SUPREME COURT OF QUEENSLAND

CITATION:	*McDonald v Douglas SC* [2002] QCA 387
PARTIES:	**JOHN JOSEPH PETER MCDONALD** (applicant) **v** **DOUGLAS SHIRE COUNCIL** (respondent)
FILE NO/S:	Appeal No 4999 of 2002 P & E Appeal No 1088 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2002
JUDGES:	Williams and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, Williams and Jerrard JJA concurring as to the orders made, Atkinson J dissenting
ORDERS:	**1. Leave to appeal granted with costs reserved** **2. Leave to cross appeal granted to the respondent with costs reserved**
CATCHWORDS:	ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – INTERPRETATION AND CONSTRUCTION – GENERALLY – consideration of the construction and effect of s 4.13(18) of the *Local Government (Planning & Environment) Act* 1990 (Qld) and the appropriate test to be applied in determining whether "a use…has ceased" for the purposes of s 4.13(18)(b) of the Act – leave to appeal granted *Integrated Planning Act* 1997 (Qld), s 4.1.56 *Local Government (Planning & Environment) Act* 1990 (Qld), s 4.13(18) *Aqua Blue (Noosa) Pty Ltd v Noosa Shire Council* [2002] QPEC 42; P & E Appeal No 5866 of 2001, 24 July 2002, considered *Friends of Stradbroke Island Association Inc and Anor* and

Sandunes Pty Ltd and Redland Shire Council (1998) 101 LGERA 161, followed
Greet v Logan City Council [2002] QCA 51; Appeal No 9827 of 2001, 25 February 2002, followed
H A Bachrach Pty Ltd v Caboolture Shire Council (1992) 80 LGERA 230, considered
Holts Hill Quarries Pty Ltd v Gold Coast City Council [2000] QCA 268; Appeal No 7006 of 1999, 14 July 2000, considered
Weightman v Gold Coast City Counci & Anor [2002] QCA 234; Appeal No 2452 of 2002, 28 June 2002, considered

COUNSEL: W L Cochrane for the applicant
D R Gore QC, with M E Rackemann, for the respondent

SOLICITORS: MacDonnells for the applicant
Williams Graham & Carman for the respondent

[1] **WILLIAMS JA:** This is an application for leave pursuant to s 4.1.56 of the *Integrated Planning Act* 1997 to appeal from a decision of a judge of the Planning and Environment Court delivered on 23 April 2002. The proceedings in that court involved, amongst other things, the proper construction of s 4.13(18) of the *Local Government (Planning & Environment) Act* 1990, and the application of that section to the relevant facts. Having heard submissions from counsel for both the applicant and the respondent I am of the view that the meaning of the section is by no means clear, and further that the appropriate test to be applied in determining whether "a use … has ceased" for purposes of s 4.13(18)(b) cannot be determined in a vacuum. At this stage this court does not have before it the full terms of the permit in question and the evidence relating to what has been done pursuant to it since it was granted. There is a subsidiary question as to whether (and if so, to what extent) off-site activities are relevant. The learned trial judge did not refer to evidence of such activities in his reasons, and if in law such activities are relevant to the application of the section then there was an error of law in failing to give them due weight.

[2] Ultimately I have come to the view that the issues raised cannot be determined in the absence of material before the Planning and Environment Court.

[3] The respondent intimated that if leave to appeal was granted it wanted to cross-appeal with respect to the construction placed by the learned judge at first instance on s 4.13(18)(a) of the Act. The grant of leave to appeal should include leave to the respondent to raise that point.

[4] In my view leave to appeal should be granted and costs reserved.

[5] **JERRARD JA:** This matter is an application for leave to appeal, pursuant to s 4.1.56(2) of the *Integrated Planning Act* 1997 (IPA), a decision of a learned judge of the Planning and Environment Court of Queensland given 23 April 2002. The judgment involved the relatively narrow issue of the correct construction of s 4.13(18)(a) and (b) of the *Local Government (Planning and Environment Act)* 1990 (the "P & E Act"). The applicant is relevantly obliged to show a reasonable prospect of demonstrating an error or mistake in law on the part of the learned judge

below.[1] The decision under appeal turned on the issue of the construction of that section.

[6] The matters relevant to the application for leave are that Town Planning Consent No 484 had been granted by the Douglas Shire Council for a Recreational Resort and Convention Centre on land at the corner of Cape Tribulation Road and Turpentine Road in the Shire of Douglas. That consent was notified to the applicant on 30 November 1990, and on 19 May 1993 Building Permit No 5124 was issued by the Douglas Shire Council to construct the buildings necessary for the development of the resort. In 1994 some physical work was done on the site pursuant to a contract entered in to "substantially start" the works required.

