SUPREME COURT OF QUEENSLAND

CITATION:	*Trevorrow v Council of the City of the Gold Coast* [2017] QSC 12
PARTIES:	**TREVORROW** (plaintiff) v **COUNCIL OF THE CITY OF THE GOLD COAST** (defendant)
FILE NO/S:	BS 7348/16
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	22 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.** **2. The applicant pay the respondent's costs of the application.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – INTERPRETATION AND CONSTRUCTION – PARTICULAR CASES – where an application for a development permit for a material change of use was made by an applicant who was not the proprietor of land – where an infrastructure charge was raised upon a decision notice approving the application – where the infrastructure charge was not paid – whether the registered proprietor of the land is liable to pay the infrastructure charge
COUNSEL:	P Dunning QC and G Radcliff for the applicant R Bain QC for the respondent
SOLICITORS:	Cooper Maloy Legal for the applicant Corrs Chambers Westgarth for the respondent

[1] **Jackson J**: The originating application seeks declaratory relief as to whether a registered proprietor of a lot of freehold land is liable to the respondent Council for

an infrastructure charge raised upon a decision notice approving an application for a development permit for a material change of use when the application was made by a third party with the proprietor's consent.

[2] From 19 October 2006 until recently, the person represented by the applicant[1] was registered as the proprietor of land described as Lot 23 on SP74294 situated at 22 Rudman Parade, Burleigh Heads.

[3] In 2005, the proprietor leased part of the land to Pro Skips Pty Ltd. Pro Skips remained in occupation until March 2016.

[4] On 19 October 2006, Pro Skips applied to the respondent under the *Integrated Planning Act* 1997 (Qld) ("IPA") for a development permit for assessable development for a material change of use of the land. The use was as a refuse transfer station.

[5] Because Pro Skips was not the owner of the land, the written consent of the proprietor as owner of the land within the meaning of the IPA was required: s 3.2.1(3)(a).

[6] The proprietor gave his consent to the application at the time of the application. Further, on 1 December 2006, the proprietor wrote a letter to the Council confirming his consent.

[7] On 4 November 2008, the respondent resolved to approve the application for a material change of use upon terms and conditions set forth. By decision notice given to Pro Skips as applicant[2] dated 13 November 2008 the respondent notified Pro Skips of the decision.

[8] The decision notice was accompanied by an infrastructure charge notice dated 2 November 2008 that levied an amount under the respondent's Priority Infrastructure Plan.

[9] On 17 December 2008, Pro Skips started an appeal from the decision to impose the infrastructure charge to the Planning and Environment Court.

[10] On 12 November 2009, the respondent issued a negotiated decision notice attaching a second infrastructure charge notice, in substitution for the first infrastructure charge notice.

[11] The second infrastructure charge notice provided that the total charge amount was $356,718.84 and that the due date for payment was "prior to use commencing".

[12] In fact, the use had commenced before the application for the material change of use was made.

[13] The second infrastructure charge notice was not paid.

---

1 It is not now in dispute that the applicant has a sufficient interest in the question to be decided because of the contract between the former registered proprietor and the transferee.

2 *Integrated Planning Act* 1997 (Qld), s 3.5.15.

[14] On 22 May 2013, the respondent delivered a rate notice to the proprietor in the sum of $400,574.94. The rate notice included an amount in respect of the unpaid infrastructure charge of $400,574.94.

Power to raise the infrastructure charge against the proprietor

[15] In effect, the applicant submits that the respondent did not have the power to raise an infrastructure charge against the proprietor in these circumstances.

[16] In oral submissions the applicant confined argument to the contention that the only source of the obligation of the proprietor to pay the infrastructure charges is s 639(1) of the *Sustainable Planning Act* 2009 (Qld) ("SPA") and that the operation of that subsection, properly construed, does not extend to an owner who was not the applicant for the development permit in question.

Transition between IPA and SPA

[17] It is common ground that at the time the infrastructure charge was levied the statutory authority for the second infrastructure charge notice to levy the infrastructure charge was found in the IPA.

[18] The SPA repealed the IPA,[3] subject to the operation of the transitional provisions in the SPA, effective 18 December 2009. From that date, s 833 of the SPA provided as follows:

> "(1) This section applies if an infrastructure charge, regulated infrastructure charge or regulated State infrastructure charge is payable under an infrastructure charges notice, regulated infrastructure charges notice or regulated State infrastructure charges notice given under repealed IPA before the commencement.
> (2) The notice is taken to be an infrastructure charges notice, regulated infrastructure charges notice or regulated State infrastructure charges notice under this Act."

