SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Heritage Council v The Corporation of the Sisters of Mercy of the Diocese of Townsville* [2014] QCA 165
PARTIES:	**QUEENSLAND HERITAGE COUNCIL** (applicant/appellant) **v** **THE CORPORATION OF THE SISTERS OF MERCY OF THE DIOCESE OF TOWNSVILLE** (respondent)
FILE NO/S:	Appeal No 7055 of 2013 DC No 835 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	22 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2014
JUDGES:	Margaret McMurdo P and Gotterson JA and Douglas J Separate reasons for judgment of each member of the Court, Gotterson JA and Douglas J concurring as to the orders made, Margaret McMurdo P dissenting in part
ORDERS:	**1. Leave be granted to the applicant to appeal against paragraph 2 of the order of the Planning and Environment Court made on 21 June 2013.** **2. The appeal be allowed by ordering that paragraph 2 be set aside.** **3. Leave be granted to the applicant and to the respondent to make submissions as to costs in accordance with Practice Direction 3 of 2013 of the Supreme Court of Queensland.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – HERITAGE CONSERVATION – JUDICIAL REVIEW OF HERITAGE DECISIONS – GENERALLY – where the Queensland Heritage Council entered a convent into the Heritage Register – where the convent is owned by the respondent, the Sisters of Mercy – where the respondent appealed to the Planning and Environment Court from the Council's decision to enter the convent in the Register – where the grounds available in that appeal were contested – where the Sisters of Mercy

contended that the physical condition and structural integrity of the convent could form a ground of appeal in the Planning and Environment Court – where the Council contended that the appeal must be limited to the cultural heritage criteria as set out in s 35(1) of the *Queensland Heritage Act* 1992 (Qld) – where, under the *Sustainable Planning Act* 2009 (Qld), an appeal is by way of hearing anew – whether the powers of the Planning and Environment Court extend to other matters if at least one of the grounds of appeal related to the cultural heritage criteria is made out

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL – whether the right of appeal to the Court of Appeal in s 498 the *Sustainable Planning Act* 2009 (Qld) applies in this case

Queensland Heritage Act 1992 (Qld), s 23(3), s 35(1), s 51, s 68, s 161, s 162, s 164
Queensland Heritage and Other Legislation Amendment Act 2007 (Qld)
Sustainable Planning Act 2009 (Qld), Ch 7 pt 1 div 13, Ch 7 pt 1 div 14, s 495, s 496, s 498

Advance Bank Australia Ltd v Queensland Heritage Council [1994] QPLR 110; [1993] QPEC 71, distinguished
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616; [1976] HCA 62, cited
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; [2000] HCA 47, cited
Gladstone Ports Corporation Ltd v Queensland Heritage Council (2012) 191 LGERA 6; [2012] QPEC 9, cited
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, considered
Metrostar Pty Ltd v Gold Coast City Council [2007] 2 Qd R 45; [2006] QCA 410, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, considered
Reelaw v Queensland Heritage Council [2005] QPELR 335; [2004] QPEC 79, considered

COUNSEL: T Sullivan QC, with N Loos, for the applicant/appellant
C Hughes QC, with M Williamson and M Batty, for the respondent

SOLICITORS: Crown Law for the applicant/appellant
Thompsons Lawyers for the respondent

[1] **MARGARET McMURDO P:** On 3 February 2012 the applicant, the Queensland Heritage Council, entered St Patrick's Convent, Townsville, in the Heritage Register. The convent is owned by the respondent, the Corporation of the Sisters of Mercy of the Diocese of Townsville. The respondent appealed to the Planning and Environment Court (P & E Court) from the applicant's decision to enter the convent in the Register. The applicant brought an interlocutory application to strike out parts of the respondent's notice of appeal. That court made a number of orders including order 2 which gave the respondent "leave to file and serve an amended notice of appeal which may seek a decision of the [P & E] Court replacing that of the [Council] by reference to s 51(2) and (3) of the *Queensland Heritage Act* 1992". The applicant has applied to this Court for leave to appeal from that order.

