SUPREME COURT OF QUEENSLAND

CITATION:	*Hayes v Walker & Anor* [2004] QCA 288
PARTIES:	**PATRICK EDWARD HAYES** (applicant/respondent) **v** **ERIC BRUCE WALKER** (respondent/appellant) **REGINA ELIZABETH WALKER** (respondent/appellant)
FILE NO/S:	Appeal No 12043 of 2003 SC No 10359 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2004
JUDGES:	de Jersey CJ, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS – APPROVALS AND PERMITS – INTERPRETATION AND CONSTRUCTION – GENERALLY – where contract for the appellants to sell land to the respondent – where the respondent hoped to develop townhouses on the land – whether the decision notice issued by Brisbane City Council should be characterised as a "development approval" within the meaning of conditions one and three of the contract *Integrated Planning Act* 1977 (Qld), s 3.5.15, s 3.5.17, s 3.5.19, s 4.1.54(3) *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, distinguished *Magic Mountain Developments Pty Ltd v Laureate Australia Pty Ltd* [1991] 2 Qd R 570, cited *Snowlife Pty Ltd v Robina Land Corporation Ltd* [1992] 1 Qd R 564, cited

COUNSEL: A J Morris QC for the appellants
T P Sullivan for the respondent

SOLICITORS: LeMass Solicitors for the appellants
Phillips Fox for the respondent

[1] **de JERSEY CJ:** By a contract dated 27 November 2002, the appellants agreed to sell, and the respondent agreed to purchase, 1,485 square metres of vacant land in the Parish of Toombul, for the price of $380,000. As will emerge, the respondent hoped to be able to construct a number of townhouses on the land: the appellants had applied previously for development approval, although approval had not, by the time of the contract, been granted.

[2] These proceedings concern the proper construction of two of the "special conditions" of the contract. Condition one is headed "Development Approval" and provides:

> "This contract is subject to the seller obtaining from the Brisbane City Council approval to develop the land and to construct:
>
> 5x3 bedroom townhouses and
> 2x2 bedroom townhouses
>
> The contract is conditional upon the buyer being satisfied with all the terms, conditions and requirements as set down by the Brisbane City in relation to the said D.A."

[3] In its originally drafted form, the words "within 30 days of receipt of all relevant documentation relating to the Development Approval" were included after "the said D.A.". The parties deleted those words and initialled the deletion.

[4] Condition three is headed "Due Diligence". It provides:

> "3.1 This Contract is conditional on the Buyer being satisfied in its absolute discretion with the results of a due diligence inquiry in respect of the Land, and any other area of consideration that the Buyer may in its discretion consider appropriate for enquiry in connection with this sale and purchase[d] within (30) days from receipt of development approval.
>
> 3.2 The Seller will provide to the Buyer all such reasonable information and reasonable assistance as may be required by the Buyer to facilitate the timely and effective conduct of the Buyer's inquiries and investigations.
>
> 3.3 The Buyer may at any time on or before the Due Diligence Date by written notice to the Seller:-
>
> 3.3.1 Terminate this Contract if the results of its inquiries are not satisfactory to the Buyer; or

3.3.2 Confirm that it is satisfied with results of its inquiries; or

3.3.3 Waive the benefit of special condition 6.1.

3.4 If the Buyer does not give written notice under special condition 6.3 by the Due Diligence Date then the Buyer shall be deemed to waive the benefit of this clause."

[5] Clause 3.1 originally concluded with the words "within (30) days from the Contract Date ('Due Diligence Date')".

[6] The respondent applied for a declaration that the due diligence period referred to in condition three "did not commence to run on 8 August 2003". The learned primary Judge made that declaration. 8 August 2003 was the date of receipt, from the Brisbane City Council, of the document which the appellants contend constituted a development approval within the meaning of condition one. (Application for development approval had been made on 23 September 2002, two months prior to the execution of the contract.) The difficulty in the case arises from the circumstance that a submitter appeal was on 9 September 2003 lodged against the decision of the Council, an appeal which remains unresolved. Her Honour observed that "[i]t could not have been the intention of the parties when the contract was subject to development approval that it would become unconditional upon the issuing of the decision notice, if the submitter's appeal were then successful and that decision were set aside so that no development approval ever took effect". (Her Honour was presumably not overlooking the separate condition as to due diligence under condition three.)

