SUPREME COURT OF QUEENSLAND

CITATION:	*R.S.L. (Qld) War Veterans' Homes Ltd & Anor v Gold Coast Airport Ltd & Anor* [2003] QSC 478
PARTIES:	**R.S.L. (QLD) WAR VETERANS' HOMES LIMITED (A.C.N. 010 488 454)** (first applicant) and **SOUTHERN QUEENSLAND ARMY HOLIDAY RESORT (A.C.N. 009 701 473)** (second applicant) **v** **GOLD COAST AIRPORT LIMITED (A.C.N. 077 200 821)** (first respondent) and **THE COMMONWEALTH OF AUSTRALIA** (second respondent)
FILE NO:	7687 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2003
JUDGE:	Atkinson J
ORDER:	**Application dismissed**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where application made for development approval for material change of use of land – where development application required consent of owners of adjoining land – where owner of adjoining land guaranteed continued right of access to applicant's land in contractual agreement – whether land owner's consent to development application implied from contract ESTOPPEL – GENERAL PRINCIPLES – where application made for development approval for material change of use of land – where development application required consent of owners of adjoining land – where owner of adjoining land guaranteed continued right of access to

applicant's land – where applicant agreed to temporary closure of the access road in reliance upon the guarantee of continued access – whether land owner estopped from consenting to development application

Airports (Transitional) Act 1996 (Cth)
Integrated Planning Act 1997 (Qld), s 3.2.1

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, referred to
Liberty Oil Pty Ltd & Westway Systems Pty Ltd v Fanigun Pty Ltd [2002] QPELR 273, considered
Oakden Investments Pty Ltd v Pine Rivers Shire Council & Anor [2003] 2 Qd R 539, referred to
Stradbroke Island Management Organisation Inc v Redland Shire Council [2002] QPELR 121 (23/8/01), cited
Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133, cited
Ventana Pty Ltd v Federal Airports Corporation & Ors [1997] 538 FCA (20/6/97), cited
West Point Island Civic Association v Dover TP. Com. (1966) 225 A 2d 579, cited

COUNSEL: R G Bain QC, for the first applicant and the first respondent
M Byres, for the second applicant
M D Hinson SC, for the second respondent

SOLICITORS: Thynne & Macartney as town agents for Minter Ellison, Gold Coast, for the first applicant and the first respondent
Corrs Chambers Westgarth, for the second applicant
Australian Government Solicitor, for the second respondent

[1] The second applicant, Southern Queensland Army Holiday Resort ("SQAHR") owns 3.46 hectares of land at Bilinga on which it conducts a holiday complex for Army personnel and their families called Mallaraba (the "Mallaraba land"). The Mallaraba land shares boundaries with the land on which the first respondent, Gold Coast Airport Limited ("GCAL") conducts the Coolangatta Airport under a long-term lease of that land from the second respondent, the Commonwealth. That land comprises Lot 1 on RP 225692, Lot 5 on RP 839952 and Lot 222 on RP 839951, County of Ward, Parish of Tallebudgera (the "airport land").

[2] The first applicant, RSL (Qld) War Veterans' Homes Limited ("RSL Homes") contracted to buy the Mallaraba land from SQAHR in the terms of an REIQ commercial land and buildings contract dated 7 August 2002 for the amount of $2,500,000 (the "sale contract"). The Mallaraba land is described as Lot 1 on RP 91922 and Lot 3 on RP 179416, County of Ward, Parish of Tallebudgera at Coolangatta Road, Bilinga, Queensland.

[3] Special Condition 2 of the sale contract is headed "Development and Planning Approval" and provides *inter alia:*

> 2.1 This contract is conditional on the Purchaser obtaining approval from the Local Government to develop and use the Property as an aged care facility including an administration centre and a high care nursing facility for up to 150 persons ("Development Condition") on or before the date which is 12 months after the Contract Date ("Development Approval Date").

[4] Special Condition 6 of the sale contract is headed "Airport Authority Approval" and provides *inter alia*:

> 6.1 The Contract is conditional on the Purchaser obtaining approval on terms reasonably satisfactory to the Purchaser, from the Coolangatta Airport Authority (Gold Coast Airport Limited) to use Longa Avenue to access the Property ("Access Approval") on or before the date which is 12 months after the Contract Date ("Access Approval Date").

[5] Special Condition 9.2 of the sale contract appears under the heading "Assignment of Existing Access Rights" and provides:

> 9.2 The Vendor will promptly do everything reasonably required of it by the Purchaser within its power to perfect the assignment of the access rights which the Vendor has in respect of the Property to the Purchaser.

