SUPREME COURT OF QUEENSLAND

CITATION:	*Wirkus & Anor v Wilson Lawyers* [2012] QSC 150
PARTIES:	**MICHELLE WIRKUS** (first plaintiff) **RANDOLF WIRKUS** (second plaintiff) **v** **WILSON LAWYERS** (defendant)
FILE NO:	BS7974 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2011
JUDGE:	Peter Lyons J
ORDER:	**1. Application for judgment refused**
CATCHWORDS:	ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - DEVELOPMENT CONTROL - CONSENTS APPROVALS PERMITS AND AGREEMENTS - CONDITIONS - GENERALLY - where approval for subdivision was granted - where a condition of the approval was that an easement was granted in favour of the lot owned by the plaintiff to allow access to Goldieslie Road - where such an easement was granted but not registered - where defendant was engaged by plaintiff to assist in achieving the provision of legal access to Goldieslie Road - where defendant did not advise plaintiff to seek to enforce approval conditions, rather advised plaintiff to rely on s 180 of the Property Law Act 1974 - where plaintiff sues for negligent advice - where defendant applies for judgment - whether the 1987 approval was 'in force' when s 6.1.23 of the Integrated Planning Act 1997 commenced such that conditions of the approval were binding upon subsequent owners and enforceable under that Act. REAL PROPERTY - TORRENS TITLE - INDEFEASIBILITY OF TITLE - GENERALLY - whether the title of the body corporate and individual lot owners was indefeasible such that the conditions of approval could not be

enforced.

Acts Interpretation Act 1954 s 20
Building Units and Group Titles Act 1980 ss7, 9(7), 24
City of Brisbane Town Plan 1987 s 21
City of Brisbane Town Planning Act 1964 ss 4, 25
Integrated Planning Act 1997 ss 1.2.1, 1.2.3, 4.3.3, 4.3.22, 4.3.25, 6.1.23, 6.1.24
Land Title Act 1994 ss 184, 185, 201
Local Government (Planning and Environment) Act 1990 ss 4.1, 4.13, 4.14, 5.1, 5.4, 8.8, 8.10, schedule 1
Property Law Act 1974 s 180
Uniform Civil Procedure Rules 1999 rules 171, 293

Benmar Properties Pty Ltd v Makucha [1996] 1 Qd R 578 distinguished
City of Canada Bay Council v F & D Bonaccorso Pty Ltd (2007) 71 NSWLR 424 distinguished
Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2004) 220 CLR 472 considered
In the matter of Giant Supermarket Properties Pty Ltd [1993] QPLR 229 considered

COUNSEL: Plaintiff/Respondent: TC Somers

Defendant/Applicant: RPS Jackson

SOLICITORS: Plaintiff/Respondent: Kathleen Dare & Associates Solicitors

Defendant/Applicant: Brian Bartley & Associates

[1] The plaintiffs in this action have claimed damages against the defendants for loss alleged to have occurred as a result of the legal services provided by the defendants in relation to obtaining access to land owned by the first plaintiff. In substance, they allege that the defendants failed to identify and pursue remedies in relation to a condition of an approval for development of land adjoining the first plaintiff's land. The defendants challenge a proposed Statement of Claim, and seek an early determination of the action.

[2] It is necessary to say something about the factual background to the plaintiffs' claim.

Background

[3] The first plaintiff's land is described as Lot 1 on RP 202855, County of Stanley, Parish of Indooroopilly. It is located at 45 Goldieslie Road, Indooroopilly. Lot 1 is an irregularly shaped parcel of land, of a kind sometimes referred to as a battleaxe allotment, with what might be described as the handle of the axe linking the major part of the lot to Goldieslie Road, to the north.

[4] Lot 2 on RP202855 is a much larger lot, surrounding the major part of the "axehead" of Lot 1 on its eastern, southern and western sides, and itself having a broader corridor linking to the north to Goldieslie Road.

[5] In 1985, Lot 1 was owned by Mr Raymond Berndt. In that year, Mr Berndt executed an easement of right of way over the "axe handle" in favour of the registered proprietors of Lot 2 (*Easement A*). This easement was registered on 7 April 1986.