[7] Some works have been constructed on the site. These comprise a maintenance shed constructed on a concrete slab, a generator shed, two tank stands and three floor slabs of an area of approximately 6 metres by 6 square metres. A sewerage treatment plant has been placed, an artesian bore has been installed, and roof trusses and wall frames sufficient to complete at least two cabins have been constructed. The maintenance shed is in good condition, and the three slabs poured on the site coincide with locations shown on a building permit plan, and are generally in accordance with the Town Planning Consent. Despite this, the site has become overgrown and there is no evidence of work having been carried on on the site since June 1994.

[8] The provisions of the *P & E Act* (s 8.10(8) and (8B) and those of s 4.13(18)(a)) have the result that if the use of land or the use or erection of a building or other structure on land the subject of the Town Planning Consent had not been commenced by 15 April 1995, then the Town Planning Consent Permit granted to the applicant lapsed on that date. This is because of the provisions of s 4.13(18) which relevantly provides:

> "A permit issued pursuant to subsection (12) lapses where –
> (a) the use of land or the use or erection of a building or other structure on land, the subject of the approval in respect of which the permit was issued, has not been commenced within 4 years of the date of issue of the permit or such extended period or periods as the local government upon application being made to it therefor approves"

[9] The learned trial judge held that by reason of the various works described herein and in the judgment under appeal, building and other work required for the development of the property as a resort development had in fact commenced within the four year period provided for by the *P & E Act;* and more particularly that there had been both the commencement of the erection of buildings and a commencement of the use of the land, the subject of the approval in respect of which the permit was issued. Accordingly, it had not lapsed pursuant to s 4.13.18(a). The applicant does not complain about that finding, but the respondent had indicated an intention, should leave be granted, to cross appeal; contending that the work performed was a sham entered into solely to avoid the application of that particular subsection to that site.

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[1] See *Friends of Stradbroke Island Association Inc and Anor* and *Sandunes Pty Ltd and Redland Shire Council* (1998) 101 LGERA 161 at 163, 164 and *Greet v Logan City Council* [2002] QCA 51 at page 2.

[10] The issue in this application for leave to appeal, and what will be in issue on any appeal if leave be granted, focuses more sharply on the correct construction of 4.13(18)(b) of the *P & E Act*. It relevantly provides that a permit issued (pursuant (to subsection (12)) also lapses where:

> "(b) a use of any premises established pursuant to the permit has ceased for a period of at least 12 months."

S 4.13(18)(b) is expressed as an alternative to s 4.13(18)(a). The learned judge found that, there having been a commencement of the use, it had been "established" and the operation of paragraph (b) was thus attracted. The judge held that the word "established" qualified the word "use" and not the word "premises", and that the use under consideration was the development of the site (excluding the erection of buildings and other structures[2]) and its operation for the purpose of a resort. There having been no evidence of works being carried on on the site since June 1994, the learned judge held that work on developing the land had ceased for well over the stipulated period, and in consequence the permit had lapsed. The rights which it conferred had therefore been extinguished.

[11] The applicant argues that the learned judge was in error in treating the word "established" as qualifying "use" rather than "premises". The applicant argues that "premises" need not be read in accordance with the inclusive definition of that word provided for in 1.4 of the *P & E Act,* and that premises are "established" when they reach a stage where they may be regarded as operational for usage for the purposes for which they are intended. The applicant's argument would most comfortably construe "premises" as meaning buildings rather than land.

[12] The applicant's case was that where use had commenced, as the learned judge found had occurred here with no further work for some years, a planning authority would not be burdened with incomplete premises or development if the applicant's construction was correct. This is because a local authority could apply for a revocation of a consent pursuant to s 4.14 of the *P & E Act,* at the time that Act was in force. The applicant contended that cessation of the use of premises "established" pursuant to the relevant approval would cease where, for example, the developer closed the completed premises for in excess of 12 months because of, for example, financial difficulty. It was submitted that just as the word "use" appears to be used in two different senses in the first line of s 4.13(18)(a), only one of which is the extended definition of that word, so both the word "use" and the word "premises" in s 4.13 (18)(b) can properly be understood in their dictionary sense rather than in their statutorily extended sense.