[19] It is not in dispute that on 17 December 2009 there was an infrastructure charge payable under an infrastructure charges notice by the Pro Skips under the IPA. Accordingly, the SPA operated thereafter in relation to the second infrastructure charge notice levied at the time of the issue of the negotiated development permit.

[20] Nevertheless, it is appropriate to begin with the relevant provisions that operated under the IPA, although the decision to be made turns on the operation of s 639 of the SPA.

IPA

[21] Chapter 5 of the IPA contained miscellaneous provisions. Part 1 of ch 5 contained provisions relating to infrastructure planning and funding. The Dictionary in Schedule 10 defined "infrastructure" to include land, facilities, services and works used for supporting economic activity and meeting environmental needs. Section 5.1.1 provided that the purpose of the part was to seek to integrate land use and infrastructure plans, establish an infrastructure planning benchmark as a basis for an

---

3 *Sustainable Planning Act* 2009 (Qld), s 764.

infrastructure funding framework, establish an infrastructure funding framework that is equitable and accountable and to integrate State infrastructure providers into the framework.

[22] The Dictionary defined "trunk infrastructure" to mean development infrastructure identified in a priority infrastructure plan as trunk infrastructure. It defined a "priority infrastructure plan" to mean part of a planning scheme that identifies an area, includes the intended plans, identifies and states other matters such as the plans and the assumptions on which they are based and includes an infrastructure charges schedule.

[23] Section 5.1.4 provided that under the IPA a local government may levy a charge for supplying the trunk infrastructure under either an infrastructure charges schedule or regulated infrastructure charges schedule. Section 5.1.6 provided that such a schedule must state, inter alia, a charge for each trunk infrastructure network identified in the schedule and information about the area in which the charge applied, the type of lot or use for which the charge applied and how the charge must be calculated.

[24] Section 5.1.7 contained restrictions that applied to making an infrastructure charge. Section 5.1.8(1) set out requirements for an "infrastructure charges notice", including the amount, "the land to which the charge applies", when it was payable, the trunk infrastructure network for which it had been stated and the person to whom the charge must be paid.

[25] Subsections 5.1.8(2) - (5) provided:

> "(2) If the notice is given as a result of a development approval, the local government must give the notice to the applicant—
>
> (a) if the local government is the assessment manager—at the same time as the approval is given; or
>
> (b) in any other case—within 10 business days after the local government receives a copy of the approval.
>
> (3) If the notice is not given as a result of a development approval, the local government must give the notice to the owner of the land.
>
> (4) The charge is not recoverable unless the entitlements under the approval are exercised.
>
> (5) The notice lapses if the approval stops having effect."

[26] I note the references to the applicant and the owner in subsections (2) and (3).

[27] Section 5.1.9 provided that "an infrastructure charge [was] payable" at different times for reconfiguring a lot, building work that was assessable development or a material change of use. For a material change of use it was before the change happened. If none of those categories applied it was on the day stated in the infrastructure charges notice.

[28] Section 5.1.12 provided that a person to whom an infrastructure charges notice had been given and the infrastructure provider could enter into a written agreement despite, inter alia, s 5.1.8 and 5.1.9, subject to certain conditions. Among its provisions, subsections (2) and (4) refer, in some circumstances, to "the person"

giving land to the local government and provided that the applicant must comply with such a notice.

[29] Against this background, s 5.1.14 (1) of the IPA provided that an infrastructure charge levied by a local government was, for the purposes of recovery, taken to be a rate within the meaning of the *Local Government Act* 1993 (Qld).

[30] However, the dispute in the present case is not whether the effect of s 5.1.14(1) was that an owner who was not an applicant was subject to a liability to pay an infrastructure charge levied by the local government. That is because s 5.1.14 was repealed, effective 18 December 2009, by the SPA.

[31] The significance of the provisions of ch 5 pt 1 of the IPA is to establish that the second infrastructure charges notice in the present case was an infrastructure charges notice given under the repealed IPA for the purposes of s 833 of the SPA. Once that conclusion is reached, it is taken to be an infrastructure charges notice under the SPA and its effect is to be ascertained in accordance with the SPA.

