SUPREME COURT OF QUEENSLAND

CITATION:	*Tighe & Anor v Pike & Ors* [2016] QCA 353
PARTIES:	**KYM LOUISE TIGHE** (applicant) **MICHAEL JAMES TIGHE** (applicant) **v** **JOSHUA JAMES PIKE** (first respondent) **NATALIE PATRICIA PIKE** (first respondent) **TOWNSVILLE CITY COUNCIL** (second respondent)
FILE NO/S:	Appeal No 3330 of 2016 P & E No 46 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Townsville – [2016] QPEC 30
DELIVERED ON:	23 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2016
JUDGES:	Fraser and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The orders made in the Planning and Environment Court are set aside.** **4. The originating application in that court is dismissed.** **5. The first respondents are to pay the applicants' costs of the application for leave to appeal and the appeal and the applicants' costs in the Planning and Environment Court.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – CONDITIONS – where the second respondent issued a decision notice under the *Integrated Planning Act* 1997 (Qld) approving an application for

reconfiguration of the original lot into two lots – where condition 2 of the approval conditions required creation of an easement for access, on-site manoeuvring and connection of services for the benefited lot, lot 2, over the burdened lot, lot 1 – where the registered proprietors of the original lot did not include grant of an easement for "on-site manoeuvring" or "connection of services and utilities" – where the second respondent nevertheless endorsed the survey plan – where the titles for lot 1 and lot 2 were created upon registration of the survey plan with this easement registered on the titles – where the applicants subsequently became the registered proprietors of lot 1 and the first respondents subsequently became the registered proprietors of lot 2 – where the first respondents applied in the Planning and Environment Court for a declaration that condition 2 of the development permit had been contravened and an enforcement order directing the applicants to comply with condition 2 – where the Planning and Environment Court granted the application – where it was submitted by the applicant that the primary judge erred in finding the Court had jurisdiction to make the enforcement order by reason of the commission of a development offence where there was no such offence – whether s 245, in combination with s 580(1), of the *Sustainable Planning Act* 2009 (Qld) operated to make condition 2 continue to have effect by attaching condition 2 to lot 1 after the reconfiguration of the lot had been completed and the approval had been spent – whether condition 2 imposed any obligation upon the applicants even though they were not parties to the reconfiguration of the original lot approved by the development approval – whether the applicants committed a development offence by failing to comply with condition 2 – whether a development offence existed that could support the making of an enforcement order

REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – OMITTED OR MISDESCRIBED EASEMENT – where the applicants contended that the primary judge erred in deciding the application on the basis that the first respondents had no indefeasible title to the land sufficient to deny the applicants' claim where it was further submitted that the primary judge erred in finding that a development approval which 'runs with the land' is an exception to indefeasibility of title – whether any question of indefeasibility arose in this case

Integrated Planning Act 1997 (Qld), s 3.1.5, s 3.5.28, s 4.3.1, s 4.3.3, s 6.1.23, s 6.1.24
Land Title Act 1994 (Qld), s 50(1), s 184, s 185
Sustainable Planning Act 2009 (Qld), s 243, s 244, s 245, s 578, s 580, s 601, s 604, s 605, s 801

Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2002) 55 NSWLR 446; [2002] NSWCA 301, cited

Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2004) 220 CLR 472; [2004] HCA 59, cited
Peet Flagstone Pty Ltd & Anor v Logan City Council & Ors [2015] QPELR 68; [2014] QCA 210, considered
Wirkus v Wilson Lawyers [2012] QSC 150, considered

COUNSEL: D A Savage QC, with A C Raeburn, for the applicant
D Gore QC, with J Lyons, for the first respondent
R G Bain QC for the second respondent

SOLICITORS: Connolly Suthers for the applicant
Wilson Ryan Grose for the first respondent
Townsville City Council Legal Service for the second respondent

[1] **FRASER JA:** In May 2009 the second respondent ("the council") issued a decision notice under the *Integrated Planning Act* 1997 (Qld) approving an application for reconfiguration of one lot of land (which I will call "the original lot") into two lots, subject to conditions stated in a schedule. Condition 2 of that schedule provided:

> "***Access and Utilities Easement***
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> An easement(s) to allow pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities for benefited lot(2) over burdened lot(1) must be provided. The easement(s) must be registered in accordance with the Land Title Act l994, in conjunction with the Survey Plan."

[2] The schedule also provided, in clause 5 under the heading "Advice", that "[u]nless explicitly stated elsewhere in this permit, all requirements of the conditions of this approval must be satisfied prior to Council signing the survey plan." There was no such explicit statement.