[2] I agree with Douglas J's reasons for concluding that the applicant has a right to apply for leave to appeal[1] to this Court under Ch 7 pt 1 div 14 (s 498 to s 501) *Sustainable Planning Act* 2009 (Qld). To obtain leave, the applicant must first demonstrate some error or mistake in law on the part of the P & E Court: s 498(1)(a) *Sustainable Planning Act*. Whilst I also agree with Douglas J's construction of the relevant provisions of the *Queensland Heritage Act* and the *Sustainable Planning Act* raised in this application, I am unpersuaded that the applicant has demonstrated any error or mistake of law warranting the grant of leave to appeal.

[3] The respondent's appeal to the P & E Court was brought under Pt 13 (s 161 to s 164) *Queensland Heritage Act*. It is clear from the terms of s 161(1)(a) and s 162(1) of that Act[2] that the respondent's only ground of appeal to the P & E Court was that the convent did not satisfy the cultural heritage criteria listed in s 35(1) of that Act upon which the applicant relied in deciding to enter the convent in the Register.[3] If the respondent was successful on this ground of appeal, under s 496(2)(c) *Sustainable Planning Act*,[4] the P & E Court, in framing its orders, could set aside the applicant's decision to enter the convent in the Register and make a replacement decision. The "decision appealed against" under s 496(2)(c) *Sustainable Planning Act* is the applicant's decision on a heritage recommendation under s 51 *Queensland Heritage Act*. The P & E Court in framing orders in the event of a successful appeal, consistent with the applicant's role under s 51(2)(b) and (3) *Queensland Heritage Act*[5] in deciding whether to enter the convent in the Register, would have regard to "whether the physical condition or structural integrity of the [convent] may prevent its cultural heritage significance being preserved". Contrary to the applicant's contention, it is clear from the terms of s 51, its context within the Act and the purpose of the Act[6] that these considerations are not limited in relevance to assessing development applications under Pt 6 div 1 (s 68 to s 71) *Queensland Heritage Act*.

[4] In construing the relevant provisions of the two Acts, the experienced primary judge in his brief *ex tempore* reasons stated:

> "I've reached the view that this court is not constrained in dealing with an appeal instituted pursuant to section 162 of the Queensland Heritage Act 1992 to examining only the ground which is the foundation of the court's jurisdiction. I think it would be astounding

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1 See Douglas J's reasons [24]-[27].
2 Above, [20].
3 Above, [12].
4 Above, [22].
5 Above, [19].
6 *Queensland Heritage Act*, s 2.

> if the court, which is engaged in a 'hearing anew', pursuant to section 495 of the Sustainable Planning Act 2009 …were unable to have regard to matters which, by section 5l(3) of the Queensland Heritage Act, [t]he respondent Council may have regard to.
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> Lest it be thought that the apparent success of the respondent's application precludes consideration of whether the particular condition of structural integrity of the appellant's place may prevent its cultural heritage significance being preserved, is by my decision today placed beyond a consideration by the judge who will hear the appeal in Townsville later in the year, I'm of the view that some provision ought to be made in the notice of appeal to signal that it may lead to investigation of matters not able to be relied on by the appellant as a 'ground' for appealing. My tentative idea is that paragraph 21C would refer to not merely to 'a decision', but to 'a decision by the court based on section 5l(2) and (3) of the Queensland Heritage Act 1992'.
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> …
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> … The notice of appeal in terms refers to section 496(2)(c) of the SPA which gives this court jurisdiction to confirm the decision appealed against or change it or, rather than 'reverse' it as formerly, set it aside and make a decision replacing it. … Untidy as that drafting may be, I'm firmly of the view that the present legislative provisions regarding appeal have the effect that a replacement decision made in this court one way or another stands as the relevant decision regarding the listing of a place in the Queensland Heritage Register."

[5] The order the subject of the application to this Court is relevantly set out in [1] of these reasons. As Douglas J suggests,[7] the respondent's amended notice of appeal filed in accordance with the judge's order[8] could have been more clearly drafted to emphasise the distinction between the grounds of appeal and the relevance of issues under s 51(2) and (3) *Queensland Heritage Act* to the orders which the P & E Court may make under s 496(2)(c) *Sustainable Planning Act* in the event the appeal is successful. It seems to me, however, clear enough from the primary judge's reasons, the order the subject of this application and the amended notice of appeal particularly the amendments to para 21(c),[9] that the s 51 considerations are not in themselves grounds of appeal. They become relevant only if the respondent is successful in the appeal to the P & E Court by demonstrating that the convent does not satisfy the cultural heritage criteria in s 35(1) *Queensland Heritage Act*. Only then may the P & E Court evaluate the s 51 considerations in deciding whether to make a decision replacing the applicant's decision to enter the convent in the Register.