SPA

[32] Chapter 8 of the SPA deals with "Infrastructure". In substance, its provisions (as they were before some 2014 amendments) broadly correspond for the purposes of the present case to some of the provisions of the IPA summarised above. The relevant provisions were substantially relocated in 2014 by s 18 of the *Sustainable Planning Infrastructure Charges) and Other Legislation Amendment Act* 2014 (Qld), but the "unamended Act", meaning the Act before the 2014 amendments, regulates the present case. Section 978(1) of the 2014 Act provides that the unamended Act continues to apply to an infrastructure charge payable under the unamended Act.

[33] Section 639 as originally enacted provided:

> "**Infrastructure charges taken to be rates**
> (1) An infrastructure charge levied by a local government is, for the purposes of recovery, taken to be rates within the meaning of the Local Government Act.
> (2) However, if the local government and an applicant or person who requested compliance assessment enter into a written agreement stating the charge is a debt owing to it by the applicant or person, subsection (1) does not apply."

[34] Section 639 was amended by s 85 of the *Sustainable Planning and Other Amendment Act* 2012 (Qld), effective 17 February 2012, to omit the words "within the meaning of the Local Government Act".

[35] Section 633 of the SPA, in the unamended Act, corresponded to s 5.1.8 of the IPA. It provided:

> **"Infrastructure charges notices**
> (1) A notice requiring the payment of an infrastructure charge (an ***infrastructure charges notice***) must state each of the following—
> (a) the amount of the charge;

(b) the land to which the charge applies;
(c) when the charge is payable;
(d) the trunk infrastructure network for which the charge has been stated;
(e) the person to whom the charge must be paid;
(f) the number of units of demand charged for;
(g) the charge rate, stated in the infrastructure charges schedule, for the charge; and
(h) if the charge rate has been adjusted for inflation—
(i) details of how it was adjusted; and
(ii) the adjusted charge rate; and
(i) the number of units of demand for which a credit has been given.

(2) If the notice is given as a result of a development approval or compliance permit, the local government must give the notice **to the applicant** or the person who requested compliance assessment—
(a) if the local government is the assessment manager or compliance assessor—
(i) at the same time as the approval or permit is given;or
(ii) for a deemed approval for which a decision notice has not been given—within 20 business days after receiving the deemed approval notice; or
(b) otherwise—
(i) within 10 business days after the local government receives a copy of the approval or permit; or
(ii) for a deemed approval for which a decision notice has not been given—within 20 business days after receiving a copy of the deemed approval notice.

(3) If the notice is not given as a result of a development approval or compliance permit, the local government must give the notice to the owner of the land.

(4) The charge is not recoverable unless the entitlements under the development approval or compliance permit are exercised.

(5) The notice lapses if the development approval or compliance permit stops having effect." (emphasis added)

[36] I note the reference in subsections (2) and (3) to the applicant and the owner. They are similar to the provisions of s 5.1.8 of the IPA.

[37] Broadly speaking again, s 634 of the unamended Act corresponded to s 5.1.9 of the IPA and s 637 of the unamended Act corresponded to s 5.1.12 of the IPA.

[38] Section 639(1) did not expressly address whether the person who is liable to pay an infrastructure charge under that section is the "owner" of the land. Nevertheless, the effect of providing that the infrastructure charge levied is "taken to be rates" invites attention to who is liable to pay rates.

[39] At the time when the SPA was enacted and afterwards the *Local Government Act* 2009 (Qld) governed the subject of rates for the City of the Gold Coast. Chapter 4

Part 1 of that Act dealt with rates and charges. I discussed some aspects of its operation in *Ostwald Accommodation Pty Ltd v Western Downs Regional Council*.[4]

[40] The discussion of the subject of rates for present purposes begins with the power of each local government to levy general, special and separate rates under s 94 of the LGA. Second, s 95 applied "if the owner of rateable land owes a local government for overdue rates and charges". It provided that the overdue rates and charges are a charge on the land. The charge was registrable under s 95(3). Section 95 did not limit any other remedy that the local government had to recover the rates including selling the land, for example: s 95(6).

[41] Section 96 provided that a regulation may provide for any matter connected with rates including the process for recovering overdue rates and charges, including by sale of the land. Chapter 4 of the *Local Government Regulation* 2012 (Qld) ("LGR") provided for matters connected with rates.

