SUPREME COURT OF QUEENSLAND

CITATION:	*Bartlett v Brisbane City Council* [2003] QCA 494
PARTIES:	**WILLIAM A BARTLETT and** **JANETTE R BARTLETT** (applicants/respondents) **v** **BRISBANE CITY COUNCIL** (respondent/appellant)
FILE NO/S:	Appeal No 2359 of 2003 P & E Appeal No 4880 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	14 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2003
JUDGES:	McPherson JA, Jones and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. The appellant pay the respondents' costs to be assessed on an indemnity basis**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – GENERALLY – WHEN APPLICATION DULY MADE – application to enclose the balcony of a residential unit – whether a "properly made application" as required under the *Integrated Planning Act* 1997 s 3.2.1(3) – whether approval by each lot holder required for valid application – whether whole complex forms a part of the 'land the subject of the application' *Body Corporate and Community Management Act* 1997 (Qld) s 35(1), s 35(3) *Integrated Planning Act* 1997 (Qld), s 3.2.1(3), s 3.5.28, Schedule 10 *Owners Strata Plan No. 50411 and Ors v Cameron North Sydney Investments Pty Ltd* [2003] NSWCA 5, considered

Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council (1980) 145 CLR 485, considered

COUNSEL: D R Gore QC, with M E Rackemann, for the appellant
G J Gibson QC, with T N Trotter, for the respondents

SOLICITORS: Brisbane City Legal Practice for the appellant
King and Company for the respondents

[1] **McPHERSON JA:** I agree with the reasons of Jones J. The appeal should be dismissed with costs, to be assessed, as agreed, on an indemnity basis.

[2] **JONES J:** This is an appeal from a decision of the Planning and Environment Court which declared that a development application to enclose the balcony of a residential unit, was a "properly made application" fulfilling the requirements of s 3.2.1(3) of the *Integrated Planning Act* 1997 ("IPA"). That section provides that an application for development approval -

> " (a) must contain a mandatory requirements part including a requirement for -
> (i) an accurate description of the land, the subject of the application; and
> (ii) the written consent of the owner of the land to the making of the application; and
> (b) may contain a supporting information part."

[3] The point at issue in this appeal is a narrow one. The appellant argues that the application was not properly made because, for an application in respect of a lot in a community title scheme, those mandatory requirements require the description of all the lands of the scheme and the written consent of all the owners.

Background facts

[4] The respondents are the registered owners of Lot 28 on SP 100 001which is located in a high rise, multi-dwelling building containing some 106 units known as "Riviera II".

[5] This building complex comprised the second stage of a total development which began with the development of "Riviera I". The land on which these building complexes have been erected was subdivided in July 1997.[1] Each complex now has a separate Body Corporate.

[6] The respondents' unit consists of a living area of 117 square metres plus an open balcony of 24 square metres.[2] The respondents' unit is located at level 6 on the eastern end of Riviera II and is adjacent to the South-East freeway and the Captain Cook Bridge. As a consequence there is an extremely high level of noise intrusion which exceeds the maximum, internal design sound levels as required by the Australian Standards. In an endeavour to abate this noise intrusion the respondents have sought approval to enclose the balcony area. This is to be achieved by fixing laminated glass panels between the existing balustrade and the roof which

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1 Affidavit of Cronin sworn 17 January 2003 – Record p 343

2 See plan at Record p 365

overhangs the balcony. All the work of fixing the panels would be undertaken entirely within the boundary of Lot 28.

[7] The 24 sq m of the open balcony was not included in the calculation of the gross floor area (GFA) for the total Riviera developments. A condition imposed on these developments at the time of granting approval was that the GFA should not exceed a certain area. The consequence of enclosing the balcony would mean that that 24 sq m would have to be added to the existing GFA of 15,600 square metres. As it happens there is available for use within the limits of that condition a further 633 sq m. The Body Corporate is willing to allow the respondents to use 24 sq m of that available capacity should approval be given for the proposed development.[3]

[8] The respondents first wrote to the appellant council on 24 June 2001 advising of their wish to enclose the balcony and seeking advice about the application process. Initial advice was given by the Council and the respondents took certain steps in accordance with that advice. However, in June 2002, the Council relying on legal advice adopted a different approach and required a new application to be lodged for a material change of use of the premises.[4] The respondents unsuccessfully appealed against this decision, the details of which are set out in the reasons of the Planning and Environment Court dated 15 July 2002.[5]

[9] As a consequence the respondents lodged a new application on 10 December 2002 seeking approval for a material change of use of the land. The application could perhaps have been framed as seeking approval for "building works". Either application would, however, be subject to impact assessment. The respondents completed, in the approved form, the mandatory requirements for the purpose of s 3.2.1(3) of IPA describing the land as Lot 28 on SP 100001. The form was duly signed by each of the respondents as owners.