[6] For those reasons, the applicant has not demonstrated any error or mistake of law warranting the granting of leave to appeal from the P & E Court's interlocutory order. I would refuse the application for leave to appeal with costs.

[7] **GOTTERSON JA:** I have had the advantage of reading the draft reasons of Douglas J. For the reasons his Honour gives, I agree, firstly, that the only

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7 See Douglas J's reasons at [40].
8 AB 180-186.
9 AB 185.

permissible ground for challenging in the Planning and Environment Court the decision of the applicant, Queensland Heritage Council, to enter St Patricks Convent on the Heritage Register is that set out in s 162(1) of the *Queensland Heritage Act* 1992 and, secondly, that where that ground is made out, that court may, for the purpose of making orders for which ss 496(1) and (2) of the *Sustainable Planning Act* 2009 provide, examine issues which, pursuant to ss 51(2)(b) and (3) of the *Queensland Heritage Act*, were open to the Council itself to examine in making the decision to register.

[8] In this appeal, paragraph 2 only of the orders made on 21 June 2013 in the Planning and Environment Court is challenged. That paragraph granted the respondent to this application and appellant in the Planning and Environment Court appeal, the Corporation of the Sisters of Mercy of the Diocese of Townsville, leave to amend the notice of appeal to that court in a way which arguably would have permitted the appellant to raise ss 51(2)(b) and (3) issues as grounds of appeal themselves. Indeed, the amended notice of appeal filed pursuant to the order did just that.

[9] His Honour observes, and I agree, that those issues have no role to play as grounds of appeal. It is appropriate then that paragraph 2 of the order under appeal be set aside. That is not to say, of course, that ss 51(2)(b) and (3) issues may not be considered by the Planning and Environment Court in the event that the permissible ground of appeal is made out. For the reasons his Honour gives, in that circumstance, they may then be considered by the court for the purpose of making orders on the appeal.

[10] I agree also with the orders proposed by his Honour.

DOUGLAS J:

The issues

[11] St Patrick's Convent on the Strand in Townsville was built in 1873 for the Sisters of St Joseph but by 1879 was taken over for the respondent, Corporation of the Sisters of Mercy of the Diocese of Townsville, ("the Sisters of Mercy"). We were told that it is the oldest known surviving convent in Queensland.

[12] The convent was entered in the Heritage Register by the applicant, Queensland Heritage Council ("the Council") by its decision of 3 February 2012 because, in its view, it satisfied three of the cultural heritage criteria set out in s 35(1) of the *Queensland Heritage Act* 1992 (Qld), namely:

> "(a) the place is important in demonstrating the evolution or pattern of Queensland's history;
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> …
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> (d) the place is important in demonstrating the principal characteristics of a particular class of cultural places;
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> …
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> (h) the place has a special association with the life or work of a particular person, group or organisation of importance in Queensland's history."

[13] The Sisters of Mercy challenged that decision by lodging an appeal to the Planning and Environment Court. The parties are at odds about the factual issues that can be canvassed on that appeal. A preliminary issue was determined in that Court

concerning the grounds available for the appeal. The learned primary judge decided that the Sisters of Mercy should be entitled to include as grounds of appeal matters going to whether it was likely the convent would need to be removed and replaced and whether its physical condition and structural integrity may prevent its cultural heritage significance from being preserved. These matters were in addition to evidence about the convent's cultural heritage significance based on s 35(1)(a), s 35(1)(d), and s 35(1)(h).

[14] The issues about the physical condition and structural integrity of the convent and whether it might need to be removed and replaced were relevant to the Council's decision because of s 51(2)(b) and s 51(3) of the *Queensland Heritage Act* which permitted the Council, in making its decision, to "have regard to whether the physical condition or structural integrity of the place may prevent its cultural heritage significance being preserved."

[15] The submission before the learned primary judge was, however, that the grounds of appeal should have been limited to whether the Convent satisfied the cultural heritage criteria stated in s 35(1) because of that express limitation to the potential grounds of appeal found in s 162(1) of the *Queensland Heritage Act*.

