SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PETER LYONS J

No 7974 of 2008

MICHELLE WIRKUS	Plaintiff
and	
WILSON LAWYERS	Defendant

BRISBANE

..DATE 02/05/2012

ORDER

HIS HONOUR: The plaintiffs have claimed damages against the defendants for loss alleged to have occurred as a result of the way in which legal services were provided by the defendants in relation to access to land owned by the first plaintiff.

The plaintiffs allege 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. A condition of that approval required the granting of access easement rights in favour of the land of the first plaintiff over the adjoining land, which has since been developed by way of a group title development as a consequence of the application of provisions of the *Building Units and Group Titles Act 1980* (Qld).

In October 2011 I heard an application relating to a proposed Statement of Claim, and an application by the defendant for judgment against the plaintiffs. I gave reasons on the 4th of April 2012. The effect of my determination was that the application for judgment should be dismissed and, in essence, that there was a viable claim to be advanced on behalf of the plaintiffs, though my reasons expressed some reservations about some parts of the pleading, which were to be addressed on a later occasion.

The hearing in October was conducted on the basis that the plaintiff's case was that the application was approved under the City of Brisbane Town Plan, which it is common ground, came into force on the 13th of June 1987. That was a matter

of considerable significance in dealing with a substantial ground on which the defendant sought judgment.

The defendant has now applied for leave to make an application for summary judgment on three bases. One of those bases was that, in fact, the approval on which the plaintiff's pleading relies was not an approval under the 1987 Town Plan, but under the previous Plan, to which I shall refer as the 1978 Town Plan. I granted leave to make the application on that ground and refused it on the other two grounds advanced.

I granted the leave, so far as leave was granted, because it seemed to me that the second application depended upon facts which I understood not to be in contention and because there seemed to be a substantial prospect that the application might be determinative of the whole action and, if it were, there would be substantial savings of costs to the parties and of Court resources.

I was not prepared to grant leave to argue the other two grounds which the defendant sought to advance because they seemed to me to be either an attempt to reargue matters which I had already dealt with or, alternatively, to adduce additional legal arguments, either identical or closely related to matters previously argued, and for re-agitating which, the appropriate venue was an appeal.

The critical facts which were not contentious were that the application made in respect of the adjoining land and which led to the imposition of a condition for the grant of an

easement was made on the 10th of March 1987; the date of commencement of the 1987 Town Plan; and the date of what might, for the sake of avoiding a more controversial expression, be described as the first decision, was the 9th of July 1987.

None of those facts was contentious and evidence or other appropriate material has been referred to in today's proceedings to satisfy me comfortably that those dates are the correct dates for those events. The first decision included the condition which I have mentioned, relating to the grant of an easement over the adjoining land in favour of the land now owned by the first plaintiff.

What might be referred to similarly as the second decision was the grant of a certificate under section 9 subsection (7) of the *Building Units and Group Titles Act*. The effect of such a certificate is to demonstrate the satisfaction of the Council that conditions of the first decision had been satisfied and that other relevant matters, including the provisions of the Planning Scheme, were not a bar to the issue of separate titles for a group title development.

The defendant, having identified the dates which I have mentioned, referred to section 22B of the City of Brisbane Town Planning Act 1964 to support the proposition that the first decision was an approval given under the 1978 Town Plan. The relevance of the submission appears from section 6.1.23 and other provisions of the *Integrated Planning Act 1997* (Qld). The provisions are set out more fully in the reasons

delivered on 4 April 2012.

The provisions which provide the context for the submission effectively commence with section 4.3.22, permitting a person to bring a proceeding for an order to remedy or restrain the commission of a development offence; section 4.3.3, which prohibits contravention of a development approval, including a condition of the approval; and the definition of the expression "development offence" in the Schedule to the *Integrated Planning Act*, which includes an offence under section 4.3.3.

To make those provisions applicable, however, it was necessary to demonstrate that the condition on which the plaintiffs seek to rely is a condition of a development approval for the purposes of the *Integrated Planning Act*.

Another relevant provision is section 6.1.23 subsection (2), the effect of which is that an approval which is a continuing approval for the purpose of that section has the effect of a preliminary approval or development permit, both terms identified elsewhere in the *Integrated Planning Act* and which identify the two classes which, together, are development approvals for that Act.

One type of continuing approval is defined in section 6.1.23(1)(d) as an approval "by whatever name called, given under a former Planning Scheme...". The term "former planning scheme" is also defined in section 6.1.1 of the *Integrated Planning Act* to mean a planning scheme under the repealed Act,

which was the *Local Government (Planning and Environment) Act* 1990.

The 1987 Town Plan was such a scheme because although it predated the 1990 Act, the transitional provisions of that Act, in particular section 8.10(3), continued the 1987 Town Plan in force after the 1990 Act commenced. However, it has not been suggested and, in my view, there is no basis for considering, the 1978 Plan to be a former Planning Scheme. Hence it is a matter of some significance for the defendant's application and, indeed, for the action to know whether the first approval was an approval granted under the 1978 Town Plan or the 1987 Town Plan.

