SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Council v City Point (Hotels) Pty Ltd* [2017] QSC 280
PARTIES:	**BRISBANE CITY COUNCIL** (plaintiff) **v** **CITY POINT (HOTELS) PTY LTD** (defendant)
FILE NO/S:	BS No 8094 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2017; 11 April 2017; 28 July 2017
JUDGE:	Douglas J
ORDER:	**Order in terms of paragraphs 1 and 2 of the application filed 21 November 2016**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – ADMISSIONS – WITHDRAWAL – where the plaintiff council's statement of claim alleged that it had levied rates and charges on the defendant by written rates notices issued to it – where the defendant made an admission in respect of the issuing of notices – where the defendant seeks to withdraw the admission in substitution for a more elaborate pleading denying the notices were effective due to the plaintiff falling into jurisdictional error – whether leave to withdraw the admission should be granted – where the defendant's solicitor, and controlling shareholder, claims not to have understood the assertions of the statement of claim, nor the processes for levying differential general rates, nor the processes for challenging those categorisations, at the time of preparing the amended defence – where there was a delay of over six years between making admission and seeking its

withdrawal – whether prejudice will be occasioned by the plaintiff – whether the proposed amendments amounted to a collateral challenge to the plaintiff's decisions to levy different general rates on the defendant's land – whether a genuine dispute exists between the parties

City of Brisbane Regulation 2012
City of Brisbane Act 2010

AON Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175
Boddington v British Transport Police [1999] 2 AC 143
Community Housing Ltd v Clarence Valley Council (2015) 90 NSWLR 292
Gray v Woollahra Municipal Council [2004] NSWSC 112
Hanson Construction Materials Pty Ltd v Norlis Pty Ltd [2010] QCA 246
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd [2012] QSC 314
R v Wicks (1988) AC 93
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455

COUNSEL: A L Wheatley for the plaintiff
J P Hastie for the defendant

SOLICITORS: Brisbane City Legal Practice for the plaintiff
Corums Lawyers for the defendant

[1] This is an application by the defendant for leave to withdraw an admission with respect to an allegation in para 3(a) of the plaintiff's fourth amended statement of claim that the plaintiff levied rates and charges on the defendant by written rates notices given to it "which comprised of … General Differential Rate Charges …". The action is one by the plaintiff, Brisbane City Council, for unpaid rates and charges.

[2] The defendant wishes to substitute for the admission a much more elaborate pleading which admits that the plaintiff gave the defendant the particular rates notices in relation to land owned by the defendant at 139 Leichhardt Street, Spring Hill during the period between 30 May 2007 and 2 March 2016 but denies that the notices were effective because they are said to be affected by jurisdictional error in that the plaintiff included the land in a category or categories that were inappropriate because the plaintiff categorised the land as being used for the purposes of an office building and levied differential general rates on the basis of that categorisation when, since at least 1 January 2003, it had not been used for the purpose of an office building, has been partly demolished and rebuilt as a residential unit building such that the plaintiff's decisions to levy differential general rates were affected by jurisdictional error, void and of no effect.

Background – explanation for the admission

[3] The explanation for the admission by the defendant's solicitor, Mr Philip Churven, who is also in control of the shares in the defendant, is that, at the time of preparation of the amended defence which included the admission, he was not aware that para 3(a) of the statement of claim was asserting that the plaintiff not only gave (that is issued and delivered) rates notices to the defendant but also that they had the additional effect of levying rates on the subject land. Nor did he fully understand the formal processes involved for objecting to the categorisation of the subject land for the purpose of levying differential general rates. Nor did he fully appreciate that there were procedural differences between the processes for challenging the categorisation of the land for differential rating purposes and its classification for the purposes of the imposition of a fire services levy.

[4] The defendant accepts that there is some correspondence between the parties where it intimates that the differential general rates the subject of the claim in para 3(a) of the statement of claim were not disputed at that time but submits that the correspondence should be considered in the context of negotiations and discussions between the parties in an attempt to resolve that aspect of the dispute at the time of writing those letters.

[5] There is also a series of letters from the defendant to the plaintiff's solicitors at earlier stages in which issues were raised about the way in which the land was categorised for the purposes of levying differential general rates such as the letters referred to at para 35 of Mr Churven's affidavit[1] which argue that the Council should change the status/categorisation of the building in correspondence of 9 and 11 February 2010 and that the rates accounts required revision from at least 1 July 2003.

[6] He was cross-examined about some of those issues and pointed out that there were appeals on foot in respect of the classification of the property with the Fire Services Commissioner for whom the plaintiff had a role as an agent in respect of the inspection of the building, at least at a preliminary stage. In his cross-examination he said rather emphatically:

> "We have a situation where the defendant has a building. It's a residential, home-unit building. It's being categorised and rated as a 12-storey commercial office building at nearly three times the rating amount. Is it conceivable that the defendant would only worry about the fire levies and the sewerage and think that the triple charges from the general rates are okay?"