[16] The general significance of the proper construction of the legislation on that point to the operations of that Court in deciding issues of this nature was said to justify the grant of leave at this stage of the proceedings, a view which seems to be appropriate. Two earlier decisions of that Court, one on earlier legislation, had taken a different approach to the issues that could be dealt with on such an appeal than the learned primary judge in this case.[10]

[17] There was also a preliminary issue whether there was a right of appeal to this court in these circumstances which I shall deal with shortly. The submission that no appeal right existed was not persuasive.

[18] This interlocutory application was also said to be justified because of the likely extra hearing time the appeal would take in the Planning and Environment Court if the issues related to the physical condition or structural integrity of the place were litigated as well as the grounds related to the cultural heritage issues.

Relevant statutory provisions

[19] Sections 51(2) and 51(3) of the *Queensland Heritage Act* provide:[11]

> "**51 Council to make decision on heritage recommendation**
> …
> (2) In making the decision, the council—
> (a) must have regard to all of the following—
> (i) the application to which the heritage recommendation relates;
> (ii) the heritage submissions for the application;
> (iii) the written representations made under section 43 or 48 about the place the subject of the application;

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[10] See *Advance Bank Australia Ltd v Queensland Heritage Council* [1994] QPLR 110 and *Gladstone Ports Corporation Ltd v Queensland Heritage Council* (2012) 191 LGERA 6.

[11] Emphasis added.

(iv) if the council allows a person or entity to make oral representations about the recommendation—the representations; and

(b) may have regard to other information the council considers relevant to the application.

(3) Without limiting subsection (2)(b), the council may, in making the decision, have regard to *whether the physical condition or structural integrity of the place may prevent its cultural heritage significance being preserved*."

[20] Sections 161 and 162 of the *Queensland Heritage Act* relevantly provide:[12]

"161 Who may appeal

(1) This section applies to the following persons—

(a) the owner of a place who is given, or is entitled to be given, an information notice under section 54(3) about a decision of the council;

(b) a person who is given, or is entitled to be given, an information notice under section 56(2) about a decision of the council;

…

(2) The person may appeal to the Planning and Environment Court against the decision.

162 Grounds for appeal

(1) An appeal by a person mentioned in section 161(1)(a) or (b) may *only be made on the ground that the place the subject of the appeal does or does not satisfy the cultural heritage criteria*.

..."

[21] Section 164 of the *Queensland Heritage Act* also provides, however, that the *Sustainable Planning Act* Chapter 7, Part 1, Division 13, with any changes the Planning and Environment Court considers appropriate, applies to an appeal under the *Queensland Heritage Act*.

[22] The *Sustainable Planning Act*, when dealing with the Planning and Environment Court's process for appeals in Chapter 7, Part 1, Division 13 provides in s 495(1) that an appeal "is by way of hearing anew". Section 496(1) goes on to provide that the Planning and Environment Court in deciding an appeal may make the orders and directions it considers appropriate while s 496(2) provides:

"(2) Without limiting subsection (1), the court may—

(a) confirm the decision appealed against; or

(b) change the decision appealed against; or

(c) set aside the decision appealed against and make a decision replacing the decision set aside."

[23] There is no obligation or express discretion, for example, to remit the decision to the Council to reconsider it. Section 496(4), however, in a different context, permits the return of a matter to a building and development committee with a direction to make its decision according to law. The powers available to decide an appeal are extensive.

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12 Emphasis added.

Is there a right of appeal to the Court of Appeal in this case?

[24] The preliminary issue argued by the respondent was whether there was a right of appeal from the Planning and Environment Court on this issue to this court. The argument was that the *Queensland Heritage Act* itself did not provide an avenue of appeal to this court. It did, however, in s 164, provide that Chapter 7, Part 1, Division 13 of the *Sustainable Planning Act* applied to an appeal under Part 13 of the *Queensland Heritage Act*. But, the submission went, Division 13 of that Part did not provide for appeals to this court. Instead, Division 14 did. Reliance was placed on the Explanatory Notes to the *Queensland Heritage Bill* 1992 which referred to there being a right of final appeal to the Planning and Environment Court with no reference to any further appeal to this court.

[25] The applicant, however, submitted that s 498 of the *Sustainable Planning Act*, the first section of Division 14 of that Act, permits a party to a proceeding in the Planning and Environment Court to appeal a decision of that court with the leave of this court.