[6] In the document identifying amendments which the plaintiffs seek leave to make to their Statement of Claim (*proposed Statement of Claim*), the plaintiffs have alleged that on 10 March 1987 an application was made to the Brisbane City Council (*Council*), on behalf of the owner of Lot 2, to subdivide it. It is apparent that the proposed subdivision was a group titles subdivision, provided for in the *Building Units and Group Titles Act* 1980 (Qld) (*BUGT Act*). It was then alleged that on 14 May 1987, the Council notified a condition to be incorporated into a decision relating to the application, requiring construction of a paved carriageway to Goldieslie Road. The proposed Statement of Claim then alleged that the Council subsequently issued what was described as a "Requisition" for the amalgamation of the driveways of Lot 1 and Lot 2. It was then alleged that on 9 June 1987, Mr Berndt wrote to a proposed purchaser of Lot 2, agreeing to the provision of landscaping on easement A, on the basis that a driveway would be constructed along that part of Lot 2 leading to Goldieslie Road, and that an easement would be granted over the driveway in favour of Lot 1.

[7] On 9 July 1987, the Council approved the subdivision application for Lot 2. It is apparent from the decision that the application was for the issue of a certificate under s 9(7) of the *BUGT Act*.

[8] The decision to approve the application (*1987 approval*) was subject to a number of conditions, including the following:

> "(b) the subdivider to grant access easement rights over the accessway required by condition (g) in favour of Lot 1 on Registered Plan 202855.
> …
> (g) the subdivider is to provide a single common accessway to Lots 1 and 2 on Registered Plan 202855 generally as indicated on drawing no. 367/2 dated 9th June, 1987."

[9] On 2 September 1987, Ibenbah Pty Ltd became the registered proprietor of Lot 2. Ibenbah executed a document dated 17 February 1988, in the form of a grant of easement of right of way, in favour of Lot 1. The right of way was granted over that part of Lot 2 connecting to Goldieslie Road (*Easement B*). However, the document was never registered.

[10] On about 13 April 1988, the Council provided a certificate under s 9(7) of the *BUGT Act*, which, it appears to be common ground, certified that the conditions of approval had been complied with. The group titles plan was

registered on 16 June 1988. The effect of registration was to create both lots and common property in accordance with the plan, and a body corporate for the plan (*body corporate*). The area proposed to be the subject of Easement B was common property under the plan.

[11] Eleven lots were created on the registration of the group titles plans, with certificates of title for each lot issuing on 14 June 1988. The lots were, in due course, sold.

[12] On 17 June 2004, Mrs Wirkus became the registered proprietor of Lot 1. The proposed Statement of Claim alleged that on 17 August 2004, the plaintiffs retained the defendant to assist in achieving the subdivision of Lot 1, including the provision of legal access to Goldieslie Road. An unsuccessful approach was made to the body corporate. The body corporate then instituted proceedings to prevent interference with an easement which it claimed over the area the subject of Easement A. The plaintiffs made a cross application for the grant of a statutory right of user under s 180 of the *Property Law Act* 1974 (Qld). After a lengthy period of time, the proceedings were settled, on the basis that what is described in the proposed Statement of Claim as "lawful limited access" was granted in favour of Lot 1 over part of the common property of the group titles development, to Goldieslie Road. The proposed Statement of Claim alleged that these events have resulted in loss to the plaintiffs. It alleged that the body corporate was bound by the conditions of the 1987 approval; and that the defendants should have taken steps to enforce those conditions under the provisions of the *Integrated Planning Act* 1997 (Qld) (*IP Act*), rather than proceeding under s 180.

The present application

[13] The defendants have applied for an order dismissing the action, their written submissions identifying the basis of the application as the inherent jurisdiction of the court. They also sought summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*). They further sought an order striking out the plaintiffs' Statement of Claim filed 13 May 2011; and an order that the Statement of Claim filed 22 June 2011 be struck out, pursuant to r 171 of the *UCPR*. They opposed an application by the plaintiffs for leave to file and serve the proposed Statement of Claim. The defendants submitted that, contrary to the allegations in the proposed Statement of Claim, the body corporate and the proprietors of the lots in the group titles subdivision[1] had no obligation to comply with the conditions of the 1987 approval, and accordingly had not committed a "development offence". That was because they did not engage in any conduct that could be said to have been a contravention of a development approval, so that the provisions of the *IP Act* did not come into effect. They further submitted that those provisions of the *IP Act* only applied in respect of an approval which was "in force" immediately prior to the commencement of the *IP Act*, and the 1987 approval was no longer "in force", a matter of consequence in

[1] However, the proposed Statement of Claim refers expressly only to the body corporate.

determining whether the 1987 approval binds the proprietors and body corporate of the group titles subdivision.

