

SUPREME COURT OF QUEENSLAND

CITATION: *Jones & Ors v Feyer & Ors* [2004] QCA 273

PARTIES: **DAVID JONES**
PATRICIA MAY JONES
(first respondents/applicants)
v
MANFRED ROBERT FEYER
MARGARET MARY LANGE
ROBERT WILLIAM WORLAND
JOSEPHINE CAROLINE BONIFACE
DENNIS FREDERICK ROUNSEFELL
MARK KENNETH BURKE
ROBERT HENRY WILLIAMS
JOHN THEO DE HEY
ROBYN MARGARET DE HEY
GRAHAM MALCOLM SADE
PATRICIA ANNETTE TANNER
DUNCAN GEORGE COLES
(applicants/first respondents)
CABOOLTURE SHIRE COUNCIL
(second respondent/second respondent)

FILE NO/S: Appeal No 4056 of 2004
P&E No 5004 of 2002

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning and Environment Court at Brisbane

DELIVERED EX TEMPORE ON: 2 August 2004

DELIVERED AT: Brisbane

HEARING DATE: 2 August 2004

JUDGES: McMurdo P, Davies JA and Helman J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Application for leave to appeal refused other than to correct the form of order made by the Planning and Environment Court**
2. Application for leave to appeal granted only for the purpose of setting aside the order made by the Planning and Environment Court and substituting the following

order:

"Order that the respondents David Jones and Patricia Jones, their servants and agents forthwith stop conducting the business of a shop, namely the display or offer of paintings for sale to members of the public, presently being conducted on the subject premises."

CATCHWORDS: ENVIRONMENT AND PLANNING - DEVELOPMENTAL CONTROL - ENVIRONMENTAL PLANNING - PLANNING OFFENCES - USE OF LAND CONTRARY TO PLANNING SCHEME - where the applicant sought leave to appeal against the decision of the Planning and Environment Court - where the applicant had been ordered to restrain using the subject land as an art gallery - whether using the subject land as an art gallery was a prohibited use - whether leave to appeal should be allowed

Integrated Planning Act 1997 (Qld), s 4.3.25, s 4.3.26

COUNSEL: M D Hinson SC for the applicants
M M Lange on her own behalf and for the first respondents
S M Ure for the second respondent

SOLICITORS: Hopgood Ganim Lawyers for the applicants
M M Lange on her own behalf and for the first respondents
King and Company for the second respondent

DAVIES JA: This is an application for leave to appeal against the decision of the Planning and Environment Court given on 2 April 2004.

In that proceeding the court made the following order:

"I order that the respondents, their servants or agents, be restrained from using the subject land as a gallery for the display of fine art other than in accordance with the definition of "home occupation" in the Planning Scheme."

That was not the order sought by the applicants before that court, the present respondents. They sought primarily the following order:

"That the shop operating as A White Patch Gallery at 164 Whitepatch Esplanade, Bribie Island be ordered to cease trading forthwith."

The applicants before this Court are the owners and operators of White Patch Gallery. The principal respondents who were the applicants in the Planning and Environment Court are the local residents in the neighbourhood of the gallery. The other respondents are the local authority.

The relevant facts are not in dispute. The gallery is located in an attractive established residential area and is situated in a home. The business which the applicants operate on those premises is that of a commercial art gallery.

On the premises are displayed works of art for sale. During normal opening hours, which are from Monday to Saturday from 9 a.m. to 5 p.m. and on Sunday from 10 a.m. to 5 p.m. The public are free to enter the gallery and there purchase works of art displayed on the walls.

A large paved area is provided in the front and side yards for parking and there is a notice on the front of the property identifying the gallery. The applicants advertise the gallery in a number of ways; billboard signs, print media and the internet.

As appears from the respondents' application in the Planning and Environment Court, they contended that the subject

premises constituted a shop. That term is defined in the Town Planning Scheme relevant for the purpose of these proceedings as follows:

"'Shop' - Any premises used or intended for use for the purpose of displaying or offering goods for sale to members of the public; the term includes incidental storage of such goods on the same premises but does not include a garden supply centre, hotel, service station or warehouse as herein defined;".

On the other hand the applicants contended and contend that the business which they carried on was one of "home occupation" which is defined in the scheme as follows:

"'Home Occupation' - An occupation or profession carried on, in or under a dwelling-house or in the case of horticultural nurseries, florist and market gardens within the curtilage of a dwelling-house by a person resident therein and in the conduct of which -

(a) no source of power other than one or more single phase electric motors having a total connected load of not more than 2.0 kilowatt is used;

(b) the floor area used (whether temporarily or permanently) does not exceed more than one third of the total floor area of the dwelling-house;

(c) not more than two persons are engaged therein;

(d) there is no interference with or injury to the amenity of the neighbourhood by reason of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit, oil or otherwise;

(e) there is no public display of goods on the premises;

...".

The relevance of the difference between the characterizations of the business is that as was accepted by Mr Hinson for the

applicant, that at the time of the order made by the Planning and Environment Court and at the present time, "home occupation" is a discretionary use in the residential 'A' zone in which the subject property is situated whilst "shop" is a prohibited use.

Notwithstanding that the relief which the respondent sought in the Planning and Environment Court was, in effect, an injunction to restrain the applicants from trading on the basis that their business was a shop and consequently a prohibited use in the zone in which it was situated, the argument before the Planning and Environment Court, the decision of that court and, at least initially, the argument in this Court appeared to focus on the definition of "home occupation" and in particular on the meaning and application of the phrase "public display of goods on the premises" in paragraph (e) of the definition of that term.

However whether the respondents were entitled to relief on the basis that the subject premises constituted a "shop" would have been and may be more simply resolved by looking at the definition of that term and its application to the facts as I have stated them.

It is plain that these premises were used for the purpose of displaying and offering goods, that is paintings, for sale to members of the public. Indeed it is difficult to see how any conclusion other than that could be reached. The premises therefore at all relevant times constituted and constitute a

shop. That was, relevantly, the primary activity conducted on the premises.

If it matters, I would construe the phrase "public display of goods on the premises" in paragraph (e) of the definition of "home occupation", consistently with the similar phrase in the definition of "shop". That is, I would construe those words as "display of goods on the premises to members of the public".

That being a prohibited use the respondents were, in my opinion, plainly entitled to some relief in respect of it. Section 4.1.21 of the *Integrated Planning Act* 1997 permits the Planning and Environment Court to make a declaration about, amongst other things, the lawfulness of land use or development. And s 4.3.25 permits the court to make an enforcement order if satisfied that a development offence (which includes the use of premises for a use which is not a lawful use: s 4.3.5 and schedule 10 a definition of "development offence") has been committed. Such an order may direct the respondent to stop an activity that constitutes or will constitute a development offence: s 4.3.26(1)(e).

Other than to correct the form of order made by the Planning and Environment Court, I would refuse leave to appeal. I would, however, grant leave only for the purpose of setting aside the order made and substituting the following order:

Order that the respondents David Jones and Patricia Jones, their servants and agents forthwith stop conducting the business of a shop, namely the display or offer of paintings for sale to members of the public, presently being conducted on the subject premises.

THE PRESIDENT: I agree.

HELMAN J: I agree.

THE PRESIDENT: That is the order of the Court.