[6] Access to the property is through part of the airport land owned by the Commonwealth and leased to the GCAL, along Terminal Drive, formerly known as Longa Avenue, on Lot 5 on RP 839952 and Lot 1 on RP 225692.

[7] On 13 December 2002, the first applicant, RSL Homes, filed a development application for a material change of use over the Mallaraba land (the "development application") with the Gold Coast City Council (the "Council"). The development application described the lot and plan details, the subject of application, as:

> "Lot 1 on RP 91922 and Lot 3 on RP 179416 (site details); and
> Part Lot 5 RP 839952 and Part Lot 1 RP 225692 (for access purposes only)."

[8] The development application also included a letter from SQAHR dated 12 November 2002 giving consent, as the registered owner of Lot 1 on RP 91922 and Lot 3 on RP 179416, to the making of the application. Included with the development application was a copy of a deed of access between the Federal Airports Corporation ("FAC")[1] and SQAHR dated 22 May 1998 in respect of the right of access for the landowner of Lot 1 on RP 91922 and Lot 3 on RP 179416 over part of Lot 5 on RP 839952 and part of Lot 1 on RP 225692 (the "deed of access"). Also included were a supporting town planning report and architectural sketches.

[9] On 20 December 2002, a traffic report prepared by Viney Traffic Engineering was also lodged with the Council. On 31 December 2002, the applicant was sent an acknowledgment notice of the development application by the Council.

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[1] The FAC represents the Crown in right of the Commonwealth: *Ventana Pty Ltd v Federal Airports Corp & Ors* [1997] 538 FCA (20/6/97) 13-22.

[10] By letter dated 29 January 2003, the applicant's town planner, Grummit Planning Pty Ltd, was requested by the Council to provide further information to assist the assessment of the development application. The applicant was asked to provide advice from GCAL confirming that the proposed development enjoyed legal vehicular access via Lot 1 on RP 225692 as granted by, and pursuant to, the deed of access dated 22 May 1998 or otherwise.

[11] By report dated 1 April 2003, the applicant, with the assistance of Larry Kumskov, a town planning and development consultant, lodged a response to that request referring the Council to the deed of access and accompanying correspondence included in the development application. Mr Kumskov stated in his report that:

> "RSL Care have been advised that the Access Deed and the Minister's Declaration are binding on the Gold Coast Airport Limited and subsequent owners of the Mallaraba site.
>
> Whereas the documents do not distinguish between Lot 5 [on] RP 839952 and Lot 1 on RP 225692, it is apparent from the submitted material and correspondence from the then Federal Airports Corporation that the Corporation provided clear undertakings that access to Mallaraba would be provided to and from the Gold Coast Highway via the airport land in exchange for an agreement to close Longa Avenue."

[12] A declaration of the right of access was one of the matters agitated in the originating application but was no longer pursued at the hearing because of agreement reached between the first applicant and the first respondent. As a result of that agreement, consent orders were made and the first respondent took no further part in the hearing. The first applicant however asserted that the history of the grant of access to the land was relevant to the determination of the declaration which it sought against the second respondent. The declaration sought was that the second respondent was obliged to consent, in writing, to the development application by the first applicant to the Council for a material change of use for aged person accommodation on the Mallaraba land.

Access History

[13] From 1980, the Commonwealth sought to acquire from the Lands Administration Commission of Queensland the public road known as Longa Avenue, to close that road and to rename it Terminal Drive as a result of a change in the design of the entry road to the airport. To do so required the consent of adjoining landowners, including SQAHR. Linda Moffat, Secretary and member of the Board of Directors of SQAHR, deposed that throughout negotiations in respect of the closure of Longa Avenue, future access to the Mallaraba land was guaranteed.

[14] By letter dated 18 July 1980 to SQAHR, the Chief Property Officer Executive of the Department of Administrative Services (Cth) stated in part:

> "The Commonwealth has designated the entry road to the Airport to include continued unrestricted ingress and egress to and from your property and your future access rights via this road system are guaranteed. If an easement is granted, costly and lengthy survey and

> legal processes are involved and considerable delay and inconvenience would result to both parties".

[15] By letter dated 6 August 1980 to the Department of Administrative Services (Cth), SQAHR accepted the Commonwealth's proposals in respect of such access.