[13] The applicant additionally complained that it necessarily follows from the ruling of the learned judge that the judge had held that "off site" activities relevant to a use (such as obtaining finance, attempting to obtain finance, obtaining relevant approvals and the like), could not prevent a finding of cessation (because the learned judge appeared to rely solely on the absence of on site work since June 1994) whereas:

- It had led evidence before the court below of extensive "off site" work from 1994 onwards.

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[2] These were excluded from consideration by reason of the definition of the word "use" in 1.4 of the *P & E Act*.

- There is a body of authority, and particularly the decision of the Planning and Environment Court in *Aqua Blue (Noosa) Pty Ltd v Noosa Shire Council* [2002] QPEC 42, to the effect that "off site" activities as described above can establish a relevant commencement under s 4.13(18)(a).

[14] The applicant argues that "off site" activities are just as relevant to a finding of non-cessation as they are to the fact of commencement. The applicant wants this court to receive the evidence it led as to those activities below, arguing that they are relevant to that finding. It says that the learned judge erred in law in his necessarily implicit ruling that those activities were not relevant to the issue of whether a use had ceased.

[15] In my judgment the applicant has a reasonable prospect of showing a mistake by the learned judge in the correct construction of s 4.13(18)(b). This is as to either the meaning of "use", or the meaning of "premises", or what it is that is qualified by the word "established", or as to what that word means. The judgment of the learned judge, in the submissions of the respondent, treats the phrase "a use of any premises established pursuant to the permit" in s 4.13(18)(b) as being the mirror image of the words "a use of land or use or erection of a building or other structure on land" in 4.13(18)(a). There is certainly an argument that this construction, if it necessarily follows from the judgment of the learned judge, is erroneous. Certainly the terminology is different.

[16] I agree with Williams JA that the issues raised by the applicant cannot be determined without learning what the evidence is of these "off site" activities, nor without examining the terms of the actual consent or permit granted to the applicant. The reasons of Atkinson J demonstrate that the decision of the learned judge may well be correct on all points, but there is at least a respectable argument to be heard that it is not, and a reasonable prospect of showing mistake. I would grant leave both to appeal and cross appeal, should the latter order be necessary, and reserve the costs.

[17] **ATKINSON J:** On 30 November 1990, the respondent, Douglas Shire Council, issued town planning consent number 484 for a recreational resort and convention centre on land located at the corner of Cape Tribulation and Turpentine Roads in the Douglas Shire, which land is more particularly described as Lot 177 on RP 840914, Parish of Alexandra, County of Solander (the "land").

[18] The consent was issued to Golbin Nominees and Zikos Nominees. On 19 May 1993, building permit number 5124 was issued by the Douglas Shire Council to Qantec Pty Ltd ("Qantec") and on 15 December 1993, Qantec entered into a contract with Emerald Waters Pty Ltd ("Emerald Waters") to "substantially start" the works. It was common ground that 15 April 1995 was the date on which the use authorised by the town planning consent was required to have commenced if it was not to lapse pursuant to s 4.13(18)(a) of the *Local Government (Planning and Environment) Act* 1990 (the "*P & E Act*"). This date is the fourth anniversary of the commencement of the *P & E Act*: see s 8.10(8)(8B).

[19] The learned primary judge found that in 1994 some physical work ("the work") was done on the site pursuant to the contract entered into on 15 December 1993. This comprised the construction of a maintenance shed, a generator shed and two tank stands on four slabs of an area of appropriately six metres by six metres with PVC

drainage cast into them. In addition a sewerage treatment plant had been placed on the site, an artesian bore had been installed and sub-grade and gravel had been placed on site to form a wet weather access road. Roof trusses and wall frames sufficient to complete at least two cabins had been constructed. The learned primary judge found that there was no other activity on the site. There is, in particular, no evidence of work being carried on on the site since June 1994 and the site has become overgrown, as might be expected in the wet tropics.

[20] The question before the learned primary judge was whether or not in these circumstances the town planning consent had lapsed pursuant to either of the paragraphs in s 4.13(18) of the *P & E Act*, which is in the following terms:

> "A permit issued pursuant to subsection (12) lapses where-
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> (a) the use of land or the use or erection of a building or other structure on land, the subject of the approval in respect of which the permit was issued, has not been commenced within 4 years of the date of issue of the permit or such extended period or periods as the local government upon application being made to it therefor approves; or
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> (b) a use of any premises established pursuant to the permit has ceased for a period of at least 12 months."

