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The right of local governments to recover legal costs in proceedings for recovery of unpaid rates

By Adam Watts

Local governments are given significant power in relation to the recovery of unpaid rates under the *Local Government Act 1995* (WA) (**LG Act**), including the right to recover the costs of rates recovery proceedings under section 6.56 of the LG Act, which states—

> *'[if] a rate or service charge remains unpaid after it becomes due and payable, the local government may recover it, as well as the costs of proceedings, if any, for that recovery, in a court of competent jurisdiction.'*

The costs component of the provision is intended to protect the revenue of local governments and also encourages ratepayers to address unpaid rates at an early stage to minimise exposure to costs, which may ultimately include legal and court costs.

In a recent decision of the Western Australian Court of Appeal in *Parker v City of Rockingham* [2021] WASCA 120, the court provided some clarity on the position of local governments in relation to the recovery of legal costs in rates recovery proceedings under section 6.56 of the LG Act. It is decision, the Court held that a local government's entitlement to recover legal costs is not unfettered, as the costs sought must be within reason. Accordingly, local governments must prove that the costs sought have been reasonably incurred and are of a reasonable amount. Prior to this appeal, local governments typically sought to recover these legal costs on an indemnity basis. Despite this new requirement for reasonableness, the independent and substantive right of local governments to recover such legal costs remains.

Key Elements of *Parker v City of Rockingham*

In the original claim before the Magistrates Court of Western Australia, the City relied on section 6.56(1) of the LG Act, as well as a parallel cost provision in section 36Z(2) of the *Fire and Emergency Services Act* (**FES Act**), to obtain orders for the recovery of legal costs on an indemnity basis

In regard to the recovery of these costs, the Magistrates Court considered that the only relevant issue to be determined was whether the City had in fact incurred the legal costs it sought to claim. The lawyers for the City provided proof of the legal costs incurred, which amounted to a surprising $62,344.96 against a debt of $13,232.62 for unpaid rates and services charges. Ultimately, the ratepayer was ordered to pay recovery costs of $62,344.96. The ratepayer subsequently appealed the Magistrate's Court order as to costs to the District Court.

In this appeal, the District Court ultimately held that the Magistrates Court erred by—

1. refusing to order a disclosure of documents relevant to the City's costs; and
2. basing costs solely on invoices without assessment on whether these costs were of a reasonable amount or reasonably incurred.

However, her Honour Vernon DCJ (the presiding District Court Judge) relied on the comments of Judge Davis in *O'Dea v Shire of Coolgardie* [2013] WADC 150 in finding that local governments are entitled to be indemnified for the legal costs incurred in rates recovery proceedings on the basis that these are not usual party-party costs.

Her Honour's decision was appealed to the Court of Appeal on two grounds being the following—

1. The cost provisions of the LG Act and the FES Act do not confer on a local government an entitlement to legal costs on an indemnity basis; and
2. Subsequently, the cost provisions of the LG Act and the FES Act do not confer on a local government an independent and substantive right to recover legal costs without the making of a costs order by the court in the exercise of its ordinary power to award costs in the proceedings.

The Court of Appeal's findings on indemnity costs

In relation to ground 1, counsel for the appellant argued that section 6.56(1) of the LG Act does not give local governments the power to recover legal costs on an indemnity basis. This argument was put forward on the basis that for litigants other than local governments, the costs of legal proceedings are typically awarded by a court order. These costs are calculated by reference to the hourly rate limits and defined work scope limits in accordance with the scale of costs set out in the *Legal Profession Act 2008* (WA) (**Act**).

The Court held that although section 6.56(1) confers a right on local governments to the recovery of legal costs, the nature and extent of those costs are not expressly stated. As such, the Court determined that the right of local governments to recover such costs is a right to recover *reasonable* costs. Accordingly, the recovery of such costs is subject to a reasonableness test rather than the scale of costs referred to above. Therefore, any costs that a local government can prove to be reasonable in relation to the recovery of rates proceedings will be recoverable. Furthermore, the Court noted that there is no inconsistency between the local government's right to recover reasonable costs and special cost orders under section 280 of the Act.