[7] He sought to explain correspondence from his firm of solicitors, for example, on 29 April 2016, in which he said "[t]he Council rates have not been in issue at least since your client's Amended Notices some years ago" as being out of context. He believed that the disputes in regard to the Council rates were resolved in the terms of the Council's amended assessments for the relevant period. He said that at that time there

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[1] Filed 29 November 2016.

had been negotiations and a willingness of the defendant to pay the rates on certain conditions that were not accepted by the plaintiff. His evidence was that he was then requesting that the Council would quantify how much they wanted for general rates to settle the matter. He said that the defendant did not receive an answer and that was when the negotiations fell apart. He denied that the defendant had capitulated.

[8] He was inhibited in what he could say about this issue in cross-examination to avoid trespassing into "without prejudice" negotiations between the parties. He asserted that the defendant had a proposal it put to the Council which did not involve the full payment of rates. He pointed out that the defendant contested the categorisation of the property and, if and when the categorisation issue was resolved, it would expect a recalculation of rates based on the charges applicable to the categorisation that was eventually allocated to the property. His understanding was that if the fire categorisation was changed then the plaintiff would re-categorise the property for the purpose of the general rate.

[9] He was not of the view that the fire levy charges were related by way of calculation to the Council rates but did think that they were connected by the categorisation process which he said he intended to convey by a passage in his letter of 29 July 2016 to the Council's solicitor where he said:

> "It will be open to the Court and, in our opinion, quite probable to find that the Defendant pay any outstanding amounts in respect of 1 and possibly any or some interest thereon and also pay 3 based upon the subject property being classified as a construction site. In that event your client will be required to quantify their claims based upon that finding."

[10] In context the item 1 related to Council rates and charges while item 3 was for fire levy charges.

[11] He said that he did not realise until around that time that a change to the fire classification was not going to change the rates classification automatically. He believed it was the same inspectors who inspected for both the Council and the fire authority. He agreed, however, that if a classification for levy purposes came under appeal that it went to the Fire Services Department rather than the Council.

[12] Mr Churven also explained the reference in his letter of 29 April 2016 to the plaintiff's solicitors that the Council rates had not been in issue at least since the plaintiff's Amended Notices some years ago on the basis that he believed a change that occurred in respect of the notices in May 2007 was due to a change in the valuation of the land rather than as a result of any change in the land's categorisation. It seems relatively clear to me that Mr Churven in that correspondence meant to accept the valuation of the land but not the categorisation of the building on the land.

[13] It was part of his case too that he had put the plaintiff on notice by a letter of 9 February 2010 that services had been removed from the building so that it should have changed its status and categorisation as at or about July 2002 with re-issued notices both in regard to the general rate account and the water rates. He said that he had telephoned

the plaintiff around that time and raised issue with the fact that the building was still being rated as a commercial office building and said that it needed to be changed. He clarified that the date of 2002 he referred to in that letter should have been 2003.

[14] He also referred to the reply to that letter dated 10 February 2010 from the plaintiff's solicitors in which they said that the property had been rated on the basis that it was a construction site so no adjustment would be made to the rates. Having received that letter he reached the view that the plaintiff had acknowledged that the property was a construction site. Before then he had observed from the rate notices that the building was still being rated as a commercial office building.

[15] On receipt of that letter he understood that the change to the rating was to change it to a construction site and that that was going to happen after the outcome of a fire levy appeal. His letter of 11 February 2010 was meant to clarify that the categorisation of the property needed to be changed where it referred to the substantial demolition of the building and/or the re-developing construction changes should lead to a change of categorisation. He argued in that letter that both the rate accounts and the water charges in respect of the property required revision from at least 1 July 2003. His oral evidence was that he was trying to explain that the categorisation of the property needed to be changed and the calculations of the various charges should have been based upon the revised categorisation. A building report produced on 11 February 2010 described the property as a construction site and Mr Churven understood that to be consistent with how the building would ultimately be categorised for general rate purposes.

[16] In about November or December 2016 he discovered that there was a process prescribed for objecting to the categorisation of land and then lodged a form to initiate that process. Until then he was not aware that such a form or process was required. He said that in previous categorisations it had been done by letter. He had not previously been told of the procedure by officers of the Council.

[17] The plaintiff also pointed out that it was not possible for it to ascertain in the absence of a detailed inspection of the property for rating purposes between 1 January 2003 and 31 December 2016 whether, at 1 January 2003 or some other date, the construction work was at a stage of completion such that the predominant use was multi-residential. It pointed to at least some commercial presence operating in the building around the time that a development application was made in 2003/2004. The defendant has lodged an appeal against the plaintiff's decision about that issue to the Land Court.