Findings below

[10] The appellant complains that, whilst the learned primary judge correctly summarised the arguments raised by the appellant, he did not identify any specific error in those arguments. It is, however, implicit in his Honour's findings that he did not regard the appellant's arguments as assisting in the proper construction of s 3.2.1. His Honour determined the question by applying to the words of that section, the definition of "land" referred to in Schedule 10 of the IPA and noting that the proposed works were to take place entirely within Lot 28.[6] He then continued –

> "17. It is true that the other lot owners may have some concern about in the adjustment to the gross floor area and the possible impact of that upon themselves and the building as a whole. However, that is not an impact on any particular part of the multi-unit development. Such an impact is not sufficient to make any other lot, or the common property, "the subject of the application".
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> 18. The correct conclusion is the simplest. The only land which is the subject of this application is the balcony of Unit 28. That

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3 Letter from Body Corporate 2 October 2002 - Record p 336

4 See Record p 84

5 Record pp 387-399

6 Reasons para [12], para [16], Record at pp 409-410

> conclusion avoids the harsh and unworkable result contended for by the Council. In practical terms, no change of approval could ever be made, as it can be predicted that not all of the owners would agree to it, certainly in the larger multi-use buildings, and often in the smaller ones.
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> 19. Once the application is made, then the views of the other owners can be taken into account in assessing the merits of the application." [7]

The issues on appeal

[11] The appellant identifies four points on the basis of which it argues that the proper construction of s 3.2.1 requires the application form to describe all the lands in the Riviera complexes and to be signed by all the lot owners. Those points are:-

> "(a) the whole building is affected by the works (albeit that the works are only carried out on lot 28);
> (b) all lot owners are legally connected through the common area provisions of the *BCCM Act* (which underpins the assumption that all lot owners have a common interest in the maintenance of the appearance and integrity of the whole building);
> (c) all lot owners are also legally connected through s 3.5.28 of *IPA* in connection with the scheme land that was formerly 'the land the subject of (an) application';
> (d) the public notice provisions of *IPA* make specific provision for the situation where scheme land adjoins land to be developed, but do not easily accommodate the treatment of an individual lot as 'the land the subject of an application'.[8]

[12] As to the first of these, the appellant contends that the identification of "the land the subject of the application" for the purpose of s 3.2.1 of the IPA must be undertaken in the context of the planning regime and controls which are affected by the development application. The appellant points to the fact that the effect of enclosing the balcony is to increase the GFA by reason of the area no longer fitting the definition of "balcony" for the purpose of CityPlan. The Riviera complex is within the South Brisbane Local Plan Area. Under this plan there are specified controls over, and conditions attached to, the approval for the development of the complex. As previously mentioned included in these controls is the size of GFA. The appellant argues that because the development application alters the GFA for the entire complex, that fact defines "the land" which is the subject of the application.

[13] The second point is raised in support of that contention, by highlighting one of the characteristics of group or community titles schemes. Section 35 (formerly s 37) of the *Body Corporate and Community Management Act* 1997 provides that "(1) Common property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common,…" and that " (3) An owner's interest in a lot is inseparable from the owner's interest in the common property". Counsel for the appellant argues that, as a consequence, all owners have an interest in the

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7 See Record pp 410-411

8 See Outline of Argument of the appellant p 8-9

maintenance of the appearance and in the integrity of the whole building with the result that all the lots fall within the scope of the land the subject of the application and this is why all the lot owners are, to use his words, "legally connected".[9]

[14] The purpose of this section of BCCM is not to bring about a connection between separate lots of the scheme or between owners of such lots. Its function is to create interests in common property and to tie the ownership of those interests to the ownership of lots so as to make the interests indisseverable. Whilst this has the effect of linking those interests it does not, in my view, create interests for other lot owners in the lot of an individual owner. No part of the common property was involved in or impacted upon by the respondents' proposal.

[15] The appellant argues for further support for this "legal connectedness" by referring also to the provisions of s 3.5.28 of *IPA* which provides:-

> "(1) The development approval attaches to the land, the subject of the application, and binds the owner, the owners 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)."

[16] These provisions establish the continuing effect on the land after a development has been approved. The application of this section to the land under a community title scheme is no different from its application to any other property. It does not directly assist with the identification of the land which is the subject of an application.