[14] They also submitted that the effect of the provisions of the *IP Act*, for which the plaintiffs contended, amounted to an implied repeal of the indefeasibility provisions of the *Land Title Act* 1994 (Qld) (*LT Act*); but that the provisions of the *IP Act* did not have that effect.

[15] The plaintiffs submitted that the provisions of the *IP Act* gave them a right to apply to the Planning and Environment Court for orders requiring the proprietors of lots in the group titles subdivision to perform the conditions of the 1987 approval. They submitted that s 8.10(8)(a) of the *Local Government (Planning and Environment) Act* 1990 (Qld) (*P&E Act*) preserved the effect of the conditions of the 1987 approval. They also submitted that the "general law" had the effect that the proprietors of the lots were bound to comply with the conditions of the 1987 approval. They submitted that the complexity of the matter made it unfit for summary disposal.

The plaintiffs' Statement of Claim

[16] The hearing was conducted on the basis that the plaintiffs' claim is best articulated in the proposed Statement of Claim. Submissions were not specifically directed to earlier versions of the pleading.

[17] The breaches of duty which the plaintiffs allege against the defendants appear from the following extract from the proposed Statement of Claim:

> "Legal services that should have been performed by the Defendants for the Plaintiffs and that were not performed:-
> 43.(i) As and from 18 November 2004 (the date of the 'rejection') the Defendants should have investigated whether there was any legal basis on which the Body Corporate claimed a right to trespass (by constructing a concrete block wall and landscaping) on the Plaintiffs' land, by researching the history of the Development of Lot 2.
>
> (ii) As and from 18 November 2004 the Defendants should have conducted Freedom of Information searches at the Brisbane City Council in respect of the Development Approval of Lot 2, which would have revealed the Council Decision Notice, the Council Requisition, the Berndt Letter, and the Subdivisional Approval referred to in paragraphs 13-16 hereof.
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> (iii) As and from 18 November 2004 upon receipt of the Development Approval and associated documents referred to in paragraph (ii) hereof the Defendants should have:-
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> (a) forthwith threatened or brought Court proceedings in the Planning and Environment Court ('the enforcement proceedings') against the Body Corporate under section

4.3.22(i) of the *Integrated Planning Act* (1PA) to remedy or restrain the commission of the development offence referred to in paragraph 19 hereof;

(b) explored and if appropriate pursued a private prosecution of the Body Corporate for the continuation of the 'Development offence' referred to in paragraph 19 hereof pursuant to section 4.4.1 of the IPA;

(c) explored and if appropriate, claimed compensation from the Body Corporate for the financial loss suffered by the Plaintiff, pursuant to section 4.4.5(2) of the IPA

(iv) As and from 18 November 2004, upon receipt of the Development Approval and associated document referred to in paragraph (ii) hereof, the Defendants should have explored and if appropriate, claimed compensation in an action for damages for negligence from the Brisbane City Council for the financial loss suffered by the Plaintiff in respect of the error or omission in the Certificate referred to in paragraphs 18A and 19A hereof.

(v) As and from 18 November 2004, upon receipt of the Development Approval and associated document referred to in paragraph (ii) hereof the Defendants should have explored and if appropriate, pursued a private prosecution of Ibenbah Pty Ltd and/or its Directors for the 'Development Offence' referred to in paragraph 19 hereof, pursuant to section 4.4.1 of the IPA and explored and if appropriate, claimed compensation from Ibenbah Pty Ltd and/or its Directors for the financial loss suffered by the Plaintiff pursuant to section 4.4.5(2) of the IPA.

