SUPREME COURT OF QUEENSLAND

CITATION:	*Tricare Aust Ltd v Gold Coast CC* [1999] QCA 489
PARTIES:	**TRICARE AUSTRALIA LIMITED ACN 010 583 392** (appellant/appellant) v **GOLD COAST CITY COUNCIL** (respondent/respondent)
FILE NO/S:	Appeal No 10551 of 1997, Appeal No 4844 of 1999 P&E Appeal No 2124 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	Appeals
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	30 November 1999
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 1999
JUDGES:	Pincus JA, Williams J, Atkinson J
ORDER:	**Appeals dismissed with costs**
CATCHWORDS:	ESTOPPEL – FORMER ADJUDICATION AND MATTERS OF RECORD OR QUASI OF RECORD – FORMER ADJUDICATION – JUDGMENT INTER PARTES – ISSUE ESTOPPEL – RESPECTING WHAT MATTERS DECISION CONCLUSIVE – MATTERS OF LAW – ruling on point of law by lower court judge as to relationship between *Mixed Use Development Act* 1993 and *Local Government (Planning and Environment) Act* 1990 – ruling interlocutory in nature – whether creates issue estoppel *Blair v Curran* (1939) 62 CLR 464, applied *Carl Zeiss Stiflung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506, applied *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767, applied *Schlieske v Minister for Immigration and Ethnic Affairs* (1987) 79 ALR 554, applied LOCAL GOVERNMENT - TOWN PLANNING – CONSENT AND APPROVAL OF COUNCILS (DEVELOPMENT AND LIKE APPLICATIONS) –

CONSENTS, APPROVALS OR PERMITS – CONDITIONS – POWER TO IMPOSE – conditions imposed under s 29(5)(b) *Mixed Use Development Act* 1993 inconsistent with conditions attached to earlier rezoning under *Local Government Act* 1936 – whether power to impose conditions under *Mixed Use Development Act* 1993 restricted by provisions of *Local Government (Planning and Environment) Act* 1990 or *Local Government Act* 1936

LOCAL GOVERNMENT - TOWN PLANNING – CONSENT AND APPROVAL OF COUNCILS (DEVELOPMENT AND LIKE APPLICATIONS) – CONSENTS, APPROVALS OR PERMITS – CONDITIONS – RELEVANCE AND REASONABLENESS - conditions imposed under s 29(5)(b) *Mixed Use Development Act* 1993 inconsistent with conditions attached to earlier rezoning under *Local Government Act* 1936 – whether conditions imposed under *Mixed Use Development Act* 1993 reasonable

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, applied

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – PARTICULAR RULES – s 8 and s 53 *Mixed Use Development Act* 1993 irreconcilable – rule of last resort that latter provision prevails

Eastbourne Corporation v Fortes Ice Cream Parlour (1955) Ltd [1959] 2 QB 92, applied
Re Marr [1990] 2 All ER 880, distinguished
Ross (1979) 141 CLR 432, applied

Mixed Use Development Act 1993, s 8, s 53

COUNSEL: Mr C L Hughes for the appellant
Mr M D Hinson SC with him Mr R S Litster for the respondent

SOLICITORS: Bowdens for the appellant
Witheriff Nyst for the respondent

[1] **PINCUS JA and ATKINSON J:** There are two appeals before the Court, each of which is against a judgment of his Honour Judge Skoien given in the Planning and Environment Court. On 12 November 1997 the judge reached, in an appeal before that Court, certain conclusions with respect to conditions imposed on an application by the appellant under the *Mixed Use Development Act* 1993 (the *MUD Act*). The appellant appealed against the judgment given on that occasion, but

when that appeal came on for hearing in this Court on 1 October 1998 it was adjourned, for reasons which have no present relevance. Then there was a further hearing before Judge Skoien, in continuation of the appeal to the Planning and Environment Court, and that resulted in orders finally disposing of those proceedings, against which orders a second appeal was brought to this Court. It is convenient to discuss the questions raised in the second appeal, the result of which will determine the fate of the first.