[7] Mr Morris QC, for the appellants, emphasized the use of the words "obtaining from the Brisbane City Council" in condition one and "receipt of development approval" in condition 3.1, and the deletion of the words "within (30) days of receipt of all relevant documentation" from condition one (cf. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352-3). He emphasized the possibility that on the learned Judge's approach, the fate of the contract could languish indefinitely in a state of limbo, with the land, as he put it, "sterilized". (It may however be assumed that any such appeal would be diligently prosecuted and responsibly managed, and potential delays were a feature of this arrangement anyway, where central to the contract was an as yet undetermined development application.)

[8] In summary, Mr Morris submitted "that the words 'obtaining from the Brisbane City Council approval to develop the land' should be given their natural and ordinary meaning, as referring to an approval in fact obtained 'from the Brisbane City Council', and not artificially construed (by reference to a statutory provision which is nowhere mentioned in the contract) as referring to the outcome of any appeal to the Planning and Environment Court from an 'approval to develop the land' which has in fact been 'obtain[ed] from the Brisbane City Council'."

[9] Mr Morris also sought to draw a distinction between the existence of a development approval, on the one hand, and its coming into effect, on the other. There is, I

suggest at once, some artificiality about describing, as an approval, something which is of no current effect, and which may never be of any effect.

[10] In my view, the resolution of this proceeding depends on one matter alone, and that is whether the decision notice issued by the Council should be characterized as a "development approval" within the meaning of conditions one and three. The "approval" document obtained from the Council, being the only relevant document for the purposes of condition one, comprised a letter headed "Decision Notice under section 3.5.15 of the *Integrated Planning Act 1977*", and an enclosed document headed "Decision Notice Details (Section 3.5.15 of the Integrated Planning Act 1997)". The final paragraph of that document reads: "Pursuant to Section 3.5.19 of the *Integrated Planning Act 1997*, this development approval has no effect until either the submitters' appeal period has ended or, if an appeal is made to the Court or a tribunal, the decision of the entity is made in favour of the proposed development."

[11] Section 3.5.19 of the *Integrated Planning Act* provides:

> "**When approval takes effect**
> If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect -
>
> (a) if there is no submitter and the applicant does not appeal the decision to the court – from the time the decision notice is given (or if a negotiated decision notice is given, from the time the negotiated decision notice is given);
> or
> (b) if there is no submitter and the applicant does not appeal the decision to the court – when the submitter's appeal period ends; or
> (c) if an appeal is made to the court – subject to the decision of the court, when the appeal is finally decided."

[12] To my mind, the narrow question which therefore arises, as I have said, is whether the document dated 5 August 2003 amounted to the Council's development approval within the contemplation of conditions one and three. The conclusion that it did not is in my view inescapable, in light of the concluding paragraph set out above. It was at the highest an approval subject to a condition precedent: there being no appeal, or in the event of an appeal, its being unsuccessful. With the currency of the appeal, the decision of the council, by force of its own express terms, simply did not operate as an approval.

[13] Mr Sullivan, for the respondent, referred us to *Magic Mountain Developments Pty Ltd v Laureate Australia Pty Ltd* [1991] 2 Qd R 570, 581 and *Snowlife Pty Ltd v Robina Land Corporation Ltd* [1992] 1 Qd R 564, 568, as to construing such contractual terms in the context of the *Integrated Planning Act*. It is not necessary to have resort to those dicta here, where the very terms of the "decision notice" ordain that approach. In answering the question, "does the decision amount to a development approval?", one is directed by the decision notice itself to s 3.5.19, and

there being an unresolved appeal, the conclusion necessarily follows that the decision notice is not a development approval.

