SUPREME COURT OF QUEENSLAND

CITATION:	*Strasburger Enterprises (Properties) P/L & Anor v Gold Coast CC* [2010] QCA 153
PARTIES:	**STRASBURGER ENTERPRISES (PROPERTIES) PTY LTD** ACN 002 913 911 (first applicant) **MOBIL OIL AUSTRALIA PTY LTD** ACN 004 052 984 (second applicant) **v** **GOLD COAST CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 13627 of 2009 P & E Appeal No 613 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning & Environment Court at Southport
DELIVERED ON:	18 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2010
JUDGES:	Holmes, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted.** **2. Appeal dismissed with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – VALIDITY – OTHER MATTERS – where second applicant is the owner and first applicant the lessee and operator of a service station – where service station has been conducted pursuant to a Town Planning Permit issued in 1987 under the now repealed *Local Government Act* 1936 (Qld) – where no other permit or approval for the storage of large amounts of petroleum on the site was ever issued – where respondent sent an enforcement notice to first applicant in 2005 requiring it to apply for a development permit under the *Integrated Planning Act* 1997 (Qld) in order to carry out assessable development – where respondent issued a decision notice in 2007 approving first applicant's application subject to conditions – where cost of

complying with the conditions would be considerable – where applicants applied for declarations in the Planning & Environment Court against the development permit – where applicants now appeal against the dismissal of that application – whether the 1987 permit operates as a development approval for the environmentally relevant activity in the form of a development permit for the purposes of the *Integrated Planning Act* 1997 (Qld) and the *Environmental Protection Act* 1994 (Qld) – whether the primary judge misconstrued the relevant legislation – whether the operation of the service station constitutes a material change of use under s 1.3.5 of the *Integrated Planning Act* 1997 (Qld) and so amounts to assessable development – whether the 2007 development permit is valid

Acts Interpretation Act 1954 (Qld), s 20A
Environmental Protection Act 1994 (Qld), s 40, s 624, s 624(2)(b), sch 4
Environmental Protection (Interim) Regulation 1995 (Qld), s 4.1(1), s 63
Environmental Protection Regulation 1998 (Qld), s 5, s 5(2), s 64
Integrated Planning Act 1997 (Qld), s 1.3.5(c), s 4.3.1, s 6.1.23, s 6.1.23(2), s 6.1.23(2), s 6.1.24, sch 8, sch 10
Local Government (Planning and Environment) Act 1990 (Qld), s 8.10(8)

COUNSEL: D H Denton SC, with G R Allan, for the applicants
M A Williamson for the respondent

SOLICITORS: Porter Davies for the applicants
King & Company for the respondent

[1] **HOLMES JA**: I agree with the reasons of Chesterman JA and with the orders he proposes.

[2] **CHESTERMAN JA**: There has been a service station at the corner of Gold Coast Highway and Eighth Avenue, Palm Beach since July 1989. It was initially owned by Esso Australia Ltd who sold the site and business to Mobil Oil Australia Pty Ltd, the second applicant, ("Mobil") in January 1991 since when the service station has been operated by a number of different companies to whom Mobil leased the site. Strasburger Enterprises (Properties) Pty Ltd, the first applicant, ("Strasburger") has been the lessee and operator of the service station since 24 May 2004. Prior to that, between 30 June 1999 and 24 May 2004 the lessee and operator was Rafinc Pty Ltd. It took over from Whitepeak Investments Pty Ltd.

[3] The service station has been conducted pursuant to a Town Planning Permit issued by the Gold Coast City Council, the respondent, ("the Council") on 27 August 1987 which approved an application to erect a service station subject to a number of conditions. The terms of the permit might suggest that it was limited to the construction of the service station, rather than the use of the site for the operation of the service station, but it is clear enough from the conditions that permission was given as well for the use of the site as a service station. For example condition

16 was that the "erection and use" of the service station had to comply with a designated part of the Council's Town Planning Scheme. Condition 40 provided for the revocation of the permit should the use of the site be discontinued for six months or more.