[2] The appellant succeeded in having the subject land rezoned, subject to conditions, in 1987, the rezoning being effected pursuant to an order of his Honour Judge Quirk of 13 July 1987; that will be referred to as "the rezoning order". It included certain conditions to which further reference is made below and para 11 provided:

> "Construction of buildings shall be in materials approved by Respondent and development to be generally in accordance with the preliminary plan submitted with the application".

The appeal to this Court concerns a challenge to conditions sought to be imposed under s 29(5)(b) of the *MUD Act* by the respondent Council on the application under the *MUD Act* referred to above, which conditions collectively called condition 3 are argued by Mr Hughes of counsel for the appellant to be invalid, on two grounds. First, Mr Hughes says that the impugned conditions are beyond power, as they impose on the appellant heavier obligations than those which it assumed under corresponding conditions set out in the rezoning order. Secondly, Mr Hughes says that the impugned conditions are unreasonable in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229–230. Consideration of the latter ground requires one to set out some details as to the substantive merits, but it is convenient before coming to that to consider a question of inconsistency of conditions. That question depends on whether and to what extent the power to impose conditions on an approval under the *MUD Act* is implicitly restricted by provisions of the *Local Government Act* 1936 (the 1936 Act) or the *Local Government (Planning and Environment) Act* 1990 (the 1990 Act).

[3] The 1936 Act provided by s 33 for the preparation of town planning schemes and for the amendment of such schemes on application of a local authority: s 33(5). There was power to impose conditions on a rezoning, under s 33(6A)(d)(iii); see also s 33(16C). It was under the 1936 Act that the rezoning order was made by Judge Quirk; the 1990 Act is material only insofar as its content may throw light on the proper scope of the power to impose conditions under the *MUD Act*. A first application under the *MUD Act* concerning the subject land made by the appellant was approved in May 1995; these proceedings concern the fate of a second application under that Act.

[4] The *MUD Act* provides for the approval of what it calls a mixed use scheme allowing the development of land consisting of two or more different classes of uses: see ss 6(1) and 7. The Act discriminates between community development lots and community property lots: see ss 13 and 14, but it does not appear to us necessary to go into the details of the nature of the schemes under the Act. This is because the point at issue is the relationship between the powers of approval under

the *MUD Act* and those under the 1936 Act and under the 1990 Act which replaced it. Section 6(2) of the *MUD Act* says:

> "An approved mixed use scheme will allow the development and subdivision of land in a way not otherwise permitted by law".

This suggests that a mixed use scheme approval may be inconsistent with requirements of earlier laws, for example, the 1936 and 1990 Acts. But the relationship between approvals under the *MUD Act* and those under the town planning provisions of the earlier Acts is specifically dealt with, although in an obscure way, by two other sections of the *MUD Act*, ss 8 and 53. We set out s 8 wholly, but only what appear to be the most relevant parts of s 53:

> "8.(1) A mixed use scheme may be approved only if the uses under the scheme are consistent with the planning scheme for the proposed site.
>
> (2) If a proposed use is inconsistent with the planning scheme for the site, an application to amend the planning scheme to enable the use to be lawfully established may be given to the relevant local authority with the application for approval of the mixed use scheme".
>
> "53.(1) The mixed use scheme regulates the development and use of land within the site.
>
> (2) The mixed use scheme modifies any planning scheme in force in relation to the site to the extent the planning scheme is inconsistent with the mixed use scheme.
>
> (3) However, the mixed use scheme cannot increase the uses permitted by the planning scheme".

The expression "planning scheme" which appears in both ss 8 and 53 is defined in s 3 of the *MUD Act* to have the meaning given to it by the 1990 Act. Reference to ss 1.4 and 2.1 of the 1990 Act shows that it has what one might call its ordinary meaning; that is, a "planning scheme" consists of the provisions of the scheme itself and amendments to it, zoning and regulatory maps, any strategic plan and any development control plan. It does not of course include the results of applications for consent uses. Section 8(1) requires consistency between the approved mixed use scheme and the planning scheme, as to uses; s 53(2) contemplates that the mixed use scheme may be inconsistent with the planning scheme.