[3] In November 2009 the registered proprietors of the original lot executed an easement, as grantor and grantee, in accordance with the easement depicted on the survey plan mentioned in condition 2. The purpose of the easement was described in it as "access". Contrary to condition 2, the executed easement did not include the grant of an easement for "on-site manoeuvring" or "connection of services and utilities". Nevertheless, in December 2009 the council endorsed the survey plan with a certificate that the council approved that plan in accordance with the *Integrated Planning Act* 1997. In November 2010, the original proprietors executed another grant of easement as grantor and grantee in terms which were identical to the first easement save for the omission of two clauses which are not presently relevant. In December 2010 the titles for lots 1 and 2 were created upon registration of the survey plan and the easement executed in November 2010 was registered. The title for lot 1 was endorsed to describe the registered easement burdening the land in that lot to the benefit of lot 2, and the title for lot 2 was endorsed to describe the easement benefitting the land in that lot. On 18 January 2011 the applicants purchased and became registered as the owners of lot 1. On 11 January 2012 the first respondents became registered as the owners of lot 2.

[4] In July 2015 the first respondents applied in the Planning & Environment Court for orders against the applicants and the council. As amended, the first respondents' originating application sought a declaration that condition 2 of the development permit "for land described as Lot 1… has been contravened" and for an

enforcement order directing the first applicant to comply with condition 2 within 28 days of the date of the order of the Court.

[5] After a contested hearing, the primary judge granted the application, declared that the first respondents "have committed a development offence by not complying with the condition of the development approval with respect to the easement on the subdivided lot 2", and directed the parties to provide a draft order giving effect to the judgment. The primary judge's analysis is captured in the following passage of his Honour's extensive reasons:

> "[110] … An interest in a lot, in this case an easement, is created upon registration of the instrument (the easement document). That has occurred here. The indefeasibility of that interest in this case depends on whether there is a misdescription in the purpose for which the easement was created. I have found that there was, that the condition in the development approval binds a subsequent buyer of a lot in the completed subdivision and that the misdescription is open to be corrected so as to have it conform to the condition in the development approval, a condition that I have found runs with the land in respect of a reconfiguration of a lot and consistently with my construction of relevant legislation including the [Land] Title Act and section 242 [sic: s 245] of SPA [*Sustainable Planning Act* 2009 (Qld)]. The remaining issue is dealt with in the following paragraph.
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> **Has a development offence been committed by the first respondents?**
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> [111] I find that the condition in the development approval runs with the land, it subsists and has not been complied with and accordingly the first respondents have committed a development offence."

[6] The applicants have applied for leave to appeal against the orders made by the primary judge. The grounds of the proposed appeal are as follows:

> "**Ground 1**
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> The learned primary Judge erred in deciding the Application on a basis neither put nor argued by any party namely that the Respondents had no indefeasible title to their land sufficient to deny the applicant claim to relief - the imposition of an easement in their favour over that land because s.185(1)(c) of the *Land Title Ac*t 1994 (Qld) applied in that particulars of the easement sought had been omitted from the Land Title Registry - a fact of which there was no evidence and which could not in any event have constituted a development offense [sic] giving the Court jurisdiction to the make the order sought.
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> **Ground 2**
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> The primary judge erred in finding that the Court had jurisdiction to make the Order made by reason of the commission of an 'offense' when there was not such offence and no proper basis to find as a fact that there was.

Ground 3

> That the primary judge erred in finding that a development approval which 'runs with the land' is an exception to the indefeasibility of title afforded by the Land Title Act 1994 such as to require the First Respondent to both recognize an unregistered interest in land and take unidentifiable steps to register such an interest."

[7] In accordance with the Court's usual practice, the application proceeded on the footing that if leave were granted the Court would decide the appeal at the same time. The available grounds of appeal are limited to error or mistake in law or absence or excess of jurisdiction.[1]

[8] Leave to appeal was not opposed and should be granted for two reasons. First, the first respondents did not seek to challenge the applicant's contention in ground 1 that at the hearing before the primary judge no party relied upon the exception to the indefeasibility of registered freehold title of a misdescribed easement under s 185(1)(c) of the *Land Title Act* 1994 (Qld). In that respect, procedural fairness was denied to the applicants. Ground 1 of the notice of appeal should be upheld for that reason. Secondly, the proposed appeal raises an important question about the effect upon purchasers of subdivided lots of certain kinds of conditions of approval of a reconfiguration.