[14] Mr Morris urged however that s 3.5.19 should be read as establishing two things: (a) that a decision notice advising the approval of an application is "the development approval" (consistently with the definition of "development approval" in sch 10 to the *Integrated Planning Act*); and (b) the time-frames within which that approval comes into effect. That construction may have been more arguable had the provision been split up in that way. The way it is framed rather favours the conclusion that the specified time-frames regulate both the "decision notice" taking on the character of a "development approval", and its coming into effect as such. But further, and more importantly, the definition of "development approval" in sch 10 to the Act would embrace this "decision notice", so that on Mr Morris's submission, there would have been no need to include in s 3.5.19 the words "is taken to be the development approval". The provision must be read, in the case of an appeal, as deferring the notice's taking on that character until, effectively, the dismissal of the appeal.

[15] It is not a case where an "approval", though inchoate or incipient, is nevertheless an approval. Here, because of s 3.5.19 and the currency of the appeal, the decision notice is "(not) taken to be the development approval and (have) effect".

[16] Counsel before us mentioned commercial considerations. Mr Morris emphasized the "indeterminate and open-ended period of time" which could elapse before the resolution of an appeal, with the property "commercially sterilized" in the meantime. I have already referred to the aspect that the parties must have contemplated the possibility of delay, and there being mechanisms to keep court proceedings within reasonable proportion. On the other hand, Mr Sullivan submitted that the appellants' approach would, in the event of a successful appeal, leave the respondent with only "a worthless piece of paper", denying him the protection obviously intended under condition one. It would be apparent I support the latter contention, although the issue can be resolved by attention to the verbiage of the contract and the "decision notice" to which it invites attention, rather than by more general commercial considerations.

[17] The decision of the learned primary Judge to make the declaration which was made, was in my view plainly correct.

[18] I would dismiss the appeal, with costs to be assessed.

[19] **JERRARD JA:** In this matter I have had the advantage of reading the reasons for judgment and orders proposed by the Chief Justice, with which I respectfully agree. I add the following matters. The terms "approval to develop" and "development approval" used by the parties in their contract were not invented by them. Senior counsel for the appellants accepted that the parties should be presumed to have used those words to refer to the development approvals which it is necessary to get from the Brisbane City Council, available under the provisions of the *Integrated Planning Act*. A development approval can result from a first decision of the Council itself, from a subsequently negotiated decision, or a decision made on appeal.

[20] The negotiated decision referred to is a process provided for under the *Integrated Planning Act* in s 3.5.17, which allows applicants for development approval to negotiate terms for approval acceptable to the Council, even after a first decision notice is given with different terms and conditions. There is no reason to presume the parties intended to exclude that method of getting the required development approval, and the appellants accepted on the appeal that the parties had not excluded it.

[21] That process involves potential delays of at least 25 business days, or 35 ordinary ones, after the first (ineffective) development approval is received. So the 30 day due diligence period the contract allows could expire while acceptable conditions were being negotiated in the statutory process for development approval available to the appellants.

[22] There is no reason either to presume that the parties intended to exclude the possible use of the statutory appeal process allowed to an applicant for approval, and again the appellants do not argue the parties had excluded it. That process too involves delay which would invariably be longer than the 30 day due diligence period, if that started to run on receipt of an approval which was not in effect.

[23] There can therefore be no reason for presuming the parties intended to exclude just one of the processes legislated for in the *Integrated Planning Act*, namely a possible appeal by a submitter, (or objector, to use a more commonly understood term) as the appellants necessarily do contend. This is particularly because a decision by a court on appeal is declared by s 4.1.54(3) of the *IPA* to be a decision of the entity making the appealed decision, in this case the Brisbane City Council. The decision of the court on a successful submitter's appeal would therefore be the decision of the City Council, and this accords both with the construction placed on s 3.5.19 by the learned Chief Justice and also with the terms the parties used in their contract. Those terms were used in conformity with the legislation and its procedures.