[5] Were it not for s 53(3), one might reconcile ss 8(1) and 53(2) on the basis that the mixed use scheme may not modify the planning scheme in so far as land **use** is concerned. But s 53(3) implies that the uses permitted by the mixed use scheme may be different from those permitted by the planning scheme, as long as the mixed use scheme does not "increase the uses" permitted by the planning scheme; the word "increase" was, in this context, perhaps an awkward one to have used, and presumably refers to allowing any category of use not permitted by the scheme. Another difficulty, apart from the presence of s 53(3), in the suggested reconciliation is that planning schemes are in essence all about the use of land. The conclusion we draw is that s 8 and s 53 are on the face of it inconsistent with one another and their meanings are not easily reconcilable.

[6] The rule (*Ross* (1979) 141 CLR 432 at 440) that, in this situation, one treats the **later** provision as governing has been criticised: *Re Marr* [1990] 2 All ER 880 at 886; but a convincing answer to the criticism is given, in our opinion, by Bennion in his "Statutory Interpretation", Third Edition, at 903:

> "This overlooks the possibility that there may in rare cases be no means of deciding between conflicting provisions on purposive grounds, when a rule of thumb is needed".

Accepting that the rule should be applied only as a last resort (*Eastbourne Corporation v Fortes Ice Cream Parlour (1955) Ltd* [1959] 2 QB 92 at 107), it appears that it might find application here. We hold that the requirement that a mixed use scheme be approved only if the uses under it are consistent with the planning scheme, contained in s 8(1), is overridden by s 53; the result is that the mixed use scheme may be approved, and take effect, even if inconsistent with the planning scheme, except that the mixed use scheme cannot "increase" the uses permitted by the planning scheme. If the "last resort" approach is not used, but instead an attempt is made to reconcile s 8(1) with ss 53(2) and (3), as a matter of ordinary statutory construction, the result is the same; the only sensible means of reconciliation available is to treat s 8(1) as having effect subject to ss 53(2) and (3).

[7] The important point is that, treating s 53 as the governing provision, it contemplates that a mixed use scheme, when approved, may operate in a way which is inconsistent with the planning scheme; this conclusion suggests that one should be slow to imply in the *MUD Act* a restriction on the power of approval based on the principle that the planning scheme and what has been done under it must not be interfered with. More specifically, treating s 53(2) as dominant tends to support the idea that conditions of the mixed use scheme may be inconsistent with those imposed under the planning scheme.

[8] The submission advanced by Mr Hughes for the appellant, as to inconsistencies of conditions, relies in part upon the concept that planning legislation is a code of planning law: *Makucha v Albert Shire Council* [1996] 1 QdR 53 at 61. In that case it was held that the local authority had acted beyond power insofar as it attempted to achieve a planning objective by a by-law, ignoring the requirements of the planning legislation. The problem in the present case is different; it concerns the relationship between the planning legislation and another, later, statute which allows approval to be given to certain sorts of development and, on the construction we have given to it, allows that to be done in a way which is inconsistent with any planning scheme in force (but subject to s 53(3)).

[9] A second argument put forward was that, once having made a decision on a rezoning application, a local authority cannot alter it, and in particular cannot vary the conditions on which it has decided. It is unnecessary to consider the scope of any such rule, for none of the authorities relied on has to do with a problem of the present kind, where authority for a development may be given under the planning legislation and also under a separate legislative scheme.

[10] Our attention was drawn to s 4.4(13) of the 1990 Act, which has the effect that conditions imposed on approval of a rezoning application "attach to the land and are binding on successors in title". It does not appear to us that this provision throws

any light on the question of the validity of conditions of approval of a mixed use scheme which are inconsistent with those imposed on a rezoning.

[11] Mr Hughes also contended that the legal issue had been decided by his Honour Judge Quirk on 2 March 1995 in such a way as to bind the parties to the matter before his Honour, who were the appellant and the Albert Shire Council, being the local authority then having jurisdiction of the subject land; that argument must also be rejected. Reference to the reasons for decision of Judge Quirk shows that all his Honour did was to make a "preliminary ruling" on a point of law arising in an appeal then before him. The view expressed in the reasons, one with which we respectfully disagree, was in essence that no matter "properly within the province of" the 1990 Act may be made the subject matter of conditions under the *MUD Act*. No estoppel arises against the respondent, because Judge Quirk gave no judgment, but merely a "ruling". For there to be an issue estoppel, the proceedings must result in a judgment, decree or order: *Blair v Curran* (1939) 62 CLR 464 at 531, 532. Even if Judge Quirk had made a judgment, decree or order, rather than a mere ruling, it would not have been a final judgment: *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767. A truly interlocutory decision creates no issue estoppel: *Schlieske v Minister for Immigration and Ethnic Affairs* (1987) 79 ALR 554 at 574, *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506 at 538, 539.