(vi) As and from 18 November 2004 the Defendants should have advised the First Plaintiff not to bring her cross Application seeking a statutory right of user pursuant to section 180 of the *Property Law Act 1974*, as such procedure could only ever result in a limited access 'Easement of Necessity' and the risk of a compensation payment to the Body Corporate rather than full access to the entire boundary of Lot 1, where it abuts Goldieslie Park Road, which, as the Defendants well knew, was a necessary requirement of the Plaintiffs to provide access to the two new lots to be created by the proposed subdivision of the subject property (Lot 1).

(vii) As no damages have been suffered by the Plaintiffs as at 18 November 2004, it was not then appropriate for the First Plaintiff to persist with a compensation claim against either Ibanbar Pty Ltd, Brisbane City Council or the Body Corporate.

> (viii) As the enforcement proceedings were available against the Body Corporate as at 18 November 2004, in order to comply with her duty to mitigate any loss, the Defendant should have advised the First Plaintiff to proceed solely with the said enforcement proceedings."

[18] The references in paragraph 43(ii) to the development approval of Lot 2, the Council decision notice, the Council requisition, the Berndt letter and the subdivisional approval are respectively references to the 1987 approval; the approval decision including its conditions; the requisition relating to the amalgamation of the driveways for Lot 1 and Lot 2; Mr Berndt's agreement to permit landscaping on easement A, on the basis that he would receive a right of way over that part of Lot 2 linking to Goldieslie Road, the subject of Easement B; and again the 1987 approval. The development offence referred to in paragraph 43(iii)(b) and again in paragraph 43(v) is the failure by Ibenbah Pty Ltd to register Easement B in favour of Lot 1, as required by the conditions of the 1987 approval. The certificate referred to in paragraph 43(iv) is the certificate which issued pursuant to s 9(7) of the *BUGT Act.*

[19] The basis on which the plaintiffs allege they have suffered loss is in part apparent from paragraph 43(vi). To that may be added the following:

> "47. What the Plaintiffs would have achieved if the Defendants had performed their obligations under paragraph 36(iii)(a) hereof:-
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> (i) By 18 May 2005 (within 6 months of the 'rejection' in paragraph 32 hereof) the Plaintiffs should have received, either by way of agreement from the Body Corporate, or by way of Court Order of the enforcement proceedings, an easement in accordance with the Condition of Approval in paragraph 16 hereof.
>
> (ii) By 18 June 2005, pursuant to the 'Fast-Track' Regime provided by the Brisbane City Council, the Plaintiffs would have received Development Approval for the subdivision of Lot 1 into two new lots, without the loss of any part thereof for a new driveway.
>
> (iii) By 18 October 2005 the Plaintiffs would have obtained new titles for two new lots created by the subdivision of Lot 1.
>
> (iv) By October 2005, by utilising a bequest from the estate of the late father of the male Plaintiff, the Plaintiffs would have purchased the adjoining block of land at 47 Goldieslie Road and used the battle-axe position of Lot 1 to create two new lots, and utilised a gain of $145,000.000.
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> (v) By October 2006 would have constructed their family home on the new Western lot and taken up residence thereon,

> and utilised the new Eastern lot to construct a second dwelling for investment purposes or for sale."

[20] There are additional allegations relating to breaches of duty, and the loss claimed by the plaintiffs, but it is not necessary to set them out.

Statutory basis for plaintiffs' allegations of breach and loss

[21] At the time when the defendants were retained by the plaintiffs, development in Queensland was regulated by the *IP Act* which included the following[2]

> **"Division 5 Enforcement orders of court**
> **Proceeding for orders**
> **4.3.22.(1)** A person may bring a proceeding in the court—
> (a) for an order to remedy or restrain the commission of a development offence (an **'enforcement order'**); or
> …
> **(3)** The person may bring a proceeding under subsection (1)(a) whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence."

[22] The expression "development offence" was defined in the schedule to the *IP Act* by reference to other sections of that Act. The relevant section for the plaintiffs' case is s 4.3.3. So far as relevant, it provides:

> "**Compliance with development approval**
> **4.3.3.(1)** A person must not contravene a development approval, including any condition in the approval.
> Maximum penalty--1665 penalty units."

[23] Although the expression "development approval" is defined in schedule 10 to the *IP Act*, the definition is of no assistance. It is necessary to make reference to the transitional provisions found in ch 6, Pt 1, of the *IP Act*. In s 6.1.23, a number of classes of approvals given under earlier legislation are identified as "continuing approvals", including the following:

> "(d) approvals (also **'continuing approvals'**), by whatever name called, given under a former planning scheme but not included in paragraphs (a) to (c) in force immediately before the commencement of this section..."