[24] Despite the terms of the contract and of the *IPA*, the appellants nevertheless challenge the conclusion by the learned trial judge that the parties should be presumed to have intended that the development approval the respondent buyer was entitled and obliged to consider, and to accept or reject, was one the terms of which were in force and had effect. The one the parties received was not, for the reasons given by the Chief Justice. On the appellants' construction of the contract, the respondent agreed to receive a development approval that had no effect and to take the risk that in agreeing to its terms, the respondent would do so without knowing if those terms would ever come into effect, or if quite different terms would be imposed on a submitter's appeal.

[25] The appellants' construction is inconsistent with the parties' agreement that the contract was subject to the appellants obtaining approval to develop the land and to construct the specified number of townhouses, conditional upon the respondents being satisfied with the terms, conditions and requirements "set down" by the Brisbane City Council. A contract subject to that approval and conditional upon the buyer being satisfied with it is an agreement to receive a development approval the conditions of which are in force. That could occur by the Council's first development approval coming into effect, or by a negotiated decision being subsequently made and coming into effect, or by a decision made on appeal.

[26] **MACKENZIE J:** On 27 November 2002 a contract for the appellants to sell and the respondent to purchase land at Northgate was executed. On 23 September 2002 an application for development approval consistent in scope with special condition 1 of the contract signed by both applicants had been lodged with the Brisbane City Council.

[27] Special condition 1 was as follows:

> "1. DEVELOPMENT APPROVAL
>
> This contract is subject to the seller obtaining from the Brisbane City Council approval to develop the land and to construct:
>
> 5x3 bedroom townhouses and
> 2x2 bedroom townhouses
>
> The contract is conditional upon the buyer being satisfied with all the terms, conditions and requirements as set down by the Brisbane City in relation to the said D.A."

In its original form, additional words, "within 30 days of receipt of all relevant documentation relating to the Development Approval" followed on from where the clause now terminates, but were struck through and initialled by the parties.

[28] Special condition 3.1 was as follows:

> "3. DUE DILIGENCE
>
> 3.1 This Contract [i]s conditional on the Buyer being satisfied in its absolute discretion with the results of a due diligence inquiry in respect of the Land, and any other area of consideration that the Buyer may in its discretion consider appropriate for enquiry in connection with this sale and purchased within (30) days from *receipt of development approval*." (italics added)

[29] In its original form the concluding words "the Contract Date ('Due Diligence Date')" appeared in place of the italicised words but they too were struck out in a similar fashion to the words deleted from special condition 1 and the italicised words handwritten and initialled in substitution. Significance was placed by the appellants on the insertion of a reference to "receipt" of development approval. It may also be noted at this point that the handwritten alterations do not appear to be the product of a legal draftsman. Nor was it suggested by either side that there was imbalance in commercial sophistication between the parties.

[30] The proceedings which resulted in this appeal had their genesis in correspondence in which the appellants purported to terminate the contract, the underlying reason being that it was alleged that receipt on 8 August 2003 of a document described as a

Decision Notice under s 3.5.15 of the *Integrated Planning Act* 1997 ("the Act") together with a document enclosed with it entitled Decision Notice Details constituted the relevant approval under special condition 1 and therefore 8 August 2003 was the date upon which "receipt of development approval" occurred for the purposes of special condition 3.1.

[31] Section 3.5.19 of the Act is as follows:

> "**3.5.19 When approval takes effect**
> If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect-
> (a) if there is no submitter and the applicant does not appeal the decision to the court – from the time the decision notice is given
> (or if a negotiated decision notice is given, from the time the negotiated decision notice is given); or
> (b) if there is a submitter and the applicant does not appeal the decision to the court – when the submitter's appeal period ends;
> or
> (c) if an appeal is made to the court – subject to the decision of the court, when the appeal is finally decided."