[4] The permit was granted under the *Local Government Act* 1936 ("*LG Act*") which was repealed and replaced by the *Local Government (Planning and Environment) Act* 1990 ("*P & E Act*"). By s 8.10(8) of the *P & E Act* permits issued under the *LG Act* continued in force. The sub-section provided:

> "Each approval … granted by a local authority … prior to the commencement of this Act, is to continue to have force and effect as if it were an approval, consent or permission, as the case may be, made pursuant to this Act … ."

On 30 March 1998 the *Integrated Planning Act* 1997 ("*IP Act*") became law. It repealed the *P & E Act* but by virtue of s 6.1.23 the 1987 permit was a "continuing approval" and has effect as if it were a development approval under the *IP Act*. Section 6.1.23(2) provided for the "Continuing effect of approvals issued before commencement" of the *IP Act* in these terms:

> "Despite the repeal of the (*P & E Act*), each continuing approval and any conditions attached to a continuing approval have effect as if the approval and the conditions were a preliminary approval or development permit, as the case may be."

By s 6.1.24 the permit attaches to the land and binds successors in title. The effect of these provisions was to make the 1987 permit a development approval or permit under the *IP Act*.

[5] On 1 March 1995, the *Environmental Protection Act* 1994 ("*EP Act*") and the *Environmental Protection (Interim) Regulation* 1995 ("*Interim Regulation*") both came into effect. Schedule 4 of the *EP Act* described an "environmentally relevant activity" ("ER activity") as an "… activity prescribed by regulation as an environmentally relevant activity". Section 4.(1) of the *Interim Regulation* provided that "An activity mentioned in column 1 of Schedule 1 is an environmentally relevant activity of the level set out opposite the activity in column 2 of the Schedule." Item 11(a) in the schedule is the storage of 10,000 litres or more but less than 500,000 litres of petroleum products. It is a level 2 ER activity. Section 40 of the *EP Act* provided that:

> "A regulation may provide that a person must not carry out a level 2 environmentally relevant activity without an approval."

[6] Section 63 of the *Interim Regulation* provided that:

> "(1) This section applies to a person who –
>
> (a) immediately before the commencing day was carrying out a level 2 environmentally relevant activity … ; and
>
> (b) continues to carry out the activity after the commencing day.
>
> (2) The person is taken to have an approval to carry out the activity.
>
> (3) Subsection (2) is a law to which section 20A of the *Acts Interpretation Act 1954* applies.
>
> (4) This section expires 3 months after the commencing day."

[7] On 1 March 1998 the *Environmental Protection Regulation* 1998 ("the *1998 Regulation*") commenced. By s 64 the *Interim Regulation* was repealed. Section 5 of the *1998 Regulation* provided that a person must not carry out a level 2 ER activity without an approval. On 1 July 1998 s 5 of the *1998 Regulation* was amended to read:

> "5.(1) A person must not carry out a level 2 environmentally relevant activity without a level 2 approval.
>
> …
>
> (2) This section does not apply if –
>
> (a) … ; or
>
> (b) the person has a development approval for carrying out the activity."

[8] On and from 1 July 1998 the *EP Act* was also amended so as to define "approval" to mean an approval given under Chapter 3 Part 4 or Part 4A to carry out a "level 2 … activity". The term "development approval" was defined to mean a development approval under the *IP Act*. A development approval under that Act, and therefore under the *EP Act*, 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 …); 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."

[9] The result of these legislative changes is, as Newton DCJ, from whose judgment the applicants seek leave to appeal, pointed out, that after 1 July 1998 carrying out a level 2 ER activity could be authorised either by a level 2 approval under the *EP Act* or by a development approval for carrying out the activity under the *IP Act*. Neither Strasburger nor Mobil have ever applied for or obtained an approval for their level 2 ER activity pursuant to the provisions of the *EP Act* nor a development approval under the *IP Act*. It is their contention that the 1987 permit issued by the Council which continues in force is a development approval for carrying out the activity so that they are brought within the ambit of s 5(2) of the *1998 Regulation* as amended.

[10] By a notice dated 9 September 2005 the Council informed Strasburger that it was:

> "… deemed to be a person who has started assessable development without a development permit for the development, with respect to (the service station site) … (and was) required to … (apply) for a development permit … ."