Grounds 1 and 3 of the notice of appeal

[9] Section 184(1) of the *Land Title Act* creates indefeasibility of title: "[a] registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests." That is elaborated upon in s 184(2), including by the provision that the registered proprietor, "is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot." Section 184(3) provides exceptions for fraud by the registered proprietor and for interests mentioned in s 185. Section 185(1) deprives a registered proprietor of the lot of the benefit of s 184 for specified interests in relation to the lot, including, under s 185(1)(c), "the interest of a person entitled to the benefit of an easement if its particulars have been omitted from, or misdescribed in, the freehold land register…".

[10] Section 185(3) provides:

> "For subsection (1)(c), the particulars of an easement (the ***easement particulars***) are taken to have been omitted from the freehold land register only if—
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> (a) the easement was in existence when the lot burdened by it was first registered, but the easement particulars have never been recorded in the freehold land register against the lot; or
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> (b) the easement particulars have previously been recorded in the freehold land register, but the current particulars in the freehold land register about the lot do not include the easement

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1 *Sustainable Planning Act* 2009 (Qld), s 498(1).

particulars, other than because the easement has been extinguished in relation to the lot; or

(c) the instrument providing for the easement was lodged for registration but, because of an error of the registrar, has never been registered."

[11] The first respondents argued that ground 1 proceeded upon the false premise that the primary judge found that particulars of the easement had been "omitted from" the register. The first respondents pointed out that the primary judge found that there was "clearly no "omission from" the register" but that "there is arguably a "misdescription in" the easement as registered insofar as its purpose is concerned, if the purpose as described in the Development Approval runs with the land".[2] The applicants challenged the validity of the distinction between "omitted from" and "misdescribed in" and argued that it does not support the primary judge's conclusion.

[12] It is not necessary to decide these questions. The only evidence of the grant of an easement is summarised in [3] of these reasons. Upon the findings and the evidence no easement was ever granted for any "on-site manoeuvring and connection of services, and utilities". The primary judge's analysis assumed, incorrectly in my respectful opinion, that condition 2 of the approval granted an easement for those purposes. Rather, it imposed a conditional obligation upon the proprietor of the original lot to provide and register such an easement. Assuming all else in the first respondents' favour, including that s 245 of the *Sustainable Planning Act* (see [18] of these reasons) attached that obligation to lot 1 upon its creation and rendered that obligation binding upon a subsequent registered proprietor of that lot, in the proceedings in the Planning & Environment Court the first respondents could invoke no more than a personal right to apply for an enforcement order (see [16] of these reasons) for the grant of such an easement: see *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*[3] and *Wirkus v Wilson Lawyers*.[4]

[13] No question of indefeasibility arose in this case. The enforcement order against the first applicants for the grant of such an easement was made upon the basis that the applicants had committed a development offence by failing to comply with an obligation in a development permit binding upon them as the registered owners of part of the land in respect of which the development permit originally had been granted. As the first respondents submitted, if the Planning & Environment Court was empowered to make the enforcement order upon that basis, that order created new rights superimposed upon the existing rights of the parties. If so, indefeasibility of title was irrelevant: *Hillpalm Pty Ltd v Heavens Door Pty Ltd*.[5] On the other hand, if the relevant statutory provisions did not confer that power upon the Planning & Environment Court the enforcement order should be set aside.

Ground 2 of the notice of appeal

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2 [2016] QPEC 30 at [108].
3 (2004) 220 CLR 472 at [53] – [54].
4 [2012] QSC 150 at [49], [51].
5 (2004) 220 CLR 472 at [54].

[14] It follows that the real issue is whether there was any basis for finding that the applicants had committed the alleged development offence. That question is raised by ground 2 of the notice of appeal.

[15] The development permit was a "development approval" under the *Integrated Planning Act*, which has since been repealed by the *Sustainable Planning Act*. Section 801 of the latter Act continued the development approval in force as a development approval under that Act.

[16] The primary judge made the orders under appeal in reliance upon provisions in Div 5 of Ch 7 of the *Sustainable Planning Act* 2009 (Qld). Section s 601(1)(a) provides that, "[a] person may bring a proceeding in the court … for an order to remedy or restrain the commission of a development offence (an ***enforcement order***)". The first respondents argued that the primary judge made the orders appealed against under s 604(1) of that Act, which empowers the Planning & Environment Court to make an enforcement order "if the court is satisfied the offence … has been committed; or … will be committed unless restrained. …".

[17] Section 605(1) provides:

> "An enforcement order … may direct the respondent—
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> (a) to stop an activity that constitutes, or will constitute, a development offence; or
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> (b) not to start an activity that will constitute a development offence; or
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> (c) to do anything required to stop committing a development offence; or
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> (d) to return anything to a condition as close as practicable to the condition it was in immediately before a development offence was committed; or
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> (e) to do anything about a development or use to comply with this Act."