[16] The issue arose again in 1988 when the Australian Property Group wrote to SQAHR explaining that there had been a delay in the finalization of the road closure. On 31 August 1990, the Australian Property Group again wrote to SQAHR on behalf of the FAC seeking confirmation of its agreement to the road closure in return for the proposed access licence. In a letter dated 17 October 1990, SQAHR confirmed to the Australian Property Group that it had no objection to the proposed acquisition and closure where continued access was guaranteed.

[17] In 1991, the part of Terminal Drive formerly known as Longa Avenue was closed with SQAHR's consent and the land was acquired by the Commonwealth. That land was then transferred to the FAC.[2]

[18] By letter dated 22 June 1994, in response to requests by SQAHR in May and June 1994, the FAC confirmed that continued road access between the Mallaraba land and the Highway via the proposed airport access and egress roads was assured.

[19] On 22 May 1998 the access deed between SQAHR and FAC was executed. The deed states that:

> (a) the Commonwealth at that date had sold the Coolangatta Airport to Queensland Airports Limited (QAL);
> (b) the FAC undertakes to continue to allow road access to and from the Mallaraba land; and
> (c) the parties "hereby acknowledge and agree that the respective rights and obligations of the parties … shall be binding upon and shall enure for the benefit of those parties and their successors and assigns notwithstanding any transfer of ownership or control of Coolangatta Airport".

[20] Major Moffat deposed that it was SQAHR's belief that the deed of access would be binding on successors in title. She deposed that as a result of the Commonwealth's letter of 18 July 1980, SQAHR's Board of Directors was under the impression the deed of access was a valid alternative to an easement which would involve considerable cost, delay and inconvenience for both parties.

[21] On 28 May 1998 a declaration was made by the Minister for Finance and Administration of the Commonwealth under the *Airports (Transitional) Act* 1996 (Cth) regarding the transfer from the Commonwealth to QAL. The declaration provided, in clause 2.2(a), that the FAC's rights and obligations became those of QAL.

[22] On the following day, the lease between the Commonwealth and QAL in respect of the airport land was executed[3] granting QAL a lease in fee simple for 50 years to commence on 29 May 1998 with an option to renew for a further 49 years[4] (the

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2 See clauses F and G of access deed of 22 May 1998

3 Form 7, version 3, State of Queensland (Department of Natural Resources) 2002, Lease/Sublease.

4 Clause 20.

"lease"). The lease was registered on 3 February 1999 as lease no. 703150372. A change of name from QAL to GCAL was registered on 12 February 1999.

[23] Clause 3 of the lease is headed "Access to and Use of Airport Site" and provides *inter alia* that the lessee may permit the airport site to be used for other lawful purposes that are not inconsistent with its use as an airport: see clause 3.1(b)(i).

[24] In a letter dated 30 April 2002, GCAL stated that because it had purchased the lease from QAL without notice of the access deed, it was not bound by the deed to provide access to the Mallaraba land. However, as previously mentioned, that dispute has now been resolved between the applicants and the first respondent.

[25] On 7 August 2002 the first and second applicants executed the sale contract in respect of the Mallaraba land and a development application in respect of the land was lodged on 13 December 2002.

[26] On 14 May 2003, RSL Homes received notice of an objection lodged against the development application. By facsimile dated 4 July 2003, the first applicant requested the Council extend the decision making period in respect of the development application. The Council agreed to an extension in a facsimile dated 8 July 2003.

[27] By facsimile sent to the Department of Transport and Regional Services ("DTRS") dated 9 July 2003 the first applicant requested that DTRS consent under s 3.2.1(3)(a)(ii) of the *Integrated Planning Act* 1997 (Qld) ("IPA") to the development application to the extent of providing access to the Mallaraba land. The facsimile states *inter alia*:

> "We note the Commonwealth's concerns regarding the development proposal in its correspondence of 7 May 2003, however we submit that it is the appropriate jurisdiction of the planning authorities and courts to deal with such issues as they become relevant."

[28] By letter dated 16 July 2003 the first applicant received a response from DTRS stating that GCAL, by virtue of its long-term lease of the land, was the owner of the land under the IPA and therefore the appropriate person to grant consent under the IPA. That was clearly incorrect.

[29] In a facsimile dated 17 July 2003, the applicant requested DTRS to reconsider its position. In a further facsimile dated 1 August 2003, the applicant again requested of DTRS its consent to the development application. On 12 August 2003, DTRS in a letter to the applicant refused to provide that consent without giving any reason.