[11] Strasburger duly made an application which the Council regarded as one for a "Material Change of Use for Environmentally Relevant Activity 11 Petroleum Product Storage." On 7 September 2007 the Council issued its decision notice approving Strasburger's application subject to conditions. The court was informed that the costs of complying with the conditions would exceed $400,000. Mobil owns a large number of service station sites throughout the State. The cost of complying with similar conditions if imposed on those other sites will be very substantial.

[12] On 29 October 2008 Strasburger and Mobil instituted proceedings by way of an originating application in the Planning and Environment Court ("P & E Court") seeking declarations that:

> "1 The consent permit … granted by the … Council on 21 August 1987 remained in force as a ***continuing approval*** pursuant to … the (*IP Act*) and has effect as a development approval in the form of a development permit for the purposes of the (*IP Act*) and the (*EP Act*);
>
> 2. The continuing use of the land … 1182 Gold Coast Highway Palm Beach … by Strasburger … for Petroleum Product Storage does not constitute a material change of use under s 1.3.5 of the (*IP Act*);
>
> 3. The development permit issued by the … Council on 7 September 2007 for a material change of use for Petroleum Product Storage … is invalid and of no effect."

[13] On 22 October 2009 the P & E Court dismissed the application. The applicants seek leave to appeal against that decision.

[14] The applicants should be given leave to appeal. The Council's decision notice imposes a considerable financial burden on Strasburger and/or Mobil. The result of any appeal is likely also to determine similar applications with respect to Mobil's other sites. The monetary amounts are substantial. The application also raises the question about the power of local authorities to insist upon compliance with the *EP Act* and its regulations with respect to service station sites commissioned prior to March 1995. The question should be answered one way or the other. The appeal would raise only questions of statutory construction.

[15] The primary judge rejected the applicants' contention as to the 1987 permit. His Honour said:

> "[8] It may be accepted that each of these matters ultimately turns upon one key question, namely "is the town planning consent permit granted by the respondent in 1987 a development approval for the Level 2 ERA carried out on the land?".
>
> …
>
> [19] The EPA and the *Environmental Protection (Interim) Regulation* 1995 both commenced on 1 March 1995. The legislation introduced a regime intended to control activities on land that involved a contaminant which had the potential to cause harm to the environment if released. This new regime added a further level of control by the State to existing town planning controls.
>
> …
>
> [28] An approval for an ERA is not one which could have ever been granted under the *Local Government (Planning and Environment) Act* 1990 or its predecessor. That legislation simply did not recognise an application of such kind. The only vehicle by which such approval could be obtained was under the EPA. An approval under the EPA does not fall

> within the concept of a continuing approval in section 6.1.23 of the IPA. Thus, a reference to a "development approval" can only be a reference to a development approval granted under the IPA after March 1998. No such approval has been obtained by any entity, including the applicants, which has owned or operated the service station on the land.
>
> …
>
> [31] In my view, a development permit for a material change of use for the ERA is required by the first applicant to lawfully carry out that ERA on the land."

[16] There is a second statutory prohibition on ER activities, in addition to s 5 of the *1998 Regulation*. Section 4.3.1 of the *IP Act* provides that a person must not carry out assessable development without a development permit. Schedule 10 to the Act defines assessable development to be that set out *inter alia* in Schedule 8 Part 1. "Making a material change of use of premises for an environmentally relevant activity", with some irrelevant exceptions, is within Schedule 8 Part 1.

[17] One then turns to consider whether the operation of Strasburger's service station constituted a material change of use. Since 18 November 2005 a material change of use was relevantly defined by s 1.3.5 of the *IP Act* to be:

> "(c) the continuation of an environmentally relevant activity on the premises if –
>
> (i) an approval for the activity ceases to have effect because of the operation of the *Environmental Protection Act 1994*, section 619(2)(e) or 624(2)(b); or
>
> (ii) there is no development approval for the activity and it was, at any time before 4 October 2004, carried out without an environmental authority as required under the *Environmental Protection Act 1994*; … ."

[18] The relevance of the date, 4 October 2004, is that it was then that s 619 and s 624 of the *EP Act* came into effect.