[17] Finally, the appellant seeks support for its argument by reference to the provisions applying to the notifications stage of the Integrated Development Assessment System (IDAS) process. Counsel for the appellant relied upon the decision of *Liquorland (Australia) Pty Ltd v Gold Coast City Council*[10] for "broad indirect support". That case determined that the proper description of land for a development application notice was "the whole of the parcel of the land on which the proposed development is to occur and not the various parts of the parcel which the development and the ancillary services are likely to affect."[11] This case does not assist in identifying "the land" in the present application as Lot 28 alone satisfies that particular criterion.

[18] In summary the appellant's arguments depend on there being some relevant legal connection between Lot 28 and the interests of all other lot owners. That there is a statutory connection between lot owners in respect of certain interests is not in doubt, but it is not a connection which is relevant to the exclusive use by the respondents of their own lot. It is to a material change in this use that the development application is applicable.

[19] The respondents' argument is simply expressed. In order to construe s 3.2.1 one needs to look no further than the definitions set out in the **Dictionary** in Schedule 10 of IPA. There "**land**" is defined as including:- "(a) any estate in, on, over or under land; …"

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9 See Outline of Argument of the appellant p 8
10 [2001] 2 QdR 476.
11 Ibid at 486.

> The term "**owner",** of land, "means the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent." Each lot of the Riviera complex is land by virtue of the provisions of the *Land Title Act* 1994 (LTA). "**Lot**" is defined in Schedule 2 of the LTA as meaning "a separate, distinct parcel of land created on
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> (a) the registration of a plan of subdivision; or
> (b) the recording of particulars of an instrument;
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> and includes a lot under the *Building Units and Group Titles Act* 1980."

[20] The respondents argue that, as the proposed development is to occur wholly within the bounds of Lot 28, no other land is affected by the works. The respondents argue that the appellant has unduly and incorrectly focused on the word "affected".

[21] On a factual basis, the increase in GFA by 24 square metres could not be said to be a material change to the whole building which had an existing GFA of 15,650 square metres. A "material change of use" relevantly means "a material change in the intensity or scale of the use of the premises"[12]. The term "premises" for the purpose of this definition means "a whole building…"[13] As a consequence the respondents argue that the proposed works had no impact on the intensity or scale of use of the building complex. By contrast the proposed change is material only to the use of Lot 28.

[22] To meet the appellant's assertion of adverse impact on the appearance and integrity of the building, the respondents point to the evidence of the architects' opinion "that the proposal will not have any detrimental effect on the aesthetic appeal of the building"[14]. This is not a matter which engaged the specific consideration of the learned primary judge who held that it was not relevant to the application process.[15] In short the respondents contend for the approach adopted by the learned primary judge applying the words as defined in their ordinary meaning.

Discussion

[23] The purpose of s 3.2.1 of the IPA is limited. It simply identifies the requirements for the first stage in the IDAS process referred to in Chapter 3 of the Act. The relevance of these requirements and the need for proper identification of the relevant land and its owner is explained in the remarks of Stephen J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council*[16] where his Honour said:-

> "In any such scheme for the control of land use the two critical integers, land and use, each involves a question of definition, what land and what use? The intending user of land will, in his application for consent, have to specify these two integers, but it will be one of them, the integer of use, that will dictate the precise identity and extent of the other integer, the land the subject of the application. This is a necessary consequence of the fact that the consent being sought is consent to use for a particular purpose. The

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12 s 1.3.5 of IPA
13 Schedule 10 of IPA
14 Record p 377
15 Record p 388/30
16 (1980) 145 CLR 485

> land is merely the passive object which is being used; the active integer, use, will determine its extent."[17]

[24] The respondents' proposal is very significant to the use of Lot 28 but has no significance whatsoever to the use of the other lots. Each owner of the other lots will continue to have the same interest in the land constituted by the lot, and the same interest in the common property as that owner had prior to the application. Any concern on the part of another lot owner about the change in amenity or the integrity or aesthetics of the building are simply matters to be agitated in the decision process. They are not, in my view, factors of use which determine the identification of the land.

[25] Mr Gore, Senior Counsel for the appellant, appropriately referred the Court to a decision of the New South Wales Court of Appeal in O*wners Strata Plan No. 50411 and Ors v Cameron North Sydney Investments Pty Ltd*[18]. The court there considered the requirements of clause 49(1) of the *Environmental Planning and Assessment Regulation* 2000 (NSW) which provided that a development application may be made –

> "(a) By the owner of the land to which the development application relates; or
> (b) By any other person, with the consent in writing of the owner of that land."

I am unable to differentiate between the phrase "the land to which the development application relates" in the Regulation and the phrase "land the subject of the application" in s 3.2.1. I find the decision in this case to be helpful in consideration of the issue here.