[18] The primary judge found that the applicants had committed a development offence because they had not complied with condition 2 of the development approval. In so concluding, the primary judge relied upon a conclusion that condition 2 of the development permit bound the applicants as registered proprietors of lot 1 by the application of s 245 of the *Sustainable Planning Act*. The effect of s 245 is in issue in this application. That section (which substantially reproduced s 3.5.28 of the *Integrated Planning Act*) provides:

> "(1) A development approval—
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> (a) attaches to the land the subject of the application to which the approval relates; and
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> (b) binds the owner, the owner's successors in title and any occupier of the land.

> (2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured."

[19] The reference in s 245 to a "development approval" must be understood in light of the provision in s 244 that "[a] development approval includes any conditions".

[20] The primary judge's conclusion that by contravening condition 2 the applicants committed a development offence implies that they committed an offence against s 580(1) of the *Sustainable Planning Act* (which substantially replicated s 4.3.3 of the *Integrated Planning Act*). That provision makes it an offence for a person to "contravene a development approval, including any condition in the approval". As the applicants submitted, the primary judge did not make a finding which identified precisely what the applicants did or failed to do in contravention of the development approval. The first respondents' amended originating application set out the grounds relied on for the application. Those grounds included contentions that: the easement on the survey plan did not comply with condition 2 of the development permit because it did not permit "on-site manoeuvring and connection of services and utilities" for the benefit of the dominant tenement; an easement for the connection of services and utilities for the benefit of the dominant tenement was not registered; "Easement A on the Survey Plan has not been amended to provide for the connection of services and utilities for the benefit dominant [sic] tenement"; "As consequence [sic] of the matters alleged … there has been a failure to comply with condition 2 of the Development permit which is a development offence under s.580 of the *Sustainable Planning Act* 2009"; and in response to a letter from the first respondents' solicitors, the solicitors for the applicants indicated that they would not be providing an easement for services. It therefore may be implied that the development offence against s 580(1) contemplated by the primary judge was constituted by the applicants failing to grant and cause to be registered an additional easement, for "on-site manoeuvring and connection of services, and utilities", which burdened their land, lot 1, and benefited the first respondents' land, lot 2.

[21] The first respondents argued that s 604(1) of the *Sustainable Planning Act* justified the enforcement order upon the basis that the proprietors of the original lot committed a development offence by failing to provide and register the required easement. That argument founders upon the absence of a finding by the primary judge that the proprietors of the original lot did commit such an offence. The primary judge referred to evidence about the dealings between one of the proprietors and the council but did not express any view upon the question whether the proprietors had committed an offence. Another reason for rejecting the first respondents' argument is that the Planning & Environment Court lacked power to make a restraining order against the applicants upon the basis that someone else had committed a development offence. The first respondents emphasised the generality of s 605(1), particularly paragraph (e), but s 605(1) must be understood in the context both of s 601(1)(a) and s 604(1). Those provisions contemplate only orders (which may be orders of the kind described in s 605(1)) the effect of which is to remedy or restrain the commission or future commission of an offence. In *Hillpalm Pty Ltd v Heavens Door Pty Ltd*[6] the High Court held that the indistinguishable language of s 123 of

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[6] (2004) 220 CLR 472 at [47]–[48].

the *Environmental Planning and Assessment Act* 1979 (NSW) required the relevant offence to have been committed by the person against whom the order was sought.

[22] Accordingly, the power of the Planning & Environment Court to make the enforcement order under s 604(1) arose only upon that Court being satisfied that the applicants had committed the alleged development offence. (The power also would arise if the applicants would commit that offence unless restrained, but that is not an issue in this case.) The answer to the question whether the primary judge erred in law in holding that the applicants had committed such an offence turns upon an analysis of the applicable legislation and the terms of the development permit.

[23] The reconfiguration of the land into lots 1 and 2 was "assessable development" as defined in the *Integrated Planning Act*. Section 4.3.1 of the *Integrated Planning Act* (which is substantially replicated in s 578 of the *Sustainable Planning Act*) made it an offence to carry out assessable development unless there was an effective development permit for the development. Section 3.1.5(3) of the *Integrated Planning Act* (which is substantially replicated in s 243 of the *Sustainable Planning Act*) provided that "[a] ***development permit*** authorises assessable development to occur … to the extent stated in the permit; and … subject to … the conditions in the permit…". In short, the effect of the development permit was to render lawful what otherwise would not have been lawful, the reconfiguration of one lot into lots 1 and 2, provided that the reconfiguration was done in accordance with the conditions of the development permit. Condition 2 is a condition of approval of a reconfiguration which was to be effected by registration of a survey plan. The *Land Title Act* 1994 (Qld) provided that one of the requirements for registration of a plan of subdivision is that the plan has been approved by the relevant planning body.[7] Provisions in Ch 3 Pt 7 of the *Integrated Planning Act* empowered the council to approve a reconfiguration proposed to be effected by a plan of subdivision only if "the conditions of the development permit about the reconfiguration have been complied with" or "satisfactory security is given to the local government to ensure compliance…"[8].

