice relating to the unlawful use of the premises (as opposed to the unlawful building work), it is appropriate to order the respondent to pay only half of the appellant's costs of the proceeding subject to my findings in paragraph [13] below.

[13] The appellant also seeks the costs thrown away by the adjournment on 10 December 2018. The hearing of the appeal was adjourned solely because the respondent needed to issue the revised enforcement notice. In my view such conduct comfortably comes within what is contemplated in s 60(1)(e) and (i) of the PECA. Accordingly, the respondent should pay the appellant's costs thrown away as a consequence of the adjournment on the standard basis.

[14] The appellant further seeks costs pursuant to a *Calderbank* offer made on 28 November 2018. In circumstances where the respondent has an obligation to enforce compliance with the planning controls administered by it, there are considerations of public policy which make a *Calderbank* offer an unattractive, and in all likelihood, irrelevant consideration in a costs application pursuant to an appeal such as this. The offer also sought to dispose of the unlawful building work issue in a summary way which is a most unattractive outcome. In the circumstances I disregard the *Calderbank* offer.

Conclusion

[15] In the circumstances I find that my discretion to award costs has been enlivened and it is appropriate that I order the respondent to pay costs pursuant to s 60(1) of the PECA in the following terms:

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15 Ibid at [30].

16 *Warwick Shire Council v Wall & Anor* [2006] QPELR 786 at 788 [14].

1. The respondent is to pay the appellant's costs thrown away as a consequence of the adjournment of the hearing of the appeal on 10 December 2018 on the standard basis; and
2. The respondent is to pay half of the balance of the appellant's costs of and incidental to the appeal including the costs of the application for costs on the standard basis.