[1993] QCA 041

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 199 of 1992

Brisbane

[Heilbronn and Partners Pty. Ltd. v. Pine Rivers Shire Council]

BETWEEN

HEILBRONN AND PARTNERS PTY. LTD.
(Appellant)
Respondent

- and -

PINE RIVERS SHIRE COUNCIL
(Respondent)
Appellant

The President
Mr Justice McPherson
Mr Justice Pincus

Judgment delivered 05/03/93

Judgment of the Court.

APPEAL ALLOWED TO THE EXTENT THAT THE ORDER FOR COSTS MADE BELOW IS SET ASIDE. I ORDER THAT THE RESPONDENT PAY THE APPELLANT'S COSTS OF AND INCIDENTAL TO THE APPEAL WITH RESPECT TO THE ISSUE OF POWER OF THE JUDGE AT FIRST INSTANCE TO ORDER COSTS, SUCH COSTS TO BE TAXED. APPELLANT TO PAY RESPONDENT'S COSTS THROWN AWAY BY THE ABANDONMENT OF THE OTHER ISSUES RAISED IN THE NOTICE OF APPEAL, SUCH COSTS TO BE TAXED.

CATCHWORDS: **LOCAL GOVERNMENT - LEGAL PROCEEDINGS - costs.**

Counsel: Mr C. Hughes for the appellant
Mr J. Haydon, with him Mr Litster, for the respondent

Solicitors: Messrs. Hemming and Hart for the Respondent
Messrs. Bennett and Philp, town agents for R.D. Forbes for the appellant

Hearing Date(s): 03/03/93

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Before The President
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REASONS FOR JUDGMENT - THE COURT

This is an appeal from an order for costs made in the Planning and Environment Court. It is submitted for the appellant that the Planning and Environment Court lacked the power to award costs in the proceeding before it. The respondent argues that the necessary power is to be found in subsection 7.6(1)(b)(iii) of the Local Government (Planning and

Environment) Act 1990.

On 24 March, 1992, the respondent applied to the appellant, the relevant local authority, for its permission to subdivide a parcel of land. The appellant did not decide the application within 40 days as required by subsection 5.1(5)(a) of the Act. On 7 May 1992, the respondent lodged an appeal to the Planning and Environment Court as it was entitled to do under sub-section 5.1(11) of the Act as if the appellant had refused the application.

The point at issue between the parties is whether the appellant's failure to make its decision on the respondent's application within forty days as required by subsection 5.1(5)(a) of the Act was a default by the appellant "in the procedural requirements" within the meaning of sub-section 7.6(1)(b)(iii). Sub-section 7.6(1)(b) of the Act is as follows:

"7.6(1) [Orders] ...

(b) The Court may, upon application made to it, order such costs (including allowances to witnesses attending for the purpose of giving evidence at the hearing) as it considers appropriate in the following cases:-

(i) Where it considers the appeal or other proceedings to have been frivolous or vexatious;

(ii) where a party has not been given reasonable prior notice of intention to apply for an adjournment of an appeal or other proceedings;

(iii) where a party has incurred costs because another party has defaulted in the procedural requirements;

(iiia) without limiting the generality of paragraph (iii), where a party has incurred costs because another party has introduced (or sought to introduce) new material without first giving the party reasonable time to consider the material;

(iv) where a Local Authority does not take an active part in the proceedings where it has a responsibility to do so."

Shortly stated, the arguments for the appellant are that subsection 5.1(5) is within Part 5 of the Act which provides a

"code" with respect to subdivision applications, while subsection 7.6(1)(b) is within Part 7 which is concerned exclusively with appeals and other proceedings in the Planning and Environment Court and that, when read in context, the expression "procedural requirements" in subsection 7.6(1)(b) relates to proceedings in that Court and not the other procedural requirements provided by the Act.

The respondent, however, argues that much of the Act is procedural and that a default in respect of such an aspect of the legislation is literally within ss.7.6(1)(b)(iii).

There is little to choose between the rival contentions. The respondent's approach has some attraction in that it maximises the power of the Planning and Environment Court to award costs in proceedings before it where that is appropriate to do justice between the parties. On the other hand, there are obvious difficulties both in the wide range of disputes which might arguably attract such a power, contrary it appears to the general legislative intent, and in the difficulties in differentiating between what costs are incurred because of a default in such a procedural requirement and what are incurred for some other reason.

Overall, the appellant's approach seems to fit more easily with the general tenor of subsection 7.6(1)(b). There are several indications in that subsection that it is concerned only with proceedings before the Planning and Environment Court.

It follows that the order for costs which was made below was beyond power and should be set aside.

The appeal is to that extent allowed. The respondent must pay the appellant's taxed costs of and incidental to the appeal.