[24] Consistently with those legislative provisions, the language of the development permit (see [1] – [2] of these reasons) makes it plain that the only obligation to create an easement which was imposed by condition 2 was an obligation to register the easement described in condition 2 in conjunction with the Survey Plan and only as a condition of the simultaneous reconfiguration of the land into lots 1 and 2. The language is not that of a continuing and freestanding obligation severed from the simultaneous creation of the approved reconfiguration.

[25] An effect of s 245 of the *Sustainable Planning Act* is that, if the registered proprietors of the original lot had transferred it before completion of the reconfiguration, their successor in title would have been entitled to complete the reconfiguration of the land in accordance with the development permit.[9] Conversely, if a proprietor of the original lot or such a successor in title had completed the reconfiguration but did not provide the easement and cause it to be registered in conjunction with registration of the survey plan as required by condition 2, then that

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7 *Land Title Act* 1994, s 50(1)(h). (There are exceptions, but none are relevant here.)

8 *Integrated Planning Act* 1997, s 3.7.2(3)(a) and s 3.7.2(4)(a). These provisions are continued in force in relation to this development permit by s 815 of the *Sustainable Planning Act*.

9 Section 245(2) confirms that this result would follow even if a different development, including a different reconfiguration, was also approved for the land. That provision is of no relevance in the present case.

person would have been amenable to an enforcement order upon the grounds that the person had committed an offence against s 580(1) by contravening that condition of the development approval and, in the case of a successor in title, upon the basis, that the approval, including condition 2 of it, attached to lot 1 and bound the successor in title under s 245.

[26] The first respondents' argument attributes additional effects to s 245(1) in combination with s 580(1). Upon their argument, condition 2 continued to operate by attaching condition 2 to lot 1 after the approval had been spent by the completion of the reconfiguration of the original lot and s 580(1) created an offence of not complying with an obligation which, in its own terms, took effect only as a condition of an approval of the reconfiguration which was to be fulfilled simultaneously with the reconfiguration.

[27] In terms of s 245(1), lot 1 is part of "the land" which was "the subject of the application to which the approval relates". The development permit conditionally approved only the reconfiguration of "the land" – the original lot – into lot 1 and lot 2. It did not approve any reconfiguration of lot 1 or of lot 2 after those lots were created. Any such reconfiguration would be unlawful in the absence of a fresh development approval. Upon the first respondents' argument it is not easy to attribute meaningful content to the provisions in s 245(1) that a development approval "attaches to" and "binds" the owner of a lot. In what sense did the development approval attach to lot 1 and bind its owner where the approval did not authorise any development of that lot and where the development of the original lot which that approval did authorise had been completed when lot 1 was created?

[28] The answer to that question upon the first respondents' argument must be that in this case the content of the expressions "attaches to" and "binds" is confined to the obligations expressed in the conditions, including condition 2. That does not reflect the statutory language. Section 245(1) attaches and makes binding upon owners and successors in title (and occupiers) a "development approval" (which by s 244 "includes any conditions" of that approval) and s 580(1) makes it an offence for a person to contravene "a development approval, including any condition in the approval". Neither provision is apt to effect any change to the meaning of a condition of a development approval, but the first respondents' case requires a significant change in this case. It seems uncontroversial that the proprietors of the original lot were not obliged to provide an easement except as a condition of and simultaneously with the development of the original lot by reconfiguration, but the effect of the first respondents' argument is that every successive registered proprietor of lot 1 inherits the obligation to provide an easement even though the reconfiguration has been completed and even though no registered proprietor could develop that lot by the approved reconfiguration.

[29] Some very odd results would follow from the first respondents' construction. One is that the registered proprietor of lot 2 would also be bound by condition 2, so would commit a development offence upon becoming the owner of the lot (or upon thereafter failing to execute an easement as grantee) when it did not have the benefit of the easement required by the approval. Another is that, unlike the registered proprietor of the original lot, the registered proprietor only of one lot could not provide and cause to be registered any easement for the burden or benefit of another lot without the co-operation of a different registered proprietor of the other lot, but each proprietor of a lot would be exposed to an offence for the alleged

contravention of the development approval by becoming the proprietor (or by failing to bring about the creation of the easement).