[32] An argument concerning the proper construction of the first paragraph of that provision advanced by the appellants will be referred to later. The significance of s 3.5.19, on the facts of the case, lies in the fact that a submitter appealed to the Planning & Environment Court on 9 September 2003 and the appeal has not yet been determined.

[33] It is also convenient to note, at this point, the definition of "development approval" in sch 10 of the Act. It is as follows:

> " **'development approval'** means a decision notice or a negotiated decision notice that-
> (a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and
> (b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval."

[34] The respondent successfully applied to a judge of the Trial Division for a declaration that the due diligence period referred to in special condition 3 did not commence to run on 8 August 2003. The learned trial judge identified the issue for determination as:

> "… did the parties intend for development approval to be understood as a development approval that had taken effect or did the parties intend that the reference to development approval mean[t] the

> development approval issued by the council in the form of the decision notice, even though under IPA, it is taken not to have effect yet?"

She concluded that the contention of the present respondent more closely reflected the intention of the parties than the contention of the present appellants. She continued:

> "It could not have been the intention of the parties when the contract was subject to development approval that it would become unconditional upon the issuing of the decision notice, if the submitter's appeal were then successful and that decision were set aside so that no development approval ever took effect."

She considered that it would be an absurd result if the development approval were never to take effect and that the construction should be given to the term "development approval" that accorded with the process contemplated by the Act.

[35] These observations were criticised on the ground that it was incorrect to say that the contract became unconditional upon the issuing of a decision notice since the 30 day due diligence period under special condition 3.1, which provides a means for the contract to be terminated, was triggered by that event. Even if the learned trial judge had overlooked the effect of the due diligence provision (which I am by no means convinced was the case), in any event the point being made was that the argument pressed by the appellants had the consequence that the respondent was bound by the contract even if the development approval never came into effect because of the operation of s 3.5.19. This, she thought, could not have been the intention of the parties.

[36] The appellants contended, however, that the words "obtaining .. approval to develop the land … ." had their natural meaning which referred to obtaining an approval in fact obtained from the Council and should not be artificially construed, by reference to a statutory provision which was not mentioned anywhere in the contract, as referring to the outcome of any appeal to the Planning & Environment Court against the approval to develop which had in fact been obtained from the Council. It was also submitted that the conscious inclusion of the notion of "receipt" of the development approval during negotiations for the contract reinforced this argument. It was contended that s 3.5.19 should be construed as meaning that once the document is initially issued by the Council, it becomes an "inchoate development approval" from that time forward. If it is subsequently varied, the variation made by the court (if that is the source of the alteration) then becomes the development approval and has effect from the time of the court's pronouncement.

[37] It was further submitted that there were practical and commercial absurdities resulting from the construction adopted by the learned trial judge. The property would become, in effect, commercially sterilised until the hearing and determination of any appeal to the Planning & Environment Court. Further, even if the outcome of the appeal were advantageous, the contract still would not necessarily proceed because of the due diligence provision. Other matters such as the lack of any provision with regard to the conduct of an appeal to the Planning & Environment Court, the consequence that the construction adopted effectively conferred on the respondent an option to purchase for an indeterminate period of time, and the risk

that the appellants may conduct the appeal to the Planning & Environment Court without any guarantee that the contract would proceed, even if the appeal was dismissed, were practical factors in favour of their submissions as to the proper construction of the contract.

[38] Notwithstanding the appellants' contentions, I am of the view that the references to obtaining from the Brisbane City Council approval to develop and receipt of development approval can only reasonably refer to an approval which has effect. That does not occur until finality under s 3.5.19 is reached. The Decision Notice Details document reinforces what s 3.5.19 itself says, in that the final paragraph of the document states explicitly that the development approval has no effect until either the submitter's appeal period has ended or, if an appeal is made to the court or a tribunal, the decision of the entity is made in favour of the proposed development. Where, as the learned Trial Judge said, both parties accepted that the contract must be construed in the context of the regime for development approvals set down by the Act, the conclusion that her construction of the contract was correct is inevitable. I would therefore dismiss the appeal with costs to be assessed.