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Since 1930

## MEMORANDUM

To: Brad McDonald  
From: Tom Evatt  
Date: 21 November 2011  
Re: **COSTS**

1. You are considering whether to apply for costs against Otto. If you decide to proceed with an application you should do so within 20 working days of Otto's memo 14 November advising the Court of his wish to withdraw his application – that is by Monday 12 December 2011 (as a matter of caution). I appreciate that no time has been set.
2. Costs are very much at the Court's discretion. The Environment Court does not award costs as a matter of course. Costs are not awarded as a penalty.
3. The District Court costs scale provides some guidance. Depending on the category of the proceedings (whether two or three) I expect costs might be awarded as follows:

	<b>Category Two - \$1,500 per day</b>	<b>Category Three - \$2,220.00 per day</b>
Notice of Opposition and Affidavit:	\$600 - \$1,500	\$2,220 - \$4,440
Pre-hearing Conference 9 February:	\$450	\$450
Pre-hearing Conference 5 May:	\$450	\$450
Pre-hearing Conference 20 October:	\$450	\$450

4. On this basis I expect you might reasonably be entitled to costs between \$2,000 and \$5,790 (at the outside).
5. Factors that might weigh against the Court exercising its discretion or a lesser amount might include:
  - a. the matter has some considerable history and the Court might take the view that Otto's application was reasonable in the context of this history, in particular that the Council has dragged its feet and the application was born out of frustration in respect to the lack of progress resolving matters.
  - b. The Court might take the view that the association (or the bach owners) have done little if anything to progress the bach zone and other matters in particular given earlier undertakings to the Court.
  - c. Whether or not Otto's application was unreasonable given the status of the baches as prohibited activities.
  - d. While Otto failed to get legal advice earlier on, this did not add significantly to the costs. Most of the costs incurred were in respect of applying for Certificates from the Council. This application was a

matter for the bach owners. Against this, if the bach owners didn't apply they would have had to run the same argument in the Court at some considerable cost.

- e. I suspect the Court may have some sympathy for Otto, whether or not this is strictly relevant, on the basis that the rug was effectively pulled out from underneath him.
6. None of this should be taken as being supportive of Otto's position simply that the Environment Court historically is very light when it comes to costs.
7. Otto has quite properly withdrawn his application following the Council indicating its intention to grant Certificates of Existing Use Rights.
8. It might be more appropriate and you might get more value by meeting with Otto and impressing on him your actual costs in opposing his application and asking him to contribute to these costs or cease further action against the Association or bach owners.
9. I look forward to discussing this with you.

Tom Evatt

TWE: RDC/111118 Memo to B McDonald