[30] The first respondents relied upon the decision of the New South Wales Court of Appeal in *Hillpalm Pty Ltd v Heavens Door Pty Ltd*.[10] The facts of that case and the applicable New South Wales statutory provisions were broadly similar to the facts of and applicable legislation in this case, save that the New South Wales statute did not include any analogue of s 245 of the *Sustainable Planning Act*. There the owner of an original lot obtained an approval to subdivide it into lots 1 and 2 upon what was found in the New South Wales Court of Appeal to be a condition requiring the creation of an easement burdening lot 2 for the benefit of lot 1. The New South Wales Court of Appeal held that a successor in title to lot 1 could enforce the condition. Hodgson JA observed:

> "If the development in question is a use of land, then any person who makes that use of the land pursuant to the consent without complying with the condition will be in breach of the Act and can plainly be ordered to rectify that breach… [i]f the development in question is a subdivision, then a later owner of the subdivided land or of a subdivided part of it may not be guilty of any breach of the Act, but nevertheless, so long as the land remains subdivided in accordance with a development consent without a condition of that consent being fulfilled, there is objectively speaking a continuing contravention of the condition; and s 123 of the Act then gives power to the Land and Environment Court to order the rectification of that contravention by such person as is able to do so, again irrespective of what appears on the title of the land."[11]

[31] The New South Wales Court of Appeal's decision was reversed in the High Court. The first respondents argued that it is apparent from the reasons given for those decisions that the appeal to the High Court would have failed if the New South Wales legislation had included a provision in the form of s 245 of the *Sustainable Planning Act*. Because there was no such provision that seems unlikely to be apparent. It is not evident in the reasons of the majority in the High Court. Nor is it clearly to be implied in the dissentients' reasons, which were heavily influenced by a statutory provision which extended the meaning of "breach of this Act" in s 123(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) to a "failure to comply with" condition.[12] This application must be decided with reference to the distinct statutory provisions in this case.

[32] The first respondents argued that the primary judge was correct in considering that his conclusion was supported by *Peet Flagstone Pty Ltd & Anor v Logan City Council & Ors*,[13] and *Wirkus v Wilson Lawyers*.[14] *Peet Flagstone* does not support the first respondents' contention. The development permit in that case approved operational works on land owned by the appellant's predecessor in title, the selective removal of vegetation on land. The land was cleared under the authority of

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10 (2002) 55 NSWLR 446.
11 (2002) 55 NSWLR 446, 449.
12 (2004) 220 CLR 472 at [86]–[88] (Kirby J) and [128] (Callinan J).
13 [2014] QCA 210, referred to by the primary judge at [81].
14 [2012] QSC 150.

that permit. The appellant became the registered proprietor and embarked upon clearing. The council alleged that in the course of that clearing the appellant contravened conditions of the development approval concerning the extent of approved clearing and erosion control, and thereby committed offences. The appellant argued that when it cleared vegetation the conditions of the development approval were not in force because they had terminated when the earlier clearing authorised by the permit had been carried out. Unsurprisingly the Court rejected that argument. Gotterson JA observed that there was no justification for the implication of "a temporal correlation between the benefit of a development approval and the burden of its attendant conditions".[15] That observation was referrable to the approval of a use of land which was in issue in that appeal. Thus Gotterson JA referred to other decisions concerning approvals of the use of land upon conditions and also observed that the conditions of that development approval "do not limit their currency to a period during which the vegetation clearing permitted by it is being carried out" and some of those conditions had "an ambulatory operation" or "a focus upon an operative effect after the permitted clearing has been carried out".[16] Furthermore, the development approval in that case was required by that appellant to make lawful its clearing of the land, whereas the applicants required no town planning authority to make their ownership and occupation of lot 1 lawful.

[33] In *Wirkus* the plaintiffs claimed that their former solicitors should have advised them to enforce a condition of an approval for the subdivision of land ("Lot 2") which adjoined land ("Lot 1") owned by a predecessor in title of the first plaintiff. The approval included conditions which required that the owner of Lot 2 "is to provide a single common accessway" to both lots from the road and "to grant access easement rights over the accessway" in favour of Lot 1. The proposed accessway included part of each lot. A subsequent registered proprietor of Lot 2 executed the necessary easement ("Easement B") but the document was not registered. Nevertheless the council certified under s 9(7) of the *Building Units and Group Title Act* 1980 (Qld) that the conditions of the approval had been complied with. Upon registration of the plan of subdivision a body corporate for the plan and separate titles for each unit were created. The land the subject of proposed easement B was common property under the plan. In broad terms, the plaintiffs' case was that the approval was a development approval for the purposes of the *Integrated Planning Act*, the conditions of that approval attached to the land in respect of which the approval was granted, and the plaintiffs therefore were entitled to compel compliance with the conditions of the 1987 approval.[17] The essence of Peter Lyons J's reasons is contained in the following passages:

> "…The defendants also submitted that the consequence of accepting the contentions of the plaintiffs was that liabilities were imposed on persons who had previously been unaffected by conditions of approval; and that non-compliance with conditions would become offences, carrying not insignificant penalties, a result unlikely to have been intended by the legislature.
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15 [2014] QCA 210 at [28].
16 [2014] QCA 210 at [31] (Gotterson JA).
17 [2012] QSC 150 at [27].