[24] Section 6.1.23(2) then provides as follows:

> "**(2)** Despite the repeal of the repealed 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.

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[2] References are to Reprint No. 5C, in force when the defendants were retained.

Example for subsection (2)--
An application for a staged subdivision approval under section 5.9(1) of the repealed Act and a concurrent application under section 5.1(1) of the repealed Act for approval of the first stage of the staged subdivision would result in--

(a) for the section 5.9(1) application- a preliminary approval for reconfiguration of the whole of the land; and

(b) for the section 5.1(1) application- a development permit for reconfiguration of the land in stage 1."

[25] It is also convenient to note the provisions of s 6.1.24, as follows:

"Certain conditions attach to land

6.1.24 (1) If a local government has set conditions in relation to a continuing approval, the conditions attach to the land on and from the commencement of this section and are binding on successors in title."

[26] The defendants submitted that s 6.1.24(1) applied only to rezoning conditions. There are a number of difficulties with this submission. One is that it is contrary to the natural meaning of the provision. Another is that the heading to the section shows the section is intended to have a broader operation. A third is that conditions of a rezoning approval are dealt with expressly by s 6.1.24(2); with the result that, on the defendants' submissions, one or other of these provisions would have no operation. Accordingly, I do not accept the submission of the defendants.

[27] In essence, therefore, the plaintiffs' case is that the 1987 approval is a continuing approval, and accordingly a development approval for the purposes of the *IP Act*; the conditions of the 1987 approval attach to the land in respect of which that approval was granted; s 4.3.22 and s 4.3.3 had the effect that the plaintiffs could compel compliance with the conditions of the 1987 approval; and the defendants were negligent in not discovering the 1987 approval and its conditions, and in not advising the plaintiffs to seek to enforce them. Critical to the plaintiffs' case, and the application of these provisions, is the expression found in s 6.1.23(1)(d), "in force immediately before the commencement of this section".

Was the 1987 approval "in force" when s 6.1.23 of the *IP Act* commenced?

[28] Section 6.1.23 commenced on 30 March 1998.

[29] The submission made on behalf of the plaintiffs that the 1987 approval was an approval given under a former planning scheme was not challenged. Section 9(7) of the *BUGT Act* required that a group titles plan lodged for registration was to be endorsed with or accompanied by a certificate of the relevant local government. For Lot 2, that meant a certificate from the Council. The certificate was required to provide that the group titles subdivision had been approved by the Council, and that all requirements of the *City of Brisbane Town Planning Act* 1964 (*CBTP Act),* and the 1987 Town Plan, had been complied with in relation to the

subdivision.[3] Section 24 of the *BUGT Act* dealt with the issue of a certificate under s 9(7), and authorised the making of ordinances or bylaws to regulate and control group titles subdivision. Section 24(4)(d) specifically made amenity impacts relevant to the issue of such a certificate. Further, s 24(5) authorised a Local Government to impose conditions.

[30] Section 21 of the 1987 Town Plan contained planning ordinances relating to group titles subdivision. It dealt with the making of an application; and authorised the Council to approve the application subject to conditions.[4] Section 21.2.9 provided for the lapsing of such an approval, unless the Council was notified that the conditions of approval, and other requirements, had been complied with, and other steps were taken, within 12 months after the notification of the approval. Section 21.2.10.1 then regulated the granting of a further approval, resulting in a certificate under s 9(7) of the *BUGT Act*.

[31] The 1987 Town Plan came into force under the *CBTP Act*. That Act was repealed by the *P&E Act*.[5] However, s 8.10(3) preserved the 1987 Town Plan. Bylaws relating to town planning and subdivision were preserved by s 8.10(6). Section 8.10(8)(a) was as follows:

> "Each approval, consent or permission (but not any conditions attaching thereto) granted by a Local Authority or the Governor in Council prior to the commencement of this Act, and which is in force immediately 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 (but any conditions attaching thereto are still to apply as if this Act had not commenced)."