[12] We should add that there is a controversy as to whether the court in which an issue estoppel is pleaded may "in special circumstances" give a decision in a sense contrary to that in which the matter was first decided: *Arnold v National Westminster Bank PLC* [1991] 2 AC 93 - for example, if the point is one about which there can be no rational dispute: *Tallon v Metropolitan Towers* (Appeal No 125 of 1993, 6 December 1993). And it might seem an odd outcome that a court such as the High Court of Australia should be obliged to apply the law in a way which it believes to be erroneous, on the ground that the legal point happens to have been decided by a lower court in a previous case between the same parties; see *Wall v The King [No 2]* (1927) 39 CLR 266, *Queensland v Commonwealth* (1977) 139 CLR 585 at 614, 615. But it is unnecessary to go into that question, for it is plain that a mere interlocutory ruling in the course of proceedings cannot give rise to an issue estoppel.

[13] The rezoning was effected as we have mentioned by an order of his Honour Judge Quirk of 13 July 1997 and ultimately an Order in Council was published in the Gazette of 21 November 1987 notifying amendments to the relevant scheme. In the Order in Council, under "Zone in which said Land Included and Scheme Maps Affected" one finds a description of the rezoning without reference to any conditions. The gazettal is based on the assumption which is ordinarily made, that if a rezoning is approved subject to conditions, then the amendment made to the scheme does not include the conditions. Accepting the correctness of that assumption, what is the legal status of the conditions? If they do not become part of the town planning scheme, then perhaps their effect once accepted is merely contractual. If so, there could hardly be any question of implying in the *MUD Act* a provision which one does not find there, namely that the statutory discretion to impose conditions in respect of a *MUD Act* application, given by s 29(5)(b), cannot

be exercised in such a way as to conflict with conditions imposed in respect of an earlier rezoning application. As to this aspect, there appears to be a difference between the two town planning statutes we have mentioned; the 1990 Act (s 2.23(1A)) includes conditions of approval within planning schemes but the 1936 Act, under which the relevant conditions were imposed, does not do so.

[14] Quite apart from the doctrine that an obligation to exercise a statutory discretion cannot be contracted away, there is the point that the rezoning conditions were imposed in respect of a different proposal. The difficulty of concluding that *MUD Act* conditions must not conflict with rezoning conditions is not so acute if the rezoning conditions have in some sense statutory force; but even if they have the same answer must follow. That is so for the reasons discussed above – that the *MUD Act*, subject to the restriction in s 53(3), permits approval of a mixed use scheme which is inconsistent with the town planning scheme, as amended – and also because the *MUD Act* approval in this case is one referable to a proposal significantly different from that which was the subject of the gazetted rezoning.

[15] It follows that a finding that, as is said against the council here, there is a condition imposed on the application under the *MUD Act* which is inconsistent with and more burdensome than that imposed on the rezoning application, does not necessarily make the *MUD Act* condition invalid, whatever the degree of inconsistency. The circumstance that the later condition is inconsistent with the former may of course be of assistance to a developer in the Planning and Environment Court, in support of an argument that the imposition of the condition is not reasonable (see s 29(5)(b) of the *MUD Act*) and also in support of an argument in this Court based on unreasonableness amounting to error in law.

[16] It remains to consider the question of reasonableness. The only condition which is attacked as unreasonable is condition 3 which, it is said, was approved by Judge Skoien "notwithstanding a plethora of findings of fact which militate against such a conclusion". That contains requirements dealing with flooding and drainage. It is common ground that condition 3 of the approval under the *MUD Act* is substantially more stringent than the corresponding condition imposed at the rezoning stage. The arguments in favour of unreasonableness were, to put them briefly, that for quite some years the council has let the appellant think that it could develop the site in a way which involved substantial filling; that unless such filling took place it would be impractical to erect buildings in "anything like the usual and accepted manner"; that the strict conditions with respect to flooding and draining sought to be imposed at the present stage, by the council, are a product of recent changes of thinking; and that had the appellant anticipated this, it would never have embarked on the project at the outset.