> …The *IP Act* identified that its purposes were advanced by, amongst other things, "avoiding, if practicable, or otherwise lessening, adverse environmental effects of development …" and "applying standards of amenity … in the built environment that are cost effective and for the public benefit". In my view, therefore, the provisions of s 6.1.23 and 6.1.24 of the *IP Act* were intended to make conditions of approval binding on persons who, previously might not have been so bound. The consequences on persons not previously bound by the conditions, in my view, reflect the legislative intent previously mentioned.
>
> …There is a sense in which it can well be said that the 1987 approval no longer had any force, it having been acted upon to achieve the group titles subdivision.
>
> The answer to that question depends on the construction of the statutory provision. Part of the context for construing s 6.1.23(1)(d) includes the provisions of the *P&E Act* dealing with the lapsing of an approval; its revocation; or an approval being superseded. Approvals affected by these provisions by the time the *IP Act* commenced were, at that time, no longer "in force". It seems to me that the expression "in force" found in s 6.1.23(1)(d) was intended to exclude them from the scope of this provision.
>
> It might also be observed that an approval granted under legislation which predated the *IP Act* would, if it had been acted upon, generally be regarded as "spent", at least in the case of rezoning approvals and subdivision approvals. Section 6.1.24(2) shows that rezoning conditions were intended to remain effective, notwithstanding that the rezoning had been carried out. There is no reason to think that a similar consequence was not intended for subdivision approvals. Subdivisions typically result in an increase in the intensity of a use, with an increased need to manage the effects of development associated with a subdivision. One purpose of s 6.1.24(1) was to ensure that subdivision conditions imposed under the *P&E Act* remained effective, notwithstanding that the subdivision had been carried out, and that the approval might therefore be regarded as "spent".
>
> Having regard to the language of s 6.1.24(1), particularly by contrast with the language of s 8.10(8)(a) of the *P&E Act*, the general purposes of the *IP Act*, and the apparent intention to make conditions of all approvals binding on subsequent owners, it seems to me that s 6.1.23(1)(d) includes approvals which have been acted upon, resulting in a form of development which remains the current form of development on land; and s 6.1.24(1) makes conditions binding on subsequent owners of the land to which the approval relates. That would include the 1987 approval. The consequence of that is that it is a continuing approval, and its conditions attach to the land to which it is related, and bind successors in title."[18]

[34] Those observations should not be applied in this application. One reason for that conclusion is that the sections of the *Integrated Planning Act* which his Honour

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[18] [2012] QSC 150 at [36]–[37], [40]–[44].

construed in that passage are not analogues of ss 245 and 580(1) of the *Sustainable Planning Act*. Section 6.1.23(1)(d) described certain approvals under the previous legislation which remained in force upon the repeal of the previous legislation as "continuing approvals". Section 6.1.23(2) provided that, despite the repeal, "each continuing approval and any conditions attached to a continuing approval have effect as if the approval and the conditions were a preliminary approval or development permit, as the case may be." Section 6.1.24(1) concerned a case in which a local government had set conditions in relation to a continuing approval; it provided that, "the conditions attach to the land on and from the commencement of this section and are binding on successors in title." Section 6.1.24(2) applied only to conditions in relation to amendments of a former planning scheme which already were attached to the land by a different statutory provision. It provided that the relevant conditions "remain attached to the land … and are binding on successors in title…" In my respectful opinion, the language of s 6.1.23(2) is apt only to give to a pre-existing approval the effect which the *Integrated Planning Act* gives to a development permit granted under that Act; it does not suggest that an obligation which a registered proprietor of land was obliged to fulfil only as a condition of carrying out an approved subdivision on that land should be given the very different effect of an obligation severed from the approval of which it was a condition binding upon a person who does not carry out any approved development. I am inclined to think that the other provision focussed upon in *Wirkus*, s 6.1.24(2), also does not have any such effect. If it does, the fact that it concerns only conditions of planning scheme amendments suggests that conditions of development approvals were not to be given a similar effect.