[26] In *Owners Strata Plan*, at first instance, Young CJ in Eq found himself constrained by an earlier decision *Halpin v Sydney City Council*[19] though he doubted its correctness. By following the *Halpin* decision his Honour concluded that the consent of other lot owners was necessary to the making of the application. However his Honour held that the other owners were obliged to give their consents.

[27] On appeal, Giles JA expressed the opinion that arguments about the correctness of *Halpin* should not have been raised on appeal and he refused to consider the question. Heydon and Santow JJA, however, accepted such arguments and determined that *Halpin* was incorrectly decided. Having come to that view Heydon J looked more broadly at the proper construction of the terms of the Regulation. He said (at para 149):-

> "It would be an extreme step to hold that a lot owner can never develop the lot unless the body corporate consents to the lodging of the development application. It would be a radical derogation from the enjoyment of land in which the lot owner has a fee absolute in possession. The fact that the veto could be exercised by a bare majority of a meeting of the body corporate would not sit well with the need for special resolutions in relation to restrictive by-laws. Why should the legislation, which expressly stipulated one route to

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17 Ibid at 501
18 [2003] NSWCA 5, 6 February 2003
19 (2000) 110 LGERA 464

> the control of individual lot owners by the majority but made it subject to the requirements of special resolution, be construed as stipulating for another route to that destination which can be travelled if only a bare majority can be found? While each of those outcomes is possible, it would be unlikely that legislation could bring them about without containing clear words to that effect.
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> Further, the capacity of the body corporate to object to the development which is the subject of that application after it has been lodged points against the existence of a statutory power to veto the lodging of the application: *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 480…. The same applies to owners of lots operating through their voting powers within the body corporate."[20]

Again at paras 154 and 155 his Honour said:-

> "However, it is not necessary to adopt the construction advanced by the plaintiff, for two reasons. The first is that as a matter of ordinary language clause 49(1), even when read with paragraph (b)(i) and (iii) of the definition of "owner", does not mean what the claimants want it to mean. Secondly, even if it did, difficulties arise which suggest that the context or subject matter indicate that the statutory definition of "owner" should not apply.
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> As a matter of ordinary legal language, the owner of a lot – the owner of Lot 1, for example, - is fairly to be described as an "owner". The owner has title to property, namely the lot. An entry is inserted in the Register recording the lot owner as entitled to an estate in fee simple in that lot. The lot owner has a corresponding certificate of title. As a matter of ordinary legal language, the body corporate, too, is fairly to be described as an "owner", but of the common property as distinct from any particular lot. Its ownership is recorded in a separate folio of the Register: *Strata Schemes (Freehold Development) Act* 1973 ss 18, 20 and 23. Clause 49(1) is entirely workable by recourse to those meanings of "owner". An individual lot owner can make a development application in relation to his or her or its lot, or can consent to a development application made by any other person in relation to that lot. A body corporate can make a development application in relation to the common property, or consent to a development application made by any other person in relation to the common property."[21]

[28] Although *Owners Strata Plan* was concerned with different legislation, the task of construing the relevant section here gives use to the same consideration. To adopt the construction contended for by the appellant would, in practice, have the effect of a lot owner in a large development rarely, if ever, being able to make a development application. One cannot conclude that the legislature intended such a result. Moreover such a construction is only arrived at by a technical and strained application of the terms of the legislation with an undue focus on interests allied to

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20 Ibid at p 37

21 Ibid at p 38

lot ownership rather than the purpose of identifying the land itself. This is the proper focus as identified by Stephen J in *Pioneer Concrete*. The other lot holders and the body corporate each have the opportunity to have their respective interests considered through the submission process provided for by s 3.4.9 of IPA.

[29] The approach of the respondents of simply applying to the terms of s 3.2.1 the ordinary meaning of the words as contemplated by the statutory definitions, gives rise to no real difficulty. By this approach a construction of the section is arrived at which is functional and which does not interfere with the generally accepted rights of the owners of lots in a community title scheme. It is consistent also with the majority decision in *Owners Strata Plan* and it meets the purpose identified in *Pioneer Concrete*. This is so whether one is considering the position of the lot owner as an applicant for a development approval or as an owner entitled to notification.

Conclusion

[30] The learned primary judge no doubt had in mind these matters when he determined that the simplest construction was the more appropriate. In my view his decision was correct and there is no warrant for construing the terms of s 3.2.1 of the Act as requiring the consent of other lot holders. I would therefore dismiss the appeal.

[31] The costs of this appeal are the subject of agreement that the appellant will indemnify the respondents for these costs. I would therefore propose orders that the appeal be dismissed and that the appellant pay the respondents' costs to be assessed on an indemnity basis.

[32] **HOLMES J:** I agree with the reasons for judgment of Jones J and the orders he proposes.