[32] It will be noticed that s 8.10(8)(a) drew a distinction between the way an approval remained in force, and the effect of conditions of such an approval[6]. An approval was taken to have been an approval made pursuant to the *P&E Act*. Conditions of approvals granted under the *P&E Act* "attach to the land and are binding on successors in title".[7] Earlier legislation, such as the *CBTP Act* and the *Local Government Act* 1936 (Qld) (*1936 LG Act*) did not contain such provisions. Nor did s 21 of the 1987 Town Plan.

[33] The language of s 8.10(8)(a) is broad, and is apt to include an approval under s 21 of the 1987 Town Plan. However, if it did not extend to such an approval, the 1987 Town Plan itself had been preserved in force by s

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3 See the extension of references to the *Local Government Act* 1936 (Qld) found in s 7(3) of the *BUGT Act;* and compare s 7(4).

4 See s 21.2.4.2 of the 1987 Town Plan.

5 See s 8.8 and the first schedule of the *P&E Act*.

6 See *In the matter of Giant Supermarket Properties Pty Ltd* [1993] QPLR 229, 232.

7 See for example s 4.4(12)(b); s 5.1(8) relating to subdivision approvals. Where consent was granted to a use of land, s 4.13(16) provided that the permit, subject to the conditions contained in it, was to attach to the land and be binding on successors in title.

8.10(6); and if there were any doubt about the continued effect of such an approval (perhaps because the legislation under which the 1987 Town Plan had been made, had been repealed by the *P&E Act*), s 20 of the *Acts Interpretation Act* 1954 (Qld) (*AI Act*) would remove it.

[34] For the defendant, it was submitted that it was unlikely that s 8.10(8)(a) was intended to extend to the 1987 approval. That paragraph gave an approval to which it applied, effect as an approval "made pursuant to this Act". Since the 1987 approval related to a subdivision which had been carried out under a statutory regime (the *BUGT Act*) outside those regulated by the Acts repealed by the *P&E Act* (the *CBTP Act* and the 1936 *LG Act*), legislation which itself remained in force, it was therefore unlikely that the paragraph was directed to an approval of such a subdivision.

[35] There are difficulties with that submission. The first is that the language of paragraph (a) is plainly intended to be wide-ranging. This appears from the use of the terms "approval, consent or permission". Further, the scope of the paragraph is not expressly restricted by reference to the repealed Acts. In any event, s 21 of the 1987 Town Plan itself conferred a power to approve an application with conditions. The 1987 Town Plan (including Planning Ordinances)[8] took effect under the *CBTP Act*[9], although dealing with a subdivision under the *BUGT Act*. As has been mentioned, s 9(7) of that Act was concerned with compliance with the provisions of the 1987 Town Plan; so was s 24. There is no reason to read down the language of s 8.10(8)(a) so that it does not apply to an approval under s 21 of the 1987 Town Plan.

[36] Underlying some of the defendants' submissions was the proposition that the subdivision having been carried out, the 1987 approval was no longer "in force". The defendants also submitted that the consequence of accepting the contentions of the plaintiffs was that liabilities were imposed on persons who had previously been unaffected by conditions of approval; and that non-compliance with conditions would become offences, carrying not insignificant penalties, a result unlikely to have been intended by the legislature.

[37] For the plaintiffs it was submitted that the expression was intended to comprehend all approvals satisfying the description found in s 6.1.23(1)(d) of the *IP Act*, save for those which had lapsed or been revoked. It was implicit in the submissions made for the plaintiffs that the expression included an approval of a subdivision, which authorised the creation of lots which remained in existence on 30 March 1998.

[38] It is necessary to consider the statutory context in which s 6.1.23(1)(d) is found. It might first be observed that under s 6.1.23(1)(a) certain conditions were themselves made continuing approvals, and by s 6.1.24(1), those conditions were attached to the land. A practice that had developed in earlier planning schemes in relation to development which

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8 See ss 4(4)(d) and 25 of the *CBTP Act*.

9 See s 4, particularly (22).

itself did not require the consent of the Council, was to make it necessary for a person wishing to use such land for certain purposes, to apply for a notification of conditions. Such applications were regulated by s 4.1(5)-(8) of the *P&E Act*. The conditions so imposed were the subject of s 6.1.23(1)(a) of the *IP Act*. The *P&E Act* did not attach such conditions to land, to make them binding on successors in title; but s 6.1.24.(1) of the *IP Act* had that effect.