[30] By letter dated 18 July 2003, the applicants requested of SQAHR that clause 2.1 of the sale contract be amended to allow the applicant more time to satisfy Special Conditions 2 and 6. By facsimile dated 28 July 2003, SQAHR granted the applicant the extension of time. This agreement was formalised on 26 August 2003 by a deed of novation executed as between the applicant and the SQAHR.

[31] The deed of novation also varied the terms of the sale contract to assign any rights of access to the Mallaraba land to the first applicant. The deed of novation deleted Special Conditions 9.1 and 9.2 and substituted:

> 9.1 The Vendor hereby assigns to the Purchaser absolutely by way of transfer any legal or equitable right of action the Vendor has in relation to or in connection with access to the Property under the Deed of Access, the Transfer Instrument or, any other relevant instrument, document or agreement, or under any legislation (or any combination of any of those such sources) together with the benefit of any such action.
>
> 9.2 Subject to clause 9.6 the Vendor hereby assigns to the Purchaser absolutely by way of transfer any existing or future right the Vendor has of, in relation to or in connection with access to the Property under the Deed of Access, the Transfer Instrument or, any other relevant instrument, document or agreement, or under any legislation (or any combination of any of those sources).
>
> …
>
> 9.4 The Vendor convenants [*sic*] with the Purchaser that the Vendor will promptly do all things and will execute all documents required of it to perfect or to give effect to the assignments in Clauses 9.1 and 9.2.
>
> …

Integrated Planning Act

[32] Chapter 3 Part 2 of IPA deals with development applications. Section 3.2.1, headed "Applying for development approval", provides that an application must be made in the approved form. Section 3.2.1(3) provides:

> "(3) The approved form –
>
> (a) must contain a mandatory requirements part including a requirement for –
>
> (i) an accurate description of the land, the subject of the application; and
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> (ii) the written consent of the owner of the land to the making of the application; and
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> (b) may contain a supporting information part."

[33] Schedule 10, Dictionary, of IPA defines "owner" in the following terms:

> " '**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."

[34] If the land owner's consent is not contained within the application, the application is not a "properly made application" within s 3.2.1(6) of IPA. Under s 3.2.1(7) an assessment manager may refuse to receive an application that is not a properly made application. The assessment manager may, however, decide to receive and accept such an application at which point it will be deemed a properly made application except where a required consent was not provided: s 3.2.1(8) and (9)(a).

[35] Section 3.2.1(9) does not prevent receipt of an application which is not a properly made application and does not prevent acceptance of an application but rather

prevents the deeming of such an application to be a properly made application.[5] However, an acknowledgment notice may only be given in respect of properly made applications: s 3.2.3(1). The Planning and Environment Court has, under s 5.1.53 of the IPA, a discretion to excuse non-compliance with s 3.2.1 in certain limited circumstances.[6] It is important to recognise that no planning issues were before this court.

[36] The Commonwealth accepted on the hearing of this application that it was the owner of the airport land which gives access to the Mallarba land. A development application is required pursuant to s 3.2.1(3) to contain the written consent, not only of SQAHR, but also of the Commonwealth, to the making of the development application. It was accepted for the purpose of the application before me that the consent of the Commonwealth was necessary for the application to be a "properly made application" for development approval. The question raised by this application is whether in these circumstances the Commonwealth, as owner of the land over which access to the property is gained, is obliged to consent to the making of a development application or at least estopped from not consenting.

[37] In *Liberty Oil Pty Ltd & Anor v Fanigun Pty Ltd*,[7] the applicant made a development application seeking approval to vary the size and use of buildings on land owned by Westway. That land shared frontages to two streets with the respondent's land. At the time of the original sale of the Westway land, an easement had been granted giving the owners of the Westway land and of the respondent's land common access to one of those streets. Westway had consented to the applicant's development application but the application did not include consent from the respondent. The Council consequently refused the development application. The applicant sought a declaration the respondent had impliedly consented to the development application; or, in the alternative, a mandatory injunction requiring the respondent to give its consent. Ambrose J dismissed the application saying that the grant of the easement did not imply the respondent's consent to the development application and that he was unpersuaded there was any basis upon which a mandatory injunction could be made. His Honour said at [32]:

> "The legislative prescription requiring the written consent of the owner of the land in respect of which a development application is sought, in my view, obviously contemplates that in some circumstances an owner of land may not be prepared to consent to a development approval affecting its land."

[38] That passage was quoted with favour in *Oakden Investments Pty Ltd v Pine Rivers Shire Council & Anor* [2003] QPELR 117. In that case, Judge Dodds said at [21]:

> "The evident purpose of section 3.2.1(3)(a)(ii) seems to be to ensure an owner of land consents to that which is being applied for and which if granted will affect the land."