Adequacy of the explanation

[18] In the circumstances, it seems to me that Mr Churven has provided an adequate explanation for the making of the admission in the first place. The admission is explicable when seen simply as an admission that the rate notices were given. If the admission operates as an admission of their validity, however, that ignores what appears

to me to be a true contest about the plaintiff's claim having regard to the alleged change of use of the building during the relevant period.[2]

[19] Mr Hastie, in his written submissions, argued that the dispute concerned whether administrative decisions of the plaintiff to levy differential general rates on the land were affected by jurisdictional error and, if so, whether they were void and of no effect. It is a requirement of the levying of general rates for different categories of rateable land within Brisbane that the plaintiff decide the different categories and identify the rating category to which each parcel of rateable land in Brisbane belongs.[3]

[20] The argument sought to be advanced in the proposed amended defence is that the plaintiff failed to take into account relevant considerations when categorising the land or acted in the absence of evidence or other material on which it could have been satisfied that the land met criteria for inclusion in particular rating categories or that its decision to include the land in those categories was unreasonable because the land was not being used as an office building but instead had been partly demolished and rebuilt as a residential unit building. The argument will be that such an error made the decision to levy the rates void and of no effect.[4]

[21] In those circumstances, it does seem to me that there is a genuine dispute about the appropriate categorisation of the land in spite of the ambiguity of some of the correspondence. That ambiguity goes both ways but there was an underlying concern in the defendant about the proper categorisation of the land sufficient to give rise to a genuine dispute that, other discretionary issues aside, deserves to be litigated.

Collateral challenge

[22] The plaintiff argued that, for a number of discretionary reasons, the amendment sought should not be allowed. One of these discretionary considerations was the argument that permitting the defence to raise these issues amounted to a collateral challenge to the plaintiff's decisions to levy differential general rates on the land in circumstances where there were adequate administrative procedures available to pursue the same aim. The defendant relied on several decisions to argue that the existence of a particular right of appeal conferred on a rate payer did not detract from the more general right to seek judicial review of the exercise of a plaintiff's rate-making powers in the supervisory jurisdiction of a superior court.[5]

[23] The plaintiff accepted that a collateral challenge could be mounted but argued that, as an exercise of discretion it should not be allowed. In that context Ms Wheatley for the

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[2] See *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455, 460 and *Hanson Construction Materials Pty Ltd v Norlis Pty Ltd* [2010] QCA 246 at [15]-[16].

[3] See s 73(1) and s 74(1) and s 74(4) of the *City of Brisbane Regulation* 2012.

[4] See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 572-573 at [67]-[68].

[5] See *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, 300-301.

plaintiff argued that the delay by the defendant in these proceedings since the rates were levied should weigh against allowing the collateral challenge. She also argued that there was a potential for divergent decisions between the Land Court and this court. She submitted that the potential for divergent decisions was a good argument for permitting an initial hearing on the merits to be determined first.

[24] That is something which may be able to be resolved by the exercise of any relevant rights of judicial review of any further administrative decisions contemporaneously with this action. Mr Hastie argued that, if the defendant failed in its merits reviews, which had been instituted, and wanted to challenge those results that could be done by a judicial review application heard with this proceeding. The defendant also argued in para 7 of its written submissions that:

> "(a) the existence of a statutory right of appeal ought not to deprive it of the opportunity to challenge the legality of decisions made by the Council in relation to the imposition of rates and other charges in the context of it being a defendant in proceedings for the recovery of those rates and other charges;
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> (b) it does not have a guaranteed right to exercise its statutory right of appeal in relation to the March Objection because any such appeal depends on the Council (or the Land Court on appeal) giving it a longer time to object to the categorization of the land for the rating periods the subject of these proceedings;
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> (c) even if it were entitled to avail itself of the statutory right of objection, the task of the Land Court in considering an appeal against the Council's refusal of any such objection would be by way of merits review and would, therefore, involve different considerations to the defence which City Point seeks to advance in these proceedings; and
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> (d) the ability of City Point to seek judicial review of the decisions of the Fire Services Commissioner with respect to the Fire Services Appeals should not limit it, in these proceedings, from challenging the legality of the Council's original decisions to classify and impose levies on the Subject Land on the basis of its use as a commercial office building."

[25] Mr Hastie also pointed out that one of the rights to a merits review arising from a decision in February 2017 by the Council to allow the defendant's objection to the categorisation of the land only related to rates levied from 1 January 2017 which were not included within the plaintiff's claim.