[26] This was a proceeding in the Planning and Environment Court and many divisions of Chapter 7, Part 1 affect the jurisdiction, composition and powers of the court exercisable in proceedings in the Planning and Environment Court.[13]

[27] The conclusion that s 498 applies to the applicant as a party to a proceeding to permit it to appeal with the leave of the court is compelling. The reference in the explanatory notes to the finality of the appeal to the Planning and Environment Court is no more than a recognition of the finality that normally attaches to a decision made by a court but which does not prevent a statutory right of appeal from challenging such a final decision.

The powers of the Planning and Environment Court on the appeal to it

[28] History suggests that the legislature intended to separate the consideration of whether a place satisfied the cultural heritage criteria from an examination of the physical condition or structural integrity of the place. Before the commencement of the *Queensland Heritage and Other Legislation Amendment Act* 2007 (Qld) the test that applied both for the Council and the Planning and Environment Court pursuant to s 23(3) of the Act as it then stood included as one of the criteria for entry in the register: "A place does not satisfy the criteria for entry in the heritage register if there is no prospect of the cultural heritage significance of the place being conserved."[14]

[29] That is not now included in s 35's criteria for entry in the register. The effect of the physical condition or structural integrity of the place is dealt with separately under s 51(2)(b) and s 51(3) and the Council submitted that issues related to the physical condition or structural integrity of the place properly were to be considered, not on an appeal but if a development application for the place were to be made pursuant to s 68 of the Act.

[30] If one accepts that explanation of the limitations applicable to the grounds of appeal, which seems logical, the issue then becomes one of determining the extent of the

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13 Reliance was placed on ss 435, 436, 437, 438, 439, 441, 442, 443, 444, 447, 448, 449, 450, 452, 453, 454, 455 and 458 in Part 1, Divisions 1, 2, 3, 5, 6 and 7.

14 See the discussion of the effect of that section in *Reelaw v Queensland Heritage Council* [2005] QPELR 335, 345 at [76].

powers of the Planning and Environment Court to hear the matter anew pursuant to s 495(1) of the *Sustainable Planning Act* 2009 (Qld) if at least one of the grounds of appeal related to the cultural heritage criteria is made out.

[31] The first of the decisions in the Planning and Environment Court to which we were referred effectively limiting the matters able to be considered on an appeal to that court was *Advance Bank Australia Ltd v Queensland Heritage Council*.[15] It was decided in a different statutory context. The rights of appeal there were said not to extend to a "rehearing *de novo*" and were found by the court to be limited to whether the place was not of cultural heritage significance or did not satisfy the criteria for entry in the Heritage Register. In my view, that decision is distinguishable having regard to the explicit nature of the powers given to the Planning and Environment Court now in s 495 and s 496 of the *Sustainable Planning Act*.

[32] In this case the applicant submitted that the limitation of the grounds of appeal in s 162(1) of the *Queensland Heritage Act* determined the issues that could be examined on an appeal and also confined the powers of the court to make a decision should it be persuaded that the grounds of appeal had been made out. We were referred to a number of decisions dealing with the sometimes difficult task of elucidating the legislative intent where there is tension between separate legislative provisions acting on the same subject matter, here s 162(1) of the *Queensland Heritage Act* and s 496(1) and 496(2) of the *Sustainable Planning Act*.[16] Both parties relied, in particular, on *Project Blue Sky Inc v Australian Broadcasting Authority*[17] in this well known passage:

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often

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15 (1994) QPLR 110, 112; followed by Jones DCJ in *Gladstone Ports Corporation Ltd v Queensland Heritage Council* (2012) 191 LGERA 6, 18-19 at [42]-[45].

16 See *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 619-622; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 202, 223 and *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 596 at [56].

17 (1998) 194 CLR 355, 381-382 at [69]-[70] (footnotes omitted).

> require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."

[33] The applicant relied upon the passage dealing with determining which is the leading provision where there is conflict and which the subordinate and whether one must give way to the other.