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5 *Oakden Investments Pty Ltd v Pine Rivers Shire Council & Anor* [2003] 2 QdR 539 at 542 per Mullins J; see also *Stradbroke Island Management Organisation Inc v Redland Shire Council* [2002] QPELR 121 (23/8/01) at 124-125 [14].

6 *Stradbroke Island Management Organisation Inc v Redland Shire Council* (supra) at [24]; *Oakden Investments Pty Ltd v Pine Rivers Shire Council* (supra) at 542-543.

7 [2002] QPELR 273.

[39] In making his finding, Ambrose J was influenced by evidence that the respondent had refused to give consent on the basis of past difficulties in having access to the easement disrupted by the applicant. However, the fact remains that where legislation requires the consent of an owner, that must encompass the freedom or right of the owner not to consent. The giving of consent is an exercise of choice. The power to give consent must necessarily include the power to withhold consent.[8]

[40] In this case, however, the Commonwealth guaranteed the right of access in question. The first applicant argues that this guarantee of continuing access was relied upon by the second applicant when it agreed to the closure of Longa Avenue as a public road. It argues that it was an incident of the contract between the second applicant and the second respondent that the second respondent consent to any development application by the second applicant where its consent was required because it had granted a right of access over its land. This argument is not compelling. For it to be an implied term it would have to fall within the fivefold test set out in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [9] of terms necessary to give business efficacy to the contract. Such a term could not be implied in this case since it is not necessary to give business efficacy to any agreement between SQAHR and the Commonwealth.

[41] In the alternative, the applicants argue that the second respondent is estopped from withholding its consent to the making of a development application where its consent is required in its capacity as the entity which granted access to the Mallarba land. This is, it is submitted, because of its guarantee to the second applicant that it would have full access to its land. On reliance on this representation, the second applicant consented to Longa Avenue being closed as a public road. If the Commonwealth were now to withhold its consent to the making of the development application, the second applicant would suffer the detriment of not being able to make a "properly made" application. Had it refused its consent to the second respondent's request to the closure of the public road, it would not have needed the second respondent's consent in order to make a properly made application.[10]

[42] The applicants in their submissions identified these circumstances as giving rise to "an estoppel" but did not identify the precise nature of the jurisdiction said to give rise to such an estoppel. It is unhelpful to suggest that certain behaviour is "iniquitous" and therefore must give rise to an estoppel.

[43] It is unnecessary to venture into the debate as to whether the various types of estoppel are all subsumed within the broader approach to unconscionability.[11] For

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8 Young, PW, *The Law of Consent* (1986) LBC, 1986 at 15; *West Point Island Civic Association v Dover TP Com* (1966) 225 A 2d 579 at 58.

9 (1982) 149 CLR 337; *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 283; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606; *Julong Pty Ltd v Fenn* [2002] QCA 529 (6/12/02) at [54].

10 In fact the development application was made by the first applicant but in this, the interests of the first and second applicants were coincident.

11 See Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 151; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 403-404 per Mason CJ and Deane J; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2003] HCA18 (9/4/03) at [42] – [46] per Gummow and Hayne JJ. See also Meagher, Gummow and Lehane, *Equity Doctrines and Remedie*s (1992) 3rd ed Butterworths, 1992 [1725] – [1727]; *Tanwar Enterprises Pty Limited v Cauchi* [2003] HCA 57 and *Romanos v Pentagold Investments Pty Limited* [2003] HCA 58.

present purposes it is sufficient to repeat the circumstances in which a proprietary estoppel may arise as set out in *Gale on Easements* at [2-03].[12] A proprietary estoppel may arise where the owner of the land induces or encourages or allows another to believe that he or she has or will enjoy some right or benefit over the owner's property; in reliance upon this belief, the other acts to his or her detriment to the knowledge of the owner; and the owner then seeks to take unconscionable advantage of the other by denying him or her the right or benefit which he or she thought he or she had or expected to receive.

[44] The right which arose in this case was a right of way over the Commonwealth's property akin to an easement. That right is not denied. The second respondent did not by its actions in any way induce the second applicant to believe that it would consent to the making of any development application by the second applicant. It follows that no estoppel can arise.

Conclusion

[45] The first applicant has not shown any basis for the making of the declaration sought in paragraph 3 of the originating application. The application should therefore be dismissed.

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12 (2002) 17th ed, Sweet and Maxwell, London.