

Costs in the ERD Court

It is the general rule in the Environment, Resources and Development Court that each party to an appeal bears its own costs. However, where an appeal against a section 84 notice, or an application for civil enforcement orders under section 85 of the *Development Act 1993* has been heard and determined, the Act gives the ERD Court the discretion to make orders in relation to legal costs.

When costs are awarded, they are intended to compensate a successful party for their legal costs incurred during the course of the matter, rather than a form of punishment of the unsuccessful party.

So it can be said with a degree of certainty that if, after a hearing, a council successfully defends an appeal against a section 84 enforcement notice, or successfully obtains civil enforcement orders under section 85 of the Act, the council will generally be entitled to claim its legal costs from the unsuccessful party.

However, the chances of successfully obtaining costs orders in the ERD Court where legal proceedings have settled or have otherwise been discontinued before a hearing has occurred, are significantly reduced. Even if some costs may be able to be obtained, often the additional costs, involved in applying to the ERD Court for a costs order will outweigh the costs that a council is entitled to.

In a recent case, ***Karger v City of Onkaparinga [2009] SAERDC 42***, the ERD Court examined an application for costs in relation to both an appeal against a section 84 notice and section 85 proceedings, where the parties had reached settlement before a hearing had occurred.

Briefly, Mr Karger commenced an appeal against an enforcement notice issued to him by the Council in 2005. Between 2005 and late 2007, the appeal was continually adjourned as negotiations took place between the parties.

In late 2007, after negotiations had stalled, the Council commenced section 85 proceedings against Mr Karger. Both matters then travelled together, and were adjourned on several occasions as negotiations continued.

In late 2008, the parties reached settlement of the substantive legal issues and both matters were finalised subject to the issue of costs.

When determining whether Mr Karger should pay the Council's costs, Judge Trenorden had regard to the following considerations:

- whether either party would have succeeded, if the matters had proceeded to a hearing; and
- whether either party had acted unreasonably.

The Judge could not determine whether either party would have succeeded in the respective actions. Therefore, no costs were awarded on the basis of likely success.

In respect of the reasonableness of each parties actions, the Judge held that each party had acted reasonably during the course of each matter. Although the original section 84 proceedings had been commenced over 4 years ago, the Judge held that this delay was the necessary result of ongoing negotiations, and was not the result of unreasonable behaviour attributable to either party.

The Judge was, however, satisfied that Mr Karger had made an admission that his conduct (in undertaking unauthorised development) in the lead-up to the issue of the original section 84 enforcement notice was

unreasonable. Accordingly, the Court awarded to the Council its costs in relation to the enforcement notice, and its costs of attendance at the first compulsory conference.

Importantly, the Court stated that without the admission as to unreasonable behaviour from Mr Karger, no award as to costs would have been made. The Court did not award the costs of the application for the costs order to the Council, instead ordering that each party bear its own costs.

Although a figure on the amount of costs awarded to the Council was not disclosed in this judgment, it may be assumed from the limited scope of the award that the amount was relatively insignificant.

The important message from this judgment is that Councils need to be aware when an appeal against a section 84 notice, or a section 85 application settles before the appeal or application hearing is heard and determined, they may not be successful in redeeming their legal costs, unless the other party has acted in an unreasonable manner. Further, where they are successful in achieving a costs order, it is to be noted that the Court tends to take a cautious approach such that these costs are more likely to be conservative than generous.

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