[2002] QCA 51

COURT OF APPEAL

McMURDO P
DAVIES JA
BYRNE J

Appeal No 9827 of 2001

ALAN ROSS GREET Appellant/Plaintiff

v.

LOGAN CITY COUNCIL First Respondent/First Defendant

and

EDWARD CAMPBELL AS CHIEF EXECUTIVE OF THE DEPARTMENT OF LOCAL GOVERNMENT AND PLANNING Second Respondent/Second Defendant

BRISBANE

..DATE 25/02/2002

JUDGMENT

THE PRESIDENT: Justice Davies will deliver his reasons first.

DAVIES JA: The applicant seeks leave to appeal to this Court against a decision of the Planning and Environment Court on 21 September 2001. The only basis for appeal, if leave were granted, would be an error or mistake in law on the part of the Court.

The applicant's contention before that Court was that a declaration made by the respondent council on 5 May 1998 was invalid. That question was decided against the applicant as a preliminary point in a matter properly before the Planning and Environment Court which involved other questions.

The principal question on this application is whether there is some reasonable prospect of success in the applicant's contention that the declaration is invalid. If there is not such prospect this application should be refused. The declaration in question was made or purportedly made pursuant to section 50 of the Standard Building Regulation 1993. That section provides:

> "(1) A local government, by resolution, may declare, for single detached class 1 buildings or class 10a buildings, forms of buildings and localities the local government considers may have an extremely adverse effect on the amenity or likely amenity of a locality or which may be in extreme conflict with the character of a locality.
>
> (2) Development applications for forms of buildings or in localities mentioned in subsection (1) must be assessed by the local government for the amenity and aesthetic impact of the proposed building work.

> (3) The local government may refuse an application to which subsection (2) applies only if -
>
> (a) the building, when built, will have an extremely adverse effect on the amenity or likely amenity of the building's neighbourhood; or
>
> (b) the aesthetics of the building, when built, will be in extreme conflict with the character of the building's neighbourhood."

To be within the terms of section 50(1), a declaration must have, in my opinion, the following characteristics:

1. it must be one in respect of single detached class 1 buildings or class 10a buildings or both;

2. it must be as to forms of buildings which the council considers may have an extremely adverse effect on the amenity or likely amenity of the locality or which may be in extreme conflict with the character of a locality.

There is an alternative additional requirement as to localities which it is unnecessary to consider for present purposes.

No challenge was made either in this Court or in the Planning and Environment Court to the validity of section 50. The declaration here may be put in the following terms: "Declare that all development applications for class 1 removal houses and class 10 buildings which have a floor

> area in excess of 60 square metres proposed to be erected in the city must be assessed by council on the amenity and aesthetics in respect of the proposed work."

Two preliminary points may be made about this declaration. The first is that "removal houses" are a specific sub-category of class 1 buildings. Class 1 buildings includes single dwellings and boarding houses, guest houses, hostels or the like, up to a certain size. Removal houses are, it is accepted by Mr Cronin for the applicant, single dwellings which have been removed from another site.

The second point is that, and I quote, "class 10 buildings which have a floor area in excess of 60 square metres", are a sub-category of class 10a buildings. Class 10a buildings are non-habitable buildings consisting of private garages, carports, sheds or the like. The declaration relevantly covers only such of those buildings as are in excess of 60 square metres.

It is not difficult to see why houses removed to a site might have an extremely adverse effect on the amenity or likely amenity of a locality. Nor is it difficult to see why sheds and the like having a floor area in excess of 60 square metres might also have an adverse effect on amenity or likely amenity of a locality.

The declaration in its terms appears to be no more than a declaration in terms of the section. It declares that the council considers, as the section requires, that buildings of each of those characters may have an extremely adverse effect on the amenity or likely amenity of the city. It does not say that expressly but it does say that such buildings must be assessed by the council for the amenity and aesthetic impact of proposed building work. That is to state what section 50(2) provides as to the consequence of the council having considered that buildings may have an extremely adverse effect on the amenity or likely amenity of a locality.

To this obvious conclusion, Mr Cronin for the applicant makes three contrary contentions. The appellant asserts, as his first point, that such buildings are of a kind which it is difficult to determine have in fact an adverse effect or likely adverse effect on the amenity of the area. That is because, he submits, that the term "amenity" should be given a narrow construction.

I would accept for present purposes that it should be given an objective construction but that is not to say that it should be given a narrow construction and indeed there is nothing in section 50 itself which would require that construction.

His second contention is that from the declaration a person subjected to it would have no way of determining whether the

subject matter of the declaration here does have an extremely adverse effect on the environment. But that is not the question which a person who is subjected to it has to determine. For the purpose of the declaration all that is necessary is that the building is a class 10a building of more than 60 square metres or a dwelling house of a specific kind, namely a removal house. That is sufficient to make it the subject of the declaration.

I will then move to the next step which is an assessment under section 50(2) which has not occurred here or at least is not subject to any contentions here.

The third contention put up by Mr Cronin for the applicant is that the effect of what has happened here is that it constitutes an amendment to the planning scheme.

If in fact there is any amendment to the planning scheme and it does not seem to me that there is, it would have been constituted by section 50. The declaration adds nothing to section 50. It is, as I have already said, a declaration made in almost the precise terms of the section.

Nevertheless it seems to me that it is not difficult to read section 50 consistently with the planning scheme if that were necessary, but it is not because, as I have already said, no question is raised here as to the validity of that section.

No doubt the declaration here could have been better drafted. On the other hand, I do not think there is any doubt as to what it means, nor do I think there is any doubt about its validity. It performs precisely the construction which section 50 envisaged that such a declaration would. For that reason, in my opinion, it is unnecessary to consider any further the principles upon which the validity of subordinate legislation is to be ascertained and for that reason also I do not think there is any prospect of an appeal succeeding on this question and I would refuse the application.

THE PRESIDENT: Yes, I agree.

BYRNE J: I agree.

THE PRESIDENT: The order is the application for leave is refused.

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THE PRESIDENT: The order as to costs is the applicant is to pay the first respondent's costs to be assessed.
