

LGPA Networking Breakfast

Legal Update 2018

Recent decisions on costs in SAT
planning reviews

Presented by:
Mark Gregory, Partner
Castledine Gregory

Thursday, 2 August 2018

Overview

1. Brief review of SAT costs jurisdiction
2. *Ransberg Pty Ltd and City of Bayswater* [2016] WASAT 43 (S)
3. *Spartalis and City of Stirling* [2017] WASAT 125

Costs in the SAT - overview

State Administrative Tribunal Act 2004:

Costs of the parties (section 87, SAT Act)

- Parties usually bear their own costs in SAT (section 87(1))
- But SAT *may* order costs (section 87(2))
- SAT-ordered costs can compensate a party for ‘any expenses, loss, inconvenience, or embarrassment resulting from the proceeding’ or the underlying matter (section 87(3))

Costs in the SAT - overview

Costs of the parties (cont'd)

- In review decisions (such as planning reviews), the SAT must have regard to:
 - whether the party (in conducting the matter before the decision maker) genuinely attempted to enable and assist the decision-maker to make a decision on the merits;
 - Whether the party (being the decision-maker) genuinely attempted to make a decision on the merits

(section 87(4))

Recent cases

Ransberg Pty Ltd and City of Bayswater [2016] WASAT 43 (S)

Facts and background:

- 2010 – Ransberg applied for approval for a concrete batching plant. City refused the application.
- 2014 - SAT granted approval for batching plant on conditions (management of dust and noise).
- 2015 – Ransberg applied afresh for concrete batching plant with superior design: lower dust and noise emissions.
- May 2015 - City refused the application, despite advice regarding dust and noise, and approval recommendation, from administration. Council's reason:
 - *Council 'reiterates its previous decision of ... 2011 ...'*

Ransberg (cont'd)

The SAT review:

- September 2015 – City ‘reconsideration’ under section 31, SAT Act. SAT ‘*cautioned the City to genuinely consider the application on its merits*’ or risk liability for costs
- Administration (and external consultants) advised the Council that the amended design improved dust and noise amenity issues, and that that there were no reasons to refuse the application.
- The City's Council nevertheless refused the application on reconsideration

Ransberg (cont'd)

SAT decision on costs.

SAT commented:

- Costs orders are generally only made in review proceedings where a party has acted unreasonably, including where a party has failed to meet the expectation expressed in section 87(4) of the SAT Act (para 22)
- On the importance of consistency in decision-making, in the interests of orderly and proper planning (para 29)
- Once a 'reconsideration' invitation is accepted by a decision-maker, the decision-maker must then genuinely attempt to make a decision on the merits (para 38)
- Here, the decision under review is the 'reconsideration' decision of September 2015

Ransberg (cont'd)

SAT said:

- *'It was apparent to the Tribunal from the way the Council consistently dealt with the matter and the final reasons given by the respondent on 22 September 2015, that the respondent took the view that it would always oppose a concrete batching plant at the subject site regardless of any professional advice or previous decisions of the Tribunal.'* (para 40)
- *'While the respondent may oppose a concrete batching plant, [it] is still obliged to consider the proposal on its merits... [and apply] consistency in decision-making in the interests of orderly and proper planning'* (para 41)

Ransberg (cont' d)

SAT found that the decision-maker had failed to genuinely attempt to make a decision on the merits, because:

- It failed to have regard to the SAT's previous approval in *Ransberg No. 1*, and the planning framework had not materially changed
- It ignored extensive planning, legal and environmental advice supporting the application - which had an improved design and better dust and noise management (paras 47- 49)
- The decision-maker's conduct was unreasonable, in all the circumstances (para 51)

Ransberg (cont'd)

The SAT's costs award:

- One objective of the SAT Act is to minimise costs (section 9)
- Applicant had sought 'indemnity costs' (i.e. its full legal and other costs)
- SAT found that this was 'not the rare case where an order for indemnity the costs...should be made' (para 61)
- SAT reduced the claimed legal costs according to the SAT costs scale (about 2/3 of actual legal fees), and allowed 50% of costs at that scale rate
- SAT assessed an amount as a 'contribution to the applicant's reasonable legal costs'
- Total costs award was \$112,772 (legal fees, disbursements and expert consultants' fees)

Spartalis and City of Stirling [2017]

WASAT 125

Facts:

- Development application for minor additions to existing office building (fence, patio, outbuilding, etc) - commercial premises on Beaufort Street, Inglewood
- Deemed refusal - late 2016
- SAT review commenced October 2016
- SAT invited the City to reconsider its decision, by 21 December 2016

Spartalis (cont'd)

The SAT review proceedings:

- February 2017 – City informed SAT that it intended issuing a development approval, and the only issue was the fence
- 21 April 2017 – Directions hearing with all parties present - SAT lists hearing for 31 May 2017
- SAT and parties still expecting development approval from City – hearing to focus on any contentious conditions
- Applicant had fully prepared its case by 17 May 2017
- 25 May 2017 – 6 days before hearing – City approves all developments; vacates hearing (except for costs application)

Spartalis (cont'd)

Costs issues for the SAT:

- Had the City's conduct been unreasonable and/or unnecessarily prolonged the hearing?
- Did the City genuinely attempt to make a decision on its merits?

Spartalis (cont'd)

Unreasonableness and delay:

- Section 9, SAT Act – SAT objective of resolving disputes with little formality, speedily and minimising costs
- Section 30, SAT Act - In reviews, decision-maker to use best endeavours to assist the SAT.

The SAT found:

- ‘unreasonable conduct’ does not require ‘intention to waste resources’ or ‘personal interest’:

‘It is possible for a local government authority to disadvantage a party in a proceeding by failing to act as speedily as practicable. A finding of intent is not required.’ (para 34)

Spartalis (cont'd)

Unreasonableness and delay (cont'd):

SAT found:

- By February 2017, respondent said it intended to issue a development approval (except fence) – there was then over three months delay before approval actually granted
- Applicant had expended resources to fully prepare for hearing
- Only 6 days before hearing, respondent granted approval
- Insufficient explanation for respondent's late approval

Spartalis (cont'd)

Genuine attempt to decide on the merits

- This was a deemed refusal

SAT found:

- Relevant to consider the stage of proceeding at which the decision-maker makes any such genuine consideration
- From mid-February 2017 the Respondent inexplicably delayed progressing the matter.
- Reasons for late decision were unexplained or unacceptable:
'[either] the Respondent only very belatedly [turned] its mind to the merits of the outstanding issue, or [...] due to the unavailability of its key witness on a particular day [which was unexplained], it simply arbitrarily decided to grant an approval to save costs of retaining an external expert witness.' (para 16)
- Costs awarded of \$20,000 (of the \$29,000 sought)

Some final observations

- SAT costs awards are not ‘the norm’ – usually parties pay their own costs;
- *Ransberg* and *Spartalis* are cases with strong factors
- Local governments must ‘genuinely attempt to make a decision on its merits’ (SAT Act)
- A deemed refusal is not an ‘escape route’ from the requirement to genuinely attempt to decide on the merits (*Spartalis*)
- In a section 31 reconsideration, the LG must still attempt to decide on the merits (*Ransberg*)
- Importance of consistency in decision-making: orderly and proper planning (*Ransberg*)
- Major delay, not minimising costs, or other ‘unreasonable’ conduct, are strong factors (*Spartalis*)