The concept of 'reasonable costs' is well-established and regularly applied in accordance with fairness principles. It does not detract from the character of section 6.56(1) of the LG Act and still allows for local governments to recover costs. This principle provides a stronger right to costs, as it allows for the recovery of costs at a higher level than those costs which may be awarded under the relevant scale. However, the legal costs sought must be reasonable in amount and the Court must be satisfied by the local government (and its lawyers) as to reasonableness. In its decision in *Parker*, the Court of Appeal noted the relationship between local governments and lawyers should mean that unreasonable costs should not be incurred. However, in our experience and following this decision, it would most likely be unjustifiable for the City's lawyers in *Parker* to satisfy the Court as to the reasonableness of legal costs exceeding $60,000, particularly as that amount incurred is five times the amount of the outstanding rates. Furthermore, the purpose of section 6.56(1) is to protect the revenue of local governments. Therefore, the recovery of unreasonable costs would be inherently unjust and go against that purpose, as it would benefit lawyers rather than local governments.

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The Court of Appeal's findings on discretion

In relation to ground 2, the appellant (Parker) argued that the cost provision provided by section 6.56(1) should not be interpreted in a way which alters the 'fundamental and long-established practice' of discretion in relation to the award of legal costs. The ordinary position (under statute or rules of the Court) is that the costs of civil proceedings are the subject of judicial discretion and a party to civil proceedings does not have an automatic right to costs.

However, the Court of Appeal interpreted the words used in section 6.56(1) to apply as an altering of the ordinary position of awarding of costs in civil proceedings. The Court clarified that the words 'costs of proceedings' means *any* costs of the proceedings actually incurred by the local government, except to the extent that those costs are unreasonable in amount or have been unreasonably incurred.

Before the enactment of section 6.56(1), courts already had the jurisdiction to award the payment cost of proceedings to the successful party by the unsuccessful party, as seen in section 25 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA). As jurisdiction to award such costs already exists, it is difficult to determine any other reason for inserting an express recovery of legal proceedings other than a conferral of an independent and substantive right to recover under the LG Act. Therefore, it appears that the intent of the legislature was not to reinstate the Court's jurisdiction to order legal costs be paid, but rather to allow local governments to seek recovery of their legal costs in addition to the outstanding rates and services. In this regard, the Court of Appeal found that 's.6.56(1) confers on a local government an independent and substantive right to recover costs which is distinct from the court's ordinary discretionary power to award costs in civil proceedings.'

Burden of Proof

In relation to the burden of proof, prior to *Parker* the position was that if a ratepayer was challenging the amount of costs a local government sought to recover in rate recovery proceedings, the ratepayer would have to prove that those costs were unreasonable.

The decision of the Court of Appeal in *Parker* has changed that position and affirmed that a local government who is seeking to enforce a statutory right to recover the legal costs of proceedings now bears the onus of proving the reasonableness of such costs (on the basis that the reasonableness of such costs is an essential element of that right). This should not typically be difficult to prove given the previously stated nature of the relationship between lawyers and local governments.

Conclusion

Despite the requirement for reasonableness and the legal burden now calling on local governments to prove that costs are reasonable, local governments maintain the right to recover the legal costs of rate recovery proceedings. Local governments will be able to continue to assert this right assuming they are represented by lawyers whose costs are inherently just and reasonable.

However, in our view costs in excess of $60,000 for rate recovery proceedings does appear to be unreasonable and unjustifiable in this context. In our experience, that amount should never be reached in attempt to recover costs for a rates and services charge debt of only $13,232 proceeding in the Magistrates Court.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update or to request a free informational workshop on rate recovery, please contact Madeline Madvad by email to mmadvad@mcleods.com.au or Adam Watts to awatts@mcleods.com.au.

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