



Transcript of Proceedings

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Date: 5 August, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No BS5814 of 2004

IPSWICH CITY COUNCIL

Applicant

and

ATTORNEY-GENERAL FOR THE STATE OF
QUEENSLAND

Respondent

BRISBANE

..DATE 03/08/2004

JUDGMENT

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HIS HONOUR: The Ipswich City Council holds, pursuant to
nominations of trustees, land which can be described as 8
Warburton Court, Collingwood Park. The land was transferred
to the council on three separate occasions. On 9 September,
1985 Warcoll Holdings Pty Ltd transferred an area of 6,206
square metres to a depth of RL 15 metres AHD. A further 220
square metres was transferred by Timbertop Developments Pty
Ltd on 3 August, 1992 as a consequence of a boundary
realignment and land exchange between the council and
Timbertop Development Pty Ltd and 6,109 square metres below
the depth of RL 15 metres AHD was transferred by Timbertop
Developments Pty Ltd on 11 December, 1992.

The nominations of trustees provided that the land was to be
held by the Council:

"Upon trust for town planning purposes in respect of the
town plan for the city of Ipswich and more particularly
for the purpose of future dedication of the above
described land as reservoir and water resources as and
when the dedication of such land as a reservoir and water
resources becomes necessary."

The transfer of the principal part of the land on 9 September,
1985 was made in accordance with a condition of the council's
approval of a rezoning application for the rezoning of the
land around 8 Warburton Court, Collingwood Park from the "open
rural" zone to the "residential 1" zone for the purpose of
subdividing and ultimately developing the land as a
residential estate. In 1995 the former Moreton Shire and
City of Ipswich were amalgamated. The former councils had
operated independent water supply systems. A benefit of the

amalgamation was the opportunity to integrate water supply infrastructure provided by each of the councils.

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A firm of consulting and environmental engineers in a report to the council in January 1999 recommended that, following construction of a reservoir at Charles Street, Riverview, the Redbank water supply zone be amalgamated with the Scarborough Hill water supply zone. That report stated that, "the principal benefit of this amalgamation is that the proposed 10 ML Warburton Court reservoir on Ipswich Water's current work program is no longer required".

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The first question to consider is whether the transfer of the land pursuant to the nominations of trustees created a charitable trust in respect of the land. A very similar issue was recently considered by Muir J in Council of the Shire of Miriam Vale v Ratepayers Association of Miriam Vale Shire Incorporated (No. 11357 of 2001; 23 December 2003, unreported). His Honour there found that a nomination of trustees pursuant to which a water reservoir site was transferred to the Miriam Vale Shire Council "to be held by the trustee upon trust for water purposes" was held by the council on a charitable trust; see at [24]-[25]. His Honour relied in particular upon observations of Dixon J in *Monds v Stackhouse* (1948) 77 CLR 232, 246 as follows:

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"A bequest to a municipal corporation for the purpose of enabling it to provide a hall or towards doing so is clearly charitable. Indeed any bequest to be applied in the improvement of a city in accordance with the powers of the municipal corporation for the benefit of the inhabitants appears to be charitable...."

I am satisfied that these nominations of trustees have had a similar effect to that in Muir J's decision and that I should treat the trusts as charitable.

It now seems impractical or inefficient to construct a reservoir on the land at Warburton Court, rather than impossible. Nor is it clear that the purposes of the trust have yet been adequately provided for by other means. The consequence of those views I have formed is that I should not rely upon section 105(1)(a)(iii) or section 105(1)(e)(i) of the Trusts Act 1973 in deciding this application. It is possible, however, in my view, to apply section 105(1)(e)(iii) in that the circumstances I have related show that the trusts may be altered to allow the property to be applied cy prè where the original purposes have, since they were laid down, ceased to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

The trust was established by property developers operating in the Ipswich City Council area and it is submitted - and I think validly - by Mr Harding for the Council that the use to which the Council put the land was likely to be a matter of indifference to the property developers. That may not be the case with another type of settlor. Another settlor who became aware that the land could not be devoted to the purpose of a reservoir might have wished that the trusts fail instead of being applied cy prè. That does not seem to me to be likely in a case such as this. The engineering considerations, to

which I have referred, indicating that it is not now
appropriate to use this land, are sufficient to invoke section
105(1)(e)(iii).

There appears to have been no initial failure or impossibility
of the trust, but, in my view, there is a general charitable
intention expressed in the nominations of trustees. They were
unconditional and absolute transfers of the land to the
Council upon trust for town planning purposes and it was
submitted to me that the inclusion in the terms of the grant
of the words "as and when the dedication of such land as
reservoir and water resources becomes necessary" does not
alter this. That is a submission with which I agree. I also
agree with the submission of counsel for the Attorney-General,
Mr Parrott, that once the property has been applied to the
original charitable purpose, "the property then for all time
becomes earmarked as a charitable fund".

The application of the scheme must give effect to a purpose as
near as possible to the purpose which has become
impracticable; see *McCormack v Stevens* [1978] 2 NSWLR 517,519.

It is pointed out by Mr Parrott that the affidavit material
does not establish that the area to be served by the proposed
Charles Street Reservoir will be the same as or necessarily
include the area which would have been served by a reservoir
constructed on the land but he submits that this is not
necessary for the application of the trust property as near as
possible to the original purpose. I agree and would find that

the Council's proposal to sell the land and apply the funds to
construction of the Charles Street Reservoir is within the
spirit of the trust and as near as possible to the original
purpose of the trust.

Accordingly I shall make an order in the terms proposed.

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