[39] Further, there were very significant differences between the language used in s 8.10(8)(a), which expressly avoided any alteration to the effect of conditions imposed under earlier legislation, and s 6.1.23(1)(d) and s 6.1.24(1). On its face, the later legislation demonstrates a different attitude to the effect which conditions of earlier approvals were to have. It is difficult to conclude that the change in language does not demonstrate a different legislative intent from that found in s 8.10(8)(a).

[40] That view is consistent with the purpose of the *IP Act*, in part said to be "to achieve ecological sustainability by … managing the effects of development on the environment (including managing the use of premises)".[10] The *IP Act* identified that its purposes were advanced by, amongst other things, "avoiding, if practicable, or otherwise lessening, adverse environmental effects of development …" and "applying standards of amenity … in the built environment that are cost effective and for the public benefit".[11] In my view, therefore, the provisions of s 6.1.23 and 6.1.24 of the *IP Act* were intended to make conditions of approval binding on persons who, previously might not have been so bound. The consequences on persons not previously bound by the conditions, in my view, reflect the legislative intent previously mentioned.

[41] There remains, however, a question whether the 1987 approval was still "in force" on 30 March 1998. There is a sense in which it can well be said that the 1987 approval no longer had any force, it having been acted upon to achieve the group titles subdivision.

[42] The answer to that question depends on the construction of the statutory provision. Part of the context for construing s 6.1.23(1)(d) includes the provisions of the *P&E Act* dealing with the lapsing of an approval;[12] its revocation;[13] or an approval being superseded.[14] Approvals affected by these provisions by the time the *IP Act* commenced were, at that time, no longer "in force". It seems to me that the expression "in force" found in s 6.1.23(1)(d) was intended to exclude them from the scope of this provision.

[43] It might also be observed that an approval granted under legislation which predated the *IP Act* would, if it had been acted upon, generally be regarded as "spent", at least in the case of rezoning approvals and

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10 See s 1.2.1 (c) of the *IP Act*.
11 See s 1.2.3(1)(c) and (e) of the *IP Act*.
12 See s 4.13(18) of the *P&E Act*.
13 See s 4.14 of the *P&E Act*.
14 See s 4.13(16)(d) and s 5.4(3)(b) of the *P&E Act*.

subdivision approvals. Section 6.1.24(2) shows that rezoning conditions were intended to remain effective, notwithstanding that the rezoning had been carried out. There is no reason to think that a similar consequence was not intended for subdivision approvals. Subdivisions typically result in an increase in the intensity of a use, with an increased need to manage the effects of development associated with a subdivision. One purpose of s 6.1.24(1) was to ensure that subdivision conditions imposed under the *P&E Act* remained effective, notwithstanding that the subdivision had been carried out, and that the approval might therefore be regarded as "spent".

[44] Having regard to the language of s 6.1.24(1), particularly by contrast with the language of s 8.10(8)(a) of the *P&E Act*, the general purposes of the *IP Act*, and the apparent intention to make conditions of all approvals binding on subsequent owners, it seems to me that s 6.1.23(1)(d) includes approvals which have been acted upon, resulting in a form of development which remains the current form of development on land; and s 6.1.24(1) makes conditions binding on subsequent owners of the land to which the approval relates. That would include the 1987 approval. The consequence of that is that it is a continuing approval, and its conditions attach to the land to which it is related, and bind successors in title.

Indefeasibility

[45] It was submitted for the defendants that the body corporate (and the individual lot owners in the group titles development) were protected from the obligations of the conditions of the 1987 approval, and accordingly from proceedings under s 4.3.22 of the *IP Act*, by the fact that their title was created after the 1987 approval, and is indefeasible under the provisions of the *LT Act* 1994 (Qld). They relied upon *City of Canada Bay Council v F & D Bonaccorso Pty Ltd*[15] and *Hillpalm Pty Ltd v Heaven's Door Pty Ltd.*[16]

[46] In my view, these submissions do not pay sufficient attention to the relevant statutory provisions, and the claims made by the plaintiffs.