[19] Section 619 is not relevant. Section 624 provided:

> "(1) This section applies for a person who was the operator of, and was carrying out, a level 2 … activity under –
>
> (a) a development approval in force immediately before the commencement of this section; or
>
> (b) an approval mentioned in the (*Interim Regulation*), section 63 … in force immediately before the commencement of this section.
>
> (2) From the commencement, the person is, for 1 year after the commencement, taken to be the registered operator for the activity, and –
>
> (a) for an approval mentioned in subsection (1)(a) – the approval, and any conditions … continue to have effect; or

> (b) for an approval mentioned in subsection (1)(b) – the approval, and any conditions … continue to have effect until the person stops carrying out the activity."

[20] There is no doubt that Strasburger carries on a level 2 ER activity, storing large volumes of petroleum, on the service station site, and has done so continuously since May 2004. That activity is assessable development as defined under the *IP Act* if the storage of petroleum amounts to a material change of use of the service station site. It will be such a change if an approval for the activity ceased to have effect because of s 624(2)(b) of the *EP Act*, or if the activity was carried on without an environmental authority required under the *EP Act*, before 4 October 2004, and without development approval after the date.

[21] The question on the appeal, as it was for the primary judge, is that identified by his Honour: do Strasburger and/or Mobil have a development approval for the ER activity? This in turn comes down to the question whether the 1987 permit is such a development approval. It is common ground that neither Strasburger nor Mobil ever had any other approval for the storage of petroleum on the service station site.

[22] It was also common ground that with the enactment of the *IP Act* in March 1998 the processes for obtaining approval to conduct an ER activity were governed by the provisions of that Act which thereby superseded that part of the *EP Act*. We were not, however, provided with or referred to the relevant sections of either Act giving effect to the change of regime. We were, however, given six volumes of legislation almost none of which was referred to, some of which was clearly irrelevant, and some of which was misdescribed. Relevant provisions were omitted.

[23] As I understood the applicants' arguments there were two bases for contending that the judgment of the P & E Court was wrong. The first was that the primary judge construed the relevant legislation as requiring a development approval for the storage of petroleum to be *granted* pursuant to an application made under the *IP Act*. His Honour on several occasions referred to an approval that could never have been granted or to the need for an approval to be granted under the *IP Act*. The applicants submit that this shows a misunderstanding of the statutory scheme. Their submissions emphasise the continuation of the town planning approval given by the Council in 1987 which has remained in force and been continued successively by the *P & E Act* and the *IP Act*. That approval is, the applicants submit, a deemed development approval as defined by the *IP Act*.

[24] The applicants stress that the prohibition contained in s 5 of the *1998 Regulation*, as amended, and s 4.3.1 of the *IP Act*, does not apply if the person carrying out the ER activity has a development approval for it. They point out also that "development approval" as initially defined by the *EP Act* Schedule 4 meant such an approval "under the (*IP Act*)", not one "granted" under that Act. The continuation of the 1987 approval was said to be a development approval under the *IP Act* by reason of s 6.1.23, though it was not an approval "granted" under the *IP Act*.

[25] They further submit that the primary judge's analysis has the result that a continuing approval, which is deemed to be a development approval in the form of a development permit pursuant to s 6.1.23(2) of the *IP Act*, which attaches to land and binds successors in title, is not a development approval for the purposes of the

EP Act. The submission goes on that the primary judge ignored the clear terms of s 6.1.23(2). They refer to condition 15 of the 1987 permit which was that installation of underground petrol storage tanks was to be in accordance with the *Flammable and Combustible Liquids Act* 1976. They contend that the term "development approval" in s 5(2) of the *1998 Regulation* includes a deemed development approval under s 6.1.23(2).

[26] In my opinion the applicants' first point should be rejected. For a start it involves reading too much into the primary judge's expression of approval "granted" under the *IP Act*. His Honour was not, as I read his reasons, suggesting a dichotomy between approvals granted following an application made after the enactment of the *IP Act*, and approvals which continued in force by reason of s 6.1.23.