I return to section 22B of the City of Brisbane Town Planning Act, which was in force in 1987. Subsection (2) applied to an application made before the commencement of a Planning Scheme, for any purpose in connection with the Planning Scheme in force before that commencement; and which application had not been determined by the Council or its delegate before the commencement of the later scheme.

For such an application, subsection (2) provided that it should be "dealt with and decided by the Council or its delegate as though the (earlier Town Plan) had not been superseded, but the Council or its delegate may give such weight as it thinks to the provisions of the (later) Plan." Subsection (4) goes on to provide that where such an application is granted "the rights conferred thereby may be exercised as if the application had been granted" before the

later Scheme commenced.

Subsection (4)(b) deals with proposals to subdivide land which have been approved by the Council under an earlier Scheme, but at the time of the commencement of a later Scheme, some act, matter or thing remains to be done for the subdivision. In such a case, it provides that notwithstanding that the earlier Scheme has been superseded, that Scheme "shall continue and be in force for the purpose of continuing and completing thereunder such act, matter or thing, and such act, matter or thing shall be continued and completed thereunder accordingly."

Mr Hinson of Senior Counsel and Mr Jackson of Counsel who appear for the defendant submit that these statutory provisions were the provisions which regulated the making of the decision to approve the application made on the 10th of March 1987 and that, accordingly, their effect is that the decision made on the 9th of July 1987, which included the condition requiring the grant of an easement, was made under the 1978 Plan.

Mr Sommers of Counsel who appeared for the plaintiffs submitted first that the relevant approval was not what I have referred to as the first decision, but was the second decision, made in 1988. He also submitted that the expression found in section 6.1.23(1)(d) "given under a former Planning Scheme" means "given when a former Planning Scheme was in force", whether or not the decision was made under the authority of that Scheme.

In other words, his second submission is that it is sufficient that the approval was given during what might be referred to as the lifetime of that Scheme, rather than because it was authorised to be made under the Scheme. His third submission was that the provisions of section 28 of the 1987 Town Plan preserved both existing uses and conditions to which those uses were subject and, accordingly, that apparently was relevant to the determination of the question.

With respect to the third submission, it might be noted that section 28 dealt with uses. It contained provisions introduced when the *City of Brisbane Town Planning Act* was in force. That Act contained separate statutory regimes for dealing with re-zonings; for regulating uses and obtaining consents to carry out uses where the consent was necessary under the Planning Scheme; and for subdivision. In the context of the legislation to which section 28 was directed a clear distinction was drawn between a use and a subdivision and, in my view, section 28 is not directed to conditions of subdivision at all.

Even if that were not so, section 28, it seems to me, is not relevant to the present question. The plaintiffs' claim as formulated is directed to the propositions I previously referred to, namely, the condition requiring the grant of the easement in favour of the first plaintiff's land was a condition of a continuing approval and thus of a development approval, breach of which might have been enforced by virtue of the statutory provisions found in section 4.3.22 and

perhaps other related provisions of the *Integrated Planning Act*. It therefore seems to me that the third submission is of no assistance to the plaintiffs in resisting the present application.

The first submission, likewise, in my view, is of no assistance to them. The condition on which the plaintiffs seek to rely is a condition of the decision made on the 9th of July 1987. It has not been suggested that further conditions were imposed in 1988. Indeed, the very purpose of the issue of the certificate under section 9 subsection (7), or at least one of the purposes, is to demonstrate compliance with conditions previously imposed.

The submission that a decision is, for the purposes of section 6.1.23(1)(d) of the IP Act, a decision given under a former Planning Scheme if it is made during its lifetime, does not sit comfortably with the statutory context in which paragraph (d) appears. In each of sections 6.1.23(1)(b) and (c) and (e), the word "under" is used with respect to other statutory provisions. In each of those cases, it seems to me tolerably clear that the word is there used as identifying the statutory provision as the authority for the decision made. Paragraph (d) is expressly linked to some of those provisions because it picks up approvals not included in, amongst other things, paragraphs (b) and (c).

However, it also seems to me that a natural reading of paragraph (d) is that the paragraph is directed to the Scheme, which conferred authority for granting the approval or, at the

least, regulated in some fashion that grant. In my view, it is clear that as a consequence of the provisions of section 22B of the *City of Brisbane Town Planning Act* to which I have referred, that that authority or regulation was found, for the decision to approve the application for group subdivision, the decision being that made on the 9th of July 1987, in the provisions of the 1978 Town Plan.

Accordingly, I consider that the approval, which included the condition relating to the grant of an easement, was not a continuing approval under section 6.1.23(1)(d) of the *Integrated Planning Act* and, that being the case, the plaintiffs have not demonstrated any basis on which their claim against the defendant can succeed.

There has been no submission to the effect that if I took that view, the plaintiffs had identified some alternative basis on which their claim against the defendant might succeed. Accordingly, I propose to grant the application.