[26] Accordingly he submitted that the defendant should not be precluded from raising the defence proposed seeking to challenge the legality of the rates and other charges sought to be recovered. In that context he referred to a number of decisions permitting the

raising of a defence involving a collateral challenge to an administrative decision where there was a parallel statutory right of appeal with respect to the administrative decision.[6]

[27] Nor was there anything in the text of the *City of Brisbane Act* 2010 or the *City of Brisbane Regulation* 2012 which limited or precluded the sort of defence which a rate payer could make when sued for the recovery of rates and charges. A statutory right of appeal, he submitted, was insufficient to deprive the defendant of its right to challenge the legality of the rates and charges in a proceeding for their recovery.

[28] Nor were the merits reviews available in respect of the general rates for the fire levy equivalent to the right to challenge the validity of the general rate calculation. The merits review faced an additional hurdle related to the limited period in which such a review could be sought. A merits review may also face limitations not present in a challenge to the legality of the plaintiff's decision sought to be made by this defence. The issue whether there had been a jurisdictional error because of a flaw in the plaintiff's decision-making process may not necessarily arise in a merits review to the Land Court.

[29] He made similar submissions with respect to the role of the Fire Services Commissioner in any appeal in respect of the fire levies. He submitted that the Fire Services Commissioner had no role in categorising land or levying charges on it except and until there was an appeal. Accordingly, he submitted that the existence of a statutory right of appeal should not preclude the defendant from challenging the legality of the plaintiff's decisions both in respect of the general rates and in respect of the fire levy.

Explanation for delay

[30] The defendant explained its significant delay, upwards of six years, in seeking to withdraw the admission by some of the evidence to which I have referred before, namely Mr Churven's ignorance of the legal effect of the giving of rates notices and the formal processes involved in objecting to the categorisation of the land and its classification for the purposes of imposition of the fire services levy.

[31] It was submitted for the defendant that, even if it had not provided an adequate explanation for how the admissions came to be made, it still should have the opportunity to put its case to the court; see *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd*.[7] In that decision Martin J pointed out that the "paucity" of the pleading there was due to a lack of competence rather than the absence of a case for the defendant. That was said to apply in this case also.

Prejudice to the plaintiff

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[6] See *Gray v Woollahra Municipal Council* [2004] NSWSC 112; *R v Wicks* (1988) AC 93 and *Boddington v British Transport Police* [1999] 2 AC 143, 162 as well as *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292 referred to above.

[7] [2012] QSC 314 at [48].

[32] There have been delays in the action but they appear to be attributable to both parties. The matter is said otherwise to be almost ready for trial but the plaintiff is concerned that the widening of the issues if the amendments are allowed will prejudice it. It argues that there is the potential for it to have lost evidence over the 14 years between 2003 and the present about the actual use of the building. There was an inspection of the land carried out by the plaintiff on 11 February 2010, however, after these matters about the categorisation of the land had been raised. Mr Churven's evidence also was that there had been other inspections of the land through the period.

[33] The defendant argues, on the other hand, that there is no prejudice to the plaintiff in allowing it to withdraw its submissions because it has always disputed the plaintiff's assertions about the use of the land in the context of the imposition of the fire service levy. The amended defence filed 31 January 2013 raised the issue that that levy was based on an incorrect categorisation of the land because it has ceased to be used for the purposes of a commercial office building since at least 1 January 2003. That is a powerful argument that this issue has always been a matter which the plaintiff needed to deal with in the proceedings. Nor is this case which is one which has gone to trial or is on the eve of trial or has been case managed.[8]

Consideration

[34] Taking into account the existence of what seems to me to be a genuine dispute about the categorisation of the land which has been in existence, at some stages more clearly than others, for several years and the reflection of that dispute in another aspect of the defence which already exists where the dispute goes to the root of the right asserted by the plaintiff to the rates it has levied, it is my view that the amendment sought to withdraw the admission should be allowed and the amendments to the defence proposed should be permitted.

[35] This seems to me to be a different case from one, for example, where the statutory process of review is regarded as an appropriate reason to refuse to permit judicial review at that stage of a dispute. Where, as here, there is a claim by the plaintiff for money which the plaintiff claims to be entitled to defend because the plaintiff's rating notices proceed on an allegedly false assumption about the proper categorisation of its land, then it seems to me to be appropriate to permit the defendant to raise such an issue in its defence by withdrawing the admission. If leave were also required pursuant to r 379 of the *Uniform Civil Procedure Rules* 1999 to deliver an amended defence, I would give it having regard to the interests of justice in permitting the defendant to defend the case brought against it on the basis identified. The explanation for the delay seems adequate to me and I am not persuaded that there is significant prejudice likely to occur to the plaintiff.

Orders

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[8] Compare, eg, *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

[36] Accordingly I shall make orders in terms of paragraphs 1 and 2 of the application filed 21 November 2016 and hear the parties further as to costs.