[35] More fundamentally, if the legislative purpose was to make what was held in *Wirkus* to be a change in the law about the effect of conditions of a development approval, one would not expect that legislative purpose to be found only in contestable implications from transitional provisions. The postulated change in the law would render every purchaser of apparently clear title to a lot produced on a reconfiguration of land under the previous legislation liable for offences for contraventions of conditions committed by the subdivider in the course of that reconfiguration, with a concomitant exposure to orders requiring the purchaser to transfer the purchaser's property without any compensation necessarily being paid to the purchaser. If the legislative purpose were to produce results of that kind, one would expect to see it expressed with some clarity in the provisions of the *Integrated Planning Act* which applied to development approvals granted under that Act. The relevant provisions are s 3.5.28 and s 4.3.3 of the *Integrated Planning Act*. Those provisions were substantially replicated in ss 245 and 580(1) of the *Sustainable Planning Act*. For the reasons already given in relation to the latter provisions, I think it clear that s 3.5.28 and s 4.3.3 did not contain any indication of such a legislative purpose.

[36] I would add that the language of the relevant conditions in *Wirkus* might be regarded as having an ambulatory effect, at least if they were divorced from their statutory context, whereas the language of condition 2 suggests that, consistently with its statutory context, condition 2 imposed an obligation only as a condition of completing a reconfiguration which was to be complied with only simultaneously with that event.

[37] Any application of s 245 of the *Sustainable Planning Act* to attach the development approval to lot 1 and make it, including its conditions, binding upon the applicants

did not change that meaning of condition 2. Since the applicants were not parties to the reconfiguration of the original lot approved by the development approval, condition 2 did not impose any obligation upon the applicants. It follows that they could not have committed an offence against s 580(1) of the *Sustainable Planning Act* by not providing the registered easement described in condition 2.

[38] In my respectful opinion the primary judge erred in law in holding that the applicants committed the development offence which was alleged against them. For that reason, there was no power to make the enforcement order.

Proposed orders

[39] The council did not adopt a partisan position in the application and made submissions only by way of assisting the Court. No costs order should be made against it.

[40] I would grant leave to appeal, allow the appeal, set aside the orders made in the Planning & Environment Court, order that the originating application in that court be dismissed and order that the first respondents pay the applicants' cost of the application for leave to appeal and the appeal and the applicants' costs in the Planning & Environment Court.

[41] **MORRISON JA:** I have had the advantage of reading the draft reasons of Fraser JA. I agree with his Honour's reasons and proposed orders.

[42] **PHILIPPIDES JA:** The applicant seeks leave to appeal against the orders of the primary judge that the first respondent had committed a development offence under the *Sustainable Planning Act* 2009 (Qld) by not complying with Condition 2 of a Development Approval issued under the *Integrated Planning Act* 1997 (Qld) for reconfiguration of land into two lots, subject to an easement allowing for "pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities for benefited lot(2) over burdened lot(1) … [to] be registered in accordance with the *Land Title Act* l994, in conjunction with the Survey Plan".

[43] The purpose of the easement, as endorsed on the titles for lot 1 (purchased by the applicant) and lot 2 (purchased by the first respondent) was described to be for "access" and did not specify "on-site manoeuvring and connection of services and utilities".

[44] The critical issue that is raised concerns the proper construction of s 245 of the *Sustainable Planning Act* 2009 (Qld) which provides:

> "**245 Development approval attaches to land**
>
> (1) A development approval—
>
> (a) attaches to the land the subject of the application to which the approval relates; and
>
> (b) binds the owner, the owner's successors in title and any occupier of the land.
>
> (2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured."

[45] The Development Approval issued included the condition specified in condition 2.[19] "Development" is defined in s 7 of the *Sustainable Planning Act* 2009 (Qld) to include reconfiguring a lot. While the Development Approval concerned the reconfiguration of the original lot into lot 1 and lot 2, "the land" the subject of the application for approval is, in my view, to be construed as a reference to the original "lot". That follows from s 10 of the *Sustainable Planning Act* 2009 (Qld) which defines "reconfiguring a lot" as including "creating lots by subdividing another lot". "Lot" for the purposes of the *Sustainable Planning Act* 2009 (Qld) means a "lot" under the *Land Title Act* 1994 (Qld). The development approval, including Condition 2, attached to that lot and bound the owner (and the successors in title) of that lot.

[46] I agree with Fraser JA that the obligation on the owner (and successors) pursuant to Condition 2 was to register an easement. as specified "in conjunction with the survey plan". The obligation did not continue once the approval was spent by the simultaneous creation of the approved reconfiguration.

[47] I also agree with what Fraser JA has written concerning his reasons for refusing the application.

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19 See *Sustainable Planning Act* 2009 (Qld) s 244.