[17] The judge's views on this subject are partly contained in his Honour's discussion of the question of inconsistency of conditions – a problem which in our view does not arise – and partly with specific reference to the issue of unreasonableness. They were, in summary, as follows. His Honour was of a view that there was a "serious flooding problem" placing at risk large numbers of dwelling houses, not merely the site in question; that probably a countermeasure would be developed fairly soon which would allow the appellant to proceed with its proposals "in the intended way

or something very close to it"; that other developments now proceeding in the same flood plain have been made possible by reducing the size of the area to be developed and dedicating a large area to uses which can be low lying; that although only a small part of the presently undeveloped balance of the site could be developed until flood mitigations are carried out "at an indeterminate time in the future", it would be:

> "… contrary to the Council's public duty for it, now being aware of those dangers and disadvantages (in this case increased flooding in the event of a 100 year ARI flood), to permit a developer to create the risk of their occurrence. The evidence establishes that the consequences of that increased flooding would be widespread and seriously damaging to many people".

It is true, as the appellant submits, that on this issue there were findings made which, if they stood alone, would have been suggestive of unreasonableness; but there were also contrary findings, to which we have referred. The right balancing of these considerations was very much a factual question and it is, in our respectful opinion, impossible to characterise the learned primary judge's treatment of the matter as having led to an unreasonable result.

[18] It should be added that, in written submissions sent to the Court some weeks after the hearing the appellant discussed the question of the nature and extent of the appellant's rights under the rezoning. The argument was that the effect of the rezoning was, under the 1990 Act, to give the appellant certain rights. Our reasons have been written on the assumption that, because of the rezoning, the 1936 Act and 1990 Act vested in the appellant rights in respect of a development on the subject land, which development was to be of a similar character to that dealt with by the *MUD Act* application. For the purpose of deciding whether the *MUD Act* condition which has been challenged was validly imposed, it has been necessary to deal with the relationship of the *MUD Act's* provisions to rights acquired under the earlier legislation. But it has not been necessary to deal in detail with the nature and source of the appellant's rights under the town planning schemes. It appears to us that there are debatable questions in that area such as the effect, if any, of purported changes by agreement between the appellant and the respondent to one of the Scheme Maps referred to in the Order in Council published in the gazette of 21 November 1997. But there is no need to discuss or decide such questions.

[19] Appeal No 4844 of 1999 must be dismissed with costs. The same order must be made with respect to the earlier appeal, No 10551 of 1997.

[20] **WILLIAMS J:** I have had the advantage of reading the joint reasons for judgment of Pincus JA and Atkinson J and I only wish to add a brief observation.

[21] The Deed between the parties of 4 September 1987 which recorded the basis of the rezoning then being approved provided for the "development to be generally in accordance with the preliminary plan submitted with the application." The conditions which attached to that rezoning approval were formulated in the light of the then proposed development. The development proposed pursuant to the application under the *Mixed Use Development Act* 1993 was significantly different. That can readily be established by comparing the plan which accompanied that

application with the plans which indicated the development proposed in 1987. There will invariably be differences between a MUD development proposal and earlier proposals approved on a rezoning application; if that were not so an application pursuant to that Act would not be necessary. A reflection on that clearly indicates that the conclusion reached by Pincus JA and Atkinson J, namely that one should be slow to imply in the *MUD Act* a restriction on the power of approval based on the principle that the planning scheme and what had been done under it must not be interfered with, is correct.

[22] If the local authority takes advantage of the later application to impose conditions in the light of changed knowledge since the original conditions were imposed that is part of the price the applicant must bear for making the application under the *MUD Act.* Provided the conditions are reasonable in the light of knowledge at the time they are imposed then the fact that they are, or may be, inconsistent with the earlier conditions is irrelevant.

[23] I agree with the reasons and orders proposed by Pincus JA and Atkinson J.