[34] The respondent requested us to construe the statutes as a whole and also drew attention to the authorities asserting that the grant of power to a court should be construed in accordance with ordinary principles and given the words' full meaning unless there was something to indicate to the contrary. As Gaudron J said in *Knight v FP Special Assets Ltd*:[18]

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

[35] When one approaches the issue here, the proper resolution of the potential conflict between the two statutes – looking at the provisions as a whole and seeking to give them harmonious goals – leads to the conclusion that a ground of appeal asserting the place the subject of the appeal did not satisfy the cultural heritage criteria referred to in s 162(1) of the *Queensland Heritage Act* must be made out in order for it to be open to the Planning and Environment Court to exercise any powers under s 496(1) or s 496(2) of the *Sustainable Planning Act*.

[36] If such a ground of appeal is made out, however, it then seems to be appropriate to permit the court, in exercising its powers, to hear the matter anew pursuant to s 495(1) and, for example, to set aside the decision appealed against and make a decision replacing it under s 496(2)(c), to examine the issues which the Council itself had to examine under s 51(3) of the *Queensland Heritage Act*, namely whether the physical condition or structural integrity of the place may prevent its cultural heritage significance from being preserved.

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[18] (1992) 174 CLR 178, 205 (footnotes omitted). See also *Metrostar Pty Ltd v Gold Coast City Council* [2007] 2 Qd R 45, 52 at [22]-[24].

[37] The success of a ground of appeal may throw quite a different light on the particular issues related to the physical condition or structural integrity of the place justifying the Council, were it considering the matter anew, in reaching a different decision. If it is the case that error can be shown in the Council's assessment of the cultural heritage criteria relevant to the place then that is also likely to throw doubt on the decision generally, justifying a reconsideration of the issues, including those related to physical condition or structural integrity.

[38] It would be wrong to preclude a litigant from arguing that the court should make a decision replacing the decision set aside without reference to all the issues actually considered by the Council itself. Where it is not clear even that the matter may be remitted to the Council to make its decision according to law because of the contrasting powers provided by s 496(2) and s 496(4) that view is more compelling. Accordingly the better view is that a broad view should be given to those grants of power to permit such issues related to physical condition or structural integrity of the place to be litigated if one of the statutory grounds of appeal is made out.

Conclusion and orders

[39] The respondent, in conforming to the direction the learned primary judge made in respect of the form of the notice of appeal has produced a document which is set out in the appeal record.[19]

[40] To clarify the view I have taken, that the powers of the court can only be exercised if a ground of appeal under s 162(1) of the *Queensland Heritage Act* is made out, the introductory words of paragraphs 20A and 20B of that notice of appeal might be amended to read, for example, as follows:

> "20A In the event that the court is satisfied that the Convent does not satisfy the cultural heritage criteria on one or more of the grounds set out in paragraph 20 of the notice of appeal then the court would take into account issues relevant under s.51(2) and in particular subsection (b) in exercising its powers under s.496(1) and s.496(2) of the *Sustainable Planning Act* 2009, namely the following matters:
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> …
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> 20B In the event that the court is satisfied that the Convent does not satisfy the cultural heritage criteria on one or more of the grounds set out in paragraph 20 of the notice of appeal then the court would take into account issues relevant under s.51(3), in exercising its powers under s.496(1) and s.496(2) of the *Sustainable Planning Act* 2009, namely whether the physical condition and structural integrity of the Convent prevent its cultural heritage significance being preserved."

[41] That would be one means of putting the Council on notice that, if one of the grounds of appeal is made out then the respondent will seek to invoke those powers.

[42] In the circumstances, however, and for the sake of clarity, it seems preferable simply to accede to the notice of appeal and delete order 2 of the orders made by the learned primary judge on 21 June 2013 on the basis that the further relief to be

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19 See AR 180-186.

sought will only be available if the appeal succeeds under s 162(1). It would be wise for a litigant in such a position in the future to put its opponent on notice of what further relief it will seek if it succeeds in establishing a ground of appeal.

[43] In either case it seems to be appropriate that the issue whether a ground of appeal under s 162(1) has been established should be determined in the first instance to save the costs associated with the potentially unnecessary litigation of the issues relevant to s 51(2) and s 51(3).

[44] Accordingly, I would grant leave to the applicant to appeal against paragraph 2 of the order of the Planning and Environment Court made on 21 June 2013 and allow the appeal by ordering that paragraph 2 be set aside. I also order that leave be granted to the applicant and to the respondent to make submissions as to costs in accordance with Practice Direction 3 of 2013 of the Supreme Court of Queensland.