[27] The point made by his Honour was more fundamental and was, I think, correct. It was that the development approval referred to in s 5 of the *1998 Regulation* is an approval for the activity in question. Here that meant the ER activity of storing large amounts of petroleum on the service station site. There was never such an approval applied for or granted, whether under the *LG Act*, the *P & E Act*, the *EP Act*, or the *IP Act*. The only approval is the 1987 town planning permit issued by the Council. That was obviously not an approval for the conduct of the ER activity on the site. At the time it was given the *EP Act* had not been enacted. There were no environmentally relevant activities the conduct of which required specific approval.

[28] It is not to the point that the 1987 permit contemplated the storage of petroleum products and required the means of storage to comply with the statutory provisions relevant to flammable substances. Nothing was said about the volume of petroleum that might be stored. More fundamentally, the permit did not address the environmental protection provisions which the *EP Act* put in place. Try as one might, one cannot read the 1987 permit as one issued under or in accordance with, or by reference to, the *EP Act*. The permit did not authorise an ER activity, as it later came to be defined.

[29] The primary judge correctly observed that the enactment of the *EP Act* introduced another level of control on activities carried out on land when those activities fell within the statutory definition of environmentally relevant activities. This second layer of control was additional to town planning controls. At the time the *EP Act* commenced the relevant town planning legislation was the *P & E Act*. The primary judge pointed out, again correctly, that no permit to carry out an ER activity could be obtained under the *P & E Act*. The primary judge thus concluded, correctly in my opinion, that the 1987 town planning permit was not, and could not have been, an approval for the conduct of an ER activity.

[30] Section 63 of the *Interim Regulation* is also relevant. Although its construction is a matter of difficulty, as I will mention, it is clear enough that it was intended to be an interim provision allowing those persons who conducted what became ER activities, with the passing of the *EP Act*, before its commencement, and therefore without a permit, to continue them for three months during which a permit could be applied for. Significantly, the interim statutory approval did not attach to the land but applied only to the person then carrying out the activity, and its terms did not refer or seek to enlarge the ambit of pre-existing approvals for the use of land granted under the *LG Act* or the *P & E Act*. Instead of that approach, s 63 gave approval to conduct what had become an ER activity for a limited time.

[31] The terms of s 63 are thus incompatible with the applicants' argument. The section would not have been necessary had a pre-existing town planning permit constituted sufficient approval for the conduct of an ER activity.

[32] The changes made to the *IP Act* in March 1998 allowed, for the first time, an application to be made for a development approval, as defined by the *IP Act*, for an ER activity. Thereafter an ER activity could be authorised by an approval issued under the *EP Act* prior to March 1998, or by a development approval under the *IP Act*, after March 1998.

[33] The applicants never had an approval under the *EP Act*. They never had an approval under the *IP Act* which issued after March 1998.

[34] This, I think, was the point being made by the primary judge in his Honour's references to approvals "granted" under the *IP Act*. After March 1998 an ER activity could only lawfully be carried on pursuant to an approval under that Act. Pre-existing permits for the use of land were not a relevant authority. There was a need to apply for and obtain approval under the *IP Act*. To say of such a permit that it was granted, is not, I think, a mistake.

[35] His Honour accepted, again I think correctly, that there is no legislative provision which converts or deems a town planning permit issued under the *Local Government Act* 1936 or the *P & E Act* to take effect as an authority or approval under the *EP Act* for conduct of ER activities.

[36] The town planning permit issued in 1987 continues in force by virtue of s 8.10(8) of the *P & E Act* and s 6.1.23 of the *IP Act* but it is apparent from the terms of that consent that it is not an approval for the ER activity of storing 10,000 litres or more but less than 500,000 litres of petrol on the site. No such reference is found in the document. What the applicants required was a development approval "for the activity", relevantly, the storage of the defined amount of petroleum product. Such a development approval could only be obtained under the *IP Act* after March 1998. The 1987 permit was not an approval for *that activity*.

[37] There is also the point that s 6.1.23 of the *IP Act* continues in operation an approval given under or continued under the *P & E Act*. An approval for an ER activity could never have been obtained under the terms of the *P & E Act*.

[38] The primary judge was right to hold that the reference to a "development approval" in s 5(2)(b) of the *1998 Regulation* and in the definition of "material change of use" can only be a reference to such an approval for an ER activity obtained under the *IP Act* after March 1998.