[42] Regulation 127 of the LGR provided, in part:

> "(1) Subject to section 163, the following persons are liable to pay rates and charges—
>
> (a) for rateable land—the **current owner of the land**, even if that owner did not own the land during the period to which the rates or charges relate;
>
> …"(emphasis added)

[43] In part Schedule 4 of the LGA provided that:

> ***"owner*** of land—
>
> (a) means—
>
> (i) a registered proprietor of freehold land;
>
> …"

[44] Regulation 132 provided that overdue rates or charges include, inter alia, rates or charges that are not paid by the due date for payment stated in a rates notice. Regulation 104 provided that a local government may levy rates only by a rate notice. Regulation 134 provided that a local government may recover overdue rates or charges by bringing court proceedings for a debt against a person who is liable to pay the rates.

[45] Accordingly, it appears to follow that if an infrastructure charge were taken to be "rates' under s 639 a registered proprietor of freehold land would have been liable for the charge, by virtue of s 96 of the LGA and reg 127 of the LGR, subject possibly to compliance with the provisions of regs 104 and 132.

[46] There is nothing untoward in the Parliament seeking to pick up the provisions of one Act relating to one subject matter by providing in another Act that another subject matter is to be taken to be the first subject matter for a stated purpose. As was said recently:

> "The words "is to be taken to be" are a reasonably common drafting device in modern statutes enacted by the parliament of this state. They are a form

---

4 [2015] QSC 210, [15]-[29].

> of deeming provision. See, in relation to the proper approach to the construction of deeming provisions, *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65–7...".[5]

[47] Here the purpose is the recovery of an infrastructure charge by a local government. For that purpose, s 639 appears to have been intended to clothe the charge with the character of being rates by the words in the text that the charge is "taken to be" rates.

[48] The text and context set out above indicate that the operation of s 639(1) was intended to make the proprietor liable to pay the infrastructure charge, at least after service of a rate notice that included that charge. However, the applicant submits that construction should not be accepted where the owner was not the applicant for the relevant development permit.

[49] First, the applicant submits that it was Pro Skips, as applicant, not the proprietor that was liable as applicant for the infrastructure charge on issue of the second infrastructure charges notice, under s 5.1.8 of the IPA. I will assume that is correct – the respondent did not argue that point. On that assumption, I would add that on repeal of s 5.1.14 the infrastructure charge became payable under the SPA, by virtue of s 833 of the SPA.

[50] Second, the applicant submits that the character of "rates" as referred to in s 639(1) of the SPA is that they are a tax payable by an owner of land that is rateable. I agree with the conclusion, but that is because of the effect of the text of the provisions of the LGA and LGR referred to above, not because it flows from some inherent fixed legal meaning of the word "rates". Those are the "rates" referred to in s 639(1) that an infrastructure charge is taken to be.

[51] Third, and this is the critical step, the applicant submits that the proprietor is not made responsible for the infrastructure charge by the deeming effect of s 639(1) in the present case because the applicant for the development permit was not also the proprietor.

[52] Section 14A of the *Acts Interpretation Act* 1954 (Qld) requires the court to prefer an interpretation that will "best achieve the purpose" of the Act (including the provision) in question to any other interpretation and s 14B permits the use of extrinsic material including the explanatory note for the Bill that became the Act in question. Both parties relied on parts of the explanatory note in the present case but I did not find it to be of particular assistance.

[53] There is no textual justification I can find for the limit contended for by the applicant. It would operate as though words such as "Where the applicant is the owner of the land…" introduced and qualified the operation of s 639(1), but no such words are there.

[54] Further, in my view, there is no contextual support in other sections of the unamended Act of the SPA for the limit on the operation of s 639(1) for which the applicant contends.

---

5 *Western Australia v Olive* (2011) 57 MVR 269, 292 [121].

[55] To the contrary effect, at a general level, the SPA distinguished between an applicant for a development permit (or a person who requests a compliance assessment) on the one hand and an owner on the other. There was no requirement that an application for a development permit be made by an owner. Instead, an applicant was required to obtain the owner's consent to lodge the application. This distinction was recognised in some of the sections in ch 8 pt 1 of the SPA, as previously mentioned.

[56] Particularly, s 637(1)(d) expressly referred to a case where "the infrastructure [was] land owned by the applicant". Although the context there was different, the paragraph shows that the drafter of the SPA, where relevant, did refer to a case where an applicant owned land that was relevant to the operation of a particular provision.

[57] There are other points.

[58] The mischief to which s 639 was directed is the recovery of an infrastructure charge by the local government. Of course, where an infrastructure charge was payable by and paid by an applicant, no recovery was necessary. Section 633(2) provided that where there was a development approval the infrastructure charges notice must be given to the applicant for a development permit. Section 634 provided for when an infrastructure charge was payable. In the case where the charge applied to a material change of use, that was to be "before the change happens" or if that did not apply on the day stated in the notice.

