SUPREME COURT OF QUEENSLAND

CITATION:	*Wirkus & Anor v Wilson Lawyers* [2011] QSC 144
PARTIES:	**MICHELLE WIRKUS** (first respondent/first plaintiff) **RANDOLF WIRKUS** (second respondent/second plaintiff) v **WILSON LAWYERS** (applicant/defendant)
FILE NO/S:	SC No 7974 of 2008
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2011
JUDGE:	Chief Justice
ORDER:	**That the plaintiffs have leave to deliver a further amended statement of claim, within 21 days, should they be advised to modify or enlarge the basis for the relief claimed, in light of the observations offered in the course of these reasons.** **That the application filed 23 March 2011 is otherwise dismissed, with costs reserved.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – where application made under r 171 to strike out pleadings – where the pleadings demonstrate shortcomings – where it cannot be concluded plaintiffs have an no arguable claims – whether the pleadings should be struck out with leave to re-plead – whether the proceeding should be summarily dismissed *Integrated Planning Act* 1997 (Qld), s 4.3.3, s 4.3.22, s 6.1.24 *City of Canada Bay Council v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424, cited *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, considered
COUNSEL:	R Jackson for the applicant

T Somers for the respondents

SOLICITORS: Brian Bartley & Associates for the applicant
Kathleen Dare & Associates for the respondents

[1] **CHIEF JUSTICE**: The defendant seeks an order that the plaintiffs' fourth further amended statement of claim, and the proceeding, be struck out, with indemnity costs. The defendant's contention is that the plaintiffs' claim faces insurmountable obstacles, and this pleading being the plaintiffs' seventh attempt, the proceeding should now be brought to an end. The proceeding was begun in August 2008, and the current version of the statement of claim was filed on 13 May 2011.

[2] The plaintiffs claim damages for negligence against the defendant, a firm of solicitors which acted for the plaintiffs in the subdivision of their land (lot 1). According to the amended statement of claim, access to the road from lot 1 was via a pathway along its boundary. A previous owner of lot 1 granted the owner of the adjacent lot 2 an easement over that pathway. The then owner of lot 2 sought approval to subdivide lot 2. The previous owner of lot 1 agreed, on the basis that the existing path be added to lot 2, with the grant of an easement over lot 2 for the benefit of lot 1. That was reflected in a condition of the approval which was forthcoming.

[3] The subsequent purchaser of lot 2, Ibenbah Pty Ltd, granted the easement in favour of lot 1, but Ibenbah did not register the easement, and thereby – it is alleged – committed a "development offence", such that a subsequent owner of lot 1 could seek "an order to remedy or restrain the commission" of that offence. The plaintiffs invoke s 6.1.24 of the *Integrated Planning Act* 1997 (Qld), and s 4.3.22. The latter section provides that a person may bring a proceeding for an order to remedy or restrain the commission of a development offence, and s 6.1.24 says that a condition of a continuing approval attaches to the land and is binding on successors in title.

[4] The pleading then alleges that Ibenbah subdivided the land, lot 2, which was registered in the name of a body corporate. When the first plaintiff purchased lot 1, 15 or so years later, that land lacked lawful roadway access because the easement had not been registered. The plaintiffs subsequently retained the defendant. Then the body corporate sought an order restraining the plaintiffs from using the de facto easement, and the plaintiffs cross-applied seeking a statutory right of user. The proceeding was compromised, with the plaintiffs gaining a right of access but inferior to that promised those years earlier.

[5] That is attributed in the pleading to the defendant's neglect, for example in not finding out what had been promised by way of easement, and not counselling the bringing of a proceeding based on the above provisions of the *Integrated Planning Act*.

[6] The defendant responds that the body corporate's mere use of lot 2 did not involve its contravening the development approval (s 4.3.3). It was therefore not guilty of any "development offence" (as defined in Sched 10 to include an offence against 4.3.3), and a proceeding under s 4.3.22 is a proceeding against the party responsible for the "development offence".

[7] Further, s 6.1.24 should – it was submitted – be read as constraining the party carrying out the development under the approval, including for example a subsequent owner. In this case the development had been carried out before the body corporate and the individual lot owners acquired title, and that title, being registered, is indefeasible. Reliance was placed on *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, 486-7, 489-490. I note at once however that there was no provision of the New South Wales legislation considered in that case in terms comparable to those of s 6.1.24(1) here.

[8] Mr Jackson, who appeared for the defendant, was unable to uncover authority on the effect of s 6.1.24(1) (a comparable provision not being before the High Court in *Hillpalm*), but he submitted that it could not be read as working any implied repeal of the indefeasibility provisions, and there is strength in that submission (cf. *City of Canada Bay Council v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424, para 74).

[9] I am not satisfied, however, that Ibenbah's alleged failure to meet the approval condition as to the easement, if established, would necessarily leave the plaintiffs bereft of rights. That failure might not impinge on the validity of the body corporate's and lot owners' title, but s 6.1.24 might nevertheless arguably render the body corporate, as the successor in title, liable for other relief, such as damages or some sort of compensation adequate to 'remedy' the breach of the approval.

[10] Also, insofar as the pleading, as presently framed, should be read as a claim by the plaintiffs for an order remedying the commission of a development offence by, say, Ibenbah, it is not completely clear to me, in the context of the preservation of rights secured by s 6.1.24(1), that the words "a person" in s 4.3.22(1) do not extend to include a party in the position of the present plaintiffs. As already suggested, it might be arguable that without interfering with the title, the 'remedy' could include a grant of compensation, and that the defendant was negligent in not alerting the plaintiffs to such a possibility.

[11] The matter was advanced before me on the basis that there was nothing the defendant could have achieved if alerted to the approval condition as to the easement, in that the development was complete, the title was indefeasible, and any 'remedy' under the legislative provision was available only against the developer which committed the development offence.

[12] I am not clearly satisfied the remedial legislative provisions should be read so narrowly as to deny the plaintiffs compensation, for example, whether against the developer or the current owners, and I think it is arguable that the defendant should have explored and pursued that.

[13] Now while the current pleading tends to focus on whether a registered easement as such should have been pursued by the defendant, maybe it can be re-cast to embrace the loss of other relief of the character just discussed. Hence the orders I make.

[14] But it is not a case so bereft of prospect as to warrant summary dismissal. The points agitated before me are more suited for determination at trial than summarily upon an argument over the adequacy of a pleading.

[15] I will however order that the plaintiffs have leave to deliver a further amended statement of claim, within 21 days, should they be advised to modify or enlarge the

basis for the relief claimed, in light of the observations offered in the course of these reasons. The application filed 23 March 2011 is otherwise dismissed, with costs at this stage reserved.