

# No presumption that costs should follow the event

28 June 2016

by Ronald Yuen, Shaun Pryor

## In brief

The case of *Farrah v Brisbane City Council (No 2)* [2016] QPEC 23 concerned an application made by Jeffrey Farrah in the Planning and Environment Court for costs arising out of an appeal by Mr Farrah against the Brisbane City Council's refusal of an application to demolish two pre-1911 houses.

In the substantive appeal, the Court found that due to the likely cost involved in bringing the houses to a structurally sound condition, neither house was reasonably capable of being made structurally sound and allowed the appeal. Mr Farrah subsequently made an application for costs against the council.

The Court considered the issue on whether to award costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal. The Court found that while these aspects were finely balanced, the public interest aspect of the case warranted the making of no orders as to costs.

## Mr Farrah made an application for costs on the basis of his success and interest in the appeal and his reasonable conduct in prosecuting the appeal

Mr Farrah contended for a costs order on the following basis:

>

He was successful in the substantive appeal. In particular, he was successful on the only substantive issue in the appeal and that no other substantive reasons existed justifying the decision not to award costs.

- > He was not pursuing a commercial interest and the appeal was brought to avoid having to waste money fixing up the houses or having to sell the properties for less than their true value.
- > His conduct in the prosecution of the appeal was reasonable and the litigation had been conducted in an efficient and cost-effective way. In fact, the council had acted unreasonably by resisting his request for a mediation in circumstances where there would be a "reasonable expectation of some utility" (at [9]).
- > He had incurred costs in prosecuting the appeal.

### **The council argued to the contrary that the application for costs be dismissed**

The council submitted that the application be dismissed for the following reasons:

- > Most of the council's expert evidence was preferred to that of Mr Farrah.
- > The issue of the costs involved in bringing the houses to a habitable state was introduced by Mr Farrah, despite it being clear that the real issue was the cost of making the houses structurally sound.
- > It was in the public interest to resist the appeal as the "habitable point" had a potential to impact on the future operation of council's planning instruments relating to protection of traditional building character.
- > Mr Farrah's case in the substantive appeal was different from his pleaded case.
- > The council had not acted unreasonably in the conduct of the appeal.

### **Court found the issue on whether to award costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal and found that the public interest aspect of the case warranted no orders as to costs**

In considering whether to award costs under section 457 of the Sustainable Planning Act 2009, the Court observed the following:

*It is now well settled that the discretion provided for pursuant to s 457 is a broad one to be exercised judicially but without any presumption that costs ought follow the event or otherwise on the basis that there is some qualified protection against an adverse costs order. In exercising its jurisdiction under s 457 of the SPA the Court has to do so in a way that ensures, as far as can be, that while costs orders are made in appropriate cases it does not create a perceived established attitude as to costs that might act as a disincentive to citizens (individual and corporate) and relevant statutory authorities*

*who either have meritorious cases to litigate or reasonable administrative decisions to defend.*

In relation to the council's refusal to participate in a mediation, the Court found that it was not unreasonable since there was little prospect of reaching any compromise and it was unlikely that the mediation would result in any material narrowing of the issues.

The Court considered the council's involvement in the appeal which arose out of its concern to preserve residential buildings constructed prior to 1911 involved a matter of genuine public interest. The council was therefore not concerned with achieving or maintaining any commercial advantage over Mr Farrah.

The Court accepted that achieving or preserving the public interest might result in "significant limitations on the ability of a property owner to achieve his highest and best use..." (at [27]) and that the costs of litigation would not be insignificant. However, in the Court's opinion, Mr Farrah had secured a commercial advantage from the appeal even if that was not the intended purpose.

It was observed by the Court that both parties conducted their respective cases in an efficient and cost-effective manner and it would be wrong to criticise the council for introducing valuation evidence in circumstances where the evidence was brief and provided some assistance in determining the final outcome.

As to the submission that Mr Farrah departed from the "pleaded" case by introducing the "habitable point", the Court did not believe it materially affected the conduct of the proceeding and found it to be not an irrelevant consideration.

The Court ultimately found the issue on whether to awards costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal. The Court found that while these aspects were finely balanced, the public interest aspect of the case was a particularly significant consideration which warranted the making of no orders as to costs.

---

## KEY CONTACTS



**Shaun Pryor**  
Graduate at law



**Ronald Yuen**  
Senior Associate