[47] On the commencement of the *LT Act*, the registered interests of proprietors of lots in the group titles subdivision, and of the body corporate, became interests held by them in the freehold land register under the *LT Act.*[17] The *LT Act* then provided for indefeasibility of registered title, such indefeasibility being described as "the current particulars in the freehold land register" about a lot or common property.[18] The expression "indefeasible title" in the *LT Act* is defined by reference to the sections which use this description.[19] As is pointed out by the authors of one text book dealing with this area,[20] the quality of a

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15 (2007) 71 NSWLR 424.
16 (2004) 220 CLR 472.
17 See s 201 of the *LT Act*.
18 See s 37, s 38, s 41A, and s 42B of the *LT Act*.
19 See the definition of "indefeasible title" in schedule 2 of the *LT Act*.
20 MacDonald, McCrimmon, Wallace and Weir *Real Property Law in Queensland* (3rd ed) at [10.130].

registered interest is defined by the protection or immunity from attack provided by s 184 and s 185 of the *LT Act*. Subject to the exceptions set out in s 185, and the exception for fraud by the registered proprietor, that is identified as follows:

> "**Quality of registered interests**
> **184.(1)** A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests."

[48] There can, however, be no doubt that the manner in which a registered owner or a registered proprietor of a lot might enjoy his or her interest in the lot may be restricted by other legislation. Much planning legislation, as well as local government ordinances and by-laws, has this effect. In general terms, provisions of the *IP Act* which attach conditions of an approval to land, and make those conditions binding on successors in title, give that effect to many conditions of development approvals.

[49] The conditions of the 1987 approval did not themselves purport to create an easement. Rather, they imposed an obligation to grant an easement over the access way.

[50] Further, the proposed Statement of Claim alleged that the defendants (on behalf of the plaintiffs) should have brought proceedings under s 4.3.22 of the *IP Act* to remedy or restrain the commission of a development offence, namely, the failure to comply with the conditions of the 1987 approval. Section 4.3.22 authorised the making of the application, while s 4.3.25 conferred the power (expanded on in s 4.3.26 and s 4.3.27) to make an order on such an application. The power was clearly discretionary.

[51] In *Hillpalm*, it was accepted that a right to apply to have an interest created in land enforced by personal action under a provision similar to s 4.3.22 of the *IP Act*[21] was a right *in personam*; the availability of which "is entirely consistent with the Torrens system of title".[22]

[52] Neither the decision in *Canada Bay*, nor that in another case relied on by the defendants, *Benmar Properties Pty Ltd v Makucha*[23] are concerned with such rights. Each concerned a statutory restriction on a power to deal with land (by subdividing it or selling it) which had been breached; and the consequences of the registration of an interest subsequent to the dealing. It seems to me that these decisions are of no assistance in the present case.

[53] In my view, therefore, the submissions of the defendants based on the indefeasibility of the title of the owners of lots in the group titles subdivision and the body corporate do not warrant the summary dismissal of the plaintiffs' claim.

Other matters

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21 s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW).

22 *Hillpalm* at [53]-[54].

23 [1996] 1 Qd R 578.

[54] The defendants submitted that no obligation fell on the lot owners (or the body corporate) because they "did not engage in any conduct" which could be said to have contravened the 1987 approval. It will be apparent from these reasons that a person may contravene a condition of a development approval, notwithstanding that that person played no role in carrying out the development; and that such a contravention may provide a basis for an application under s 4.3.22 of the *IP Act*. The statutory provisions under present consideration are significantly different from those dealt with in *Hillpalm*, by reason of the fact that they impose on successors in title an obligation to comply with conditions of a development approval. As was there observed:[24]

> "It is the applicable statutory provisions, and those alone, which must be examined in order to determine the rights of the parties."

[55] There is scope for debate about some specific provisions of the proposed statement of claim: for example part of paragraph 19; paragraph 20A(xxiii); paragraph 24; and paragraph 26. It seems to me appropriate not to determine the question of leave to deliver the proposed statement of claim, without further submissions.

Conclusion

[56] I propose to dismiss the application of the defendants for judgment. I shall hear further submissions on the question of a grant of leave to deliver the proposed statement of claim, in light of matters raised in these reasons. I shall also hear submissions as to costs.

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[24] *Hillpalm* at [50].