[39] The applicants' second point was that they were not carrying out assessable development because the storage of petroleum on the site did not come within the definition of a material change of use in s 1.3.5(c) of the *IP Act*. They based that submission on the assertions that there was an approval for the activity which did not cease to have effect because of s 624(2)(b) of the *EP Act* so that paragraph (c)(i) of the definition did not apply, and they had a development approval for the activity so that paragraph (c)(ii) of the definition did not apply.

[40] The second aspect of the argument can be dismissed immediately. It suffers the same defect as the applicants' first point. It depends upon the continuing town planning consent being a development approval for the activity of petrol storage and, for the reasons just discussed, it was not.

[41] That is enough to dispose of the second point because there will be a material change of use if either of the contingencies described in paragraph (c) of the definition is satisfied. There was no development approval for the activity and it was carried out without an environmental authority required under the *EP Act* between 1989 and 3 October 2004.

[42] However because it was argued it is appropriate to deal with the point that approval for the activity did not cease to have effect because of the operation of s 624(2)(b) of the *EP Act*.

[43] The effect of the section is that an approval mentioned in s 63 of the (repealed) *Interim Regulation* which was in force immediately before the commencement of s 624 continues to have effect until the person with the approval ceases the activity.

[44] I have already set out the terms of s 63 of the *Interim Regulation*. It is at once apparent that it did not give Strasburger approval to carry out the ER activity of petrol storage. Section 63 applied to a person who was carrying out a level 2 ER activity "immediately before the commencing day", which was 1 March 1995. The person then carrying out the activity was Whitepeak Investments Pty Ltd. Section 63 operated to authorise that person, and no one else, to carry out the activity. The permit did not attach to land or to successors in title. Whitepeak Investments Pty Ltd ceased carrying on the activity when it quit the premises and Rafinc Pty Ltd took over.

[45] As well the approval conferred by s 63 was limited to the period of three months from 1 March 1995. This seems to follow from subsection (4) which provided that the section was to expire at that time. The effect of subsection (4) is however obscured by subsection (3) which provides that subsection (2), allowing the person carrying on the activity before the commencing day to continue doing so, is a law "to which section 20A of the *Acts Interpretation Act 1954*" applies.

[46] That section in turn provides that:

> "(1) In this section –
> ***Act*** includes a provision of an Act.
> ***repeal*** includes expiry.
> (2) If an Act –
> (a) declares a thing for a… transitional purpose…; or
> (b) validates a thing that may otherwise be invalid; or
> (c) declares a thing for a purpose that is consequential
> on a declaration mentioned in paragraph (a) or a validation mentioned in paragraph (b) … ;
> the declaratory or validating effect of the Act does not end merely because of the repeal of the Act."

[47] The effect of subsections (3) and (4) are therefore contradictory. Section 63 expired on 1 June 1995 but by the operation of s 20A of the *Acts Interpretation Act*, made applicable by the declaration in subsection (3), the authorisation contained in subsection (2) continues indefinitely in force. That result is clearly the opposite of what the Parliamentary Draftsman intended. There is no doubt that the authorisation contained in subsection (2) was meant to last no more than three months but the Parliamentary intention may not have been achieved because of the reference to s 20A. If it mattered to the result of the appeal I would be inclined to

construe s 63 purposively, as having a temporary operation, notwithstanding the contrary effect of subsection (3). Even if s 63 of the *Interim Regulation* continues in force it did not apply to Strasburger but only to Whitepeak Investments Pty Ltd who ceased its conduct of the ER activity in June 1999.

[48] Accordingly the primary judge was right to conclude that Strasburger was carrying out assessable development, being a material change of use of the site. It did not have development approval for the relevant activity.

[49] The respondent was entitled to issue the enforcement notice. The issuing of the development permit by the Council on 7 September 2007 was within power. The primary judge rightly dismissed the originating application.

[50] I would grant leave to appeal, but order that the appeal be dismissed with costs.

[51] **WHITE JA**: I have read the reasons for judgment of Chesterman JA and agree with the orders he proposes and those reasons.