[59] The purpose of s 639(1), as ascertained from the text, was to make the infrastructure charge recoverable as if it were rates. Rates were usually payable by the registered proprietor of freehold land. They were not usually payable by an applicant for a development approval who was not the registered proprietor, and who did not need to have any other relationship to the land or the owner of the land, beyond the owner's consent to making the application.

[60] The connection between an infrastructure charges notice that resulted from a development approval and the making of the approval or permit was expressly recognised in s 633(2) of the SPA. Of course, when a development approval was given, it "attached to the land" under s 245 of the SPA and thereby "bound the owner" and "the owner's successors in title" on transfer by a registered proprietor. The land was benefitted and burdened in that way.

[61] As well, because no application for a development permit could be properly made without the owner's consent, whether an infrastructure charge was levied was within the control of an owner of land, at least to some extent. Further, unless they had bargained it away, an owner controlled the use of the land, and an infrastructure charge for a material change of use was not payable until the change of use began.

[62] The applicant relies on s 639(2) as supporting its construction. There is no dispute that under s 639(2), a local government had the power to bargain away the right it would otherwise have had to recover against an owner under s 639(1). The applicant submits that since it was the owner's exposure that an agreement under s 639(2) might relieve, it would have been absurd to provide for the agreement to be one to which the local government and applicant are parties but not the owner. The

applicant submits that absurdity is avoided if s 639(2) is construed so that it is only engaged where the applicant subject to the infrastructure charge is also an owner.

[63] There is no practical difficulty in the operation of s 639(2) if an applicant for a development permit who was not the owner of the land agreed with the local government. The absurdity raised by the applicant is more accurately an argument that it would have been unfair or unjust for the owner to be excluded from the power to make an agreement under s 639(2), so that the word "applicant" in that subsection should be construed to mean an applicant who is an owner. Consistently with that construction, the applicant submits that s 639(1) should be construed to apply only when the infrastructure charge is payable by an applicant who is an owner.

[64] In *Adams v Lambert*,[6] the High Court said:

> "…it is a well settled principle of construction that a written instrument must be construed as a whole, and that, as Dixon CJ and Fullagar J said in *Fitzgerald v Masters*, "[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency". A striking example of the application of a cognate principle of statutory construction is to be found in *Cooper Brookes (Wollongong) Pty Ltd v FCT*."[7] (citations omitted)

[65] In my view, there is wise counsel in some well-known words of Gibbs CJ from *Cooper Brookes* as follows*:*

> "However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the Legislature", as Lord Moulton said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 130; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute." [8]

[66] Where the constructional choice urged by a party involves reading a provision as though it contained additional words of restriction, courts have adopted techniques to assess the conditions that should be present before the construction will be accepted. One approach is to be seen in Lord Diplock's speech in *Wentworth Securities Ltd v Jones*.[9] Another is to be seen in *Director of Public Prosecutions v Leys*.[10] I note also the decision in the Court of Appeal of this court in *Special Projects (Qld) Pty Ltd v Simmons.*[11]

---

6 (2006) 228 CLR 409.
7 (2006) 228 CLR 409, [ ].
8 (1981) 147 CLR 297, 305.
9 [1980] AC 74, 105.
10 (2012) 44 VR 1, 34 [97].
11 [2012] QCA 2015 at [25-[27].

[67] It is not necessary to expand at any length on these techniques. A sufficient statement emerges from the plurality reasons in the High Court in *Taylor v Owners – Strata Plan 11564*:[12]

> "The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".
>
> …However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that 'the modified construction is reasonably open having regard to the statutory scheme' because any modified meaning must be consistent with the language in fact used by the legislature. …
>
> Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of parliament: the alteration to the language of the provision in such a case may be 'too far-reaching'. In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution."[13] (footnotes omitted)

[68] In my view, there is no sufficient reason in the text or context of s 639(1) or any absurdity sufficient to construe the subsection to have the limited operation contended for by the applicant.

[69] I record for completeness that the applicant did not submit that the question of construction was one that was affected by the principles discussed in *Anderson v Commissioner of Taxation*.[14]

---

12 (2014) 253 CLR 531.

13 (2014) 253 CLR 531. 548-549 [37]-[40]. Compare also the reasons of Keane and Gageler JJ at 556 – 557 [65]-[66].

14 (1937) 57 CLR 233, 243; cf *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 49 [57].