[21] The subsection sets out two circumstances in which a town planning consent may lapse. The learned primary judge found that the permit did not lapse pursuant to s 4.13(18)(a). His Honour found that the work was done specifically to avoid lapse of the town planning consent permit and so long as any approved building work had commenced within the relevant period, the permit would not lapse pursuant to subparagraph (a). There is no current appeal from that finding although the respondent has indicated an intention to cross-appeal should leave to appeal be granted. If the applicant is to be granted leave to appeal, the respondent should also, if it be necessary, be granted leave to cross-appeal.

[22] The applicant seeks leave to appeal from the finding made by his Honour that the use of any premises established pursuant to the permit had ceased for a period of at least 12 months and therefore the permit lapsed pursuant to s 4.13(18)(b).

[23] The application for leave to appeal the decision of the Planning and Environment Court is made pursuant to s 4.1.56(2) of the *Integrated Planning Act* 1997 ("IPA"). The only grounds of appeal are those set out in s 4.1.56(1) of the IPA being:

> "(a) of error or mistake in law on the part of the court; or
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> (b) that the court had no jurisdiction to make the decision; or
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> (c) that the court exceeded its jurisdiction in making the decision."

[24] The only relevant ground of appeal on this occasion is that found in s 4.1.56(1)(a). To obtain leave to argue this ground of appeal the applicant must show a reasonable prospect of showing an error or mistake in law on the part of the primary judge: see *Friends of Stradbroke Island Association Inc v Sand Dunes Pty Ltd & Redland Shire Council* (1998) 101 LGERA 161 at 163, 164; *Greet v Logan City Council* [2002] QCA 51 at p 2; and that any alleged error is one which could have materially affected the decision: see *H A Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237 – 238; *Holts Hill Quarries Pty Ltd v Gold Coast City*

Council [2000] QCA 268 at [9]; *Weightman v Gold Coast City Counci & Anor* [2002] QCA 234 at [17].

[25] The learned trial judge determined that the permit had lapsed pursuant to s 4.13(18)(b) as "a use of any premises established pursuant to the permit [had] ceased for a period of at least 12 months." His Honour first considered the meaning of the expression, "a use of any premises established pursuant to the permit", before looking at the second question, whether such a use had ceased for the relevant period. The first question involves the proper construction of the section and so, if the construction preferred by his Honour was incorrect, it could amount to an error of law. The second question involves a consideration of whether the learned primary judge improperly failed to take account of off-site activity to determine whether the relevant use had ceased. If his Honour was required to take such activity into account this could also amount to an error of law. The relevant evidence of the permit and the activities was not before the court. Whether or not such material would show an error of law is therefore speculative. The applicant has not, in my view demonstrated a reasonable prospect of showing an error of law in the finding made by the primary judge, the possibility of an error of law, without more, being insufficient.

[26] To obtain leave to argue the question of construction the applicant must show that there is a reasonable prospect of showing that the construction adopted was wrong. That matter, being a matter of construction, was able to be argued on the material before the court on the application for leave.

[27] His Honour held that a use is established pursuant to a permit once that use has been commenced which must, pursuant to s 4.13(18)(a), be within four years of the relevant date. Once a use has substantially commenced, as it had to be in this case according to the contract entered into between Qantac and Emerald Waters, then the use of the land has become established. If that use ceases for a period of at least 12 months, then the permit lapses. The learned primary judge set out his relevant findings at para [34] as follows:

> "A permit issued pursuant to subsection 12 of the section confers the rights which are mentioned in subsection 16, but until those rights are exercised the use or uses involved has or have not commenced, which is to say they have not come into existence, and if that remains the situation for the prescribed period of four years then those rights cease to exist as a consequence of the lapse of the permit. In my opinion it is a natural use of language to say that once the use has commenced, and thus come into existence, it has been 'established' and the operation of para (b) is thus attracted. In the present case the use under consideration is the development of the site (excluding the erection of buildings and other structures) and its operation for the purpose of a resort. That use, in my view, was established when work upon the site, other than building construction, commenced, as in my view it did, within the four year period prescribed in para (a). The use was then established for the purposes of para (b)."

[28] In determining the meaning of the phrase his Honour observed that the word "established" qualifies the word "use" and not "premises". That would seem to be correct. In this context, "established" is a past participle used adjectivally. A "use" may be established; premises are completed or built rather than established. The

past participle is of the verb "to establish". It can been seen from the meanings given to "establish" in the usual dictionaries, the Oxford and the Macquarie, that "establish" qualifies abstract nouns such as "business", "church", "custom" or a person such as "oneself" rather than concrete nouns. "Use" is an abstract noun whereas "premises" is an example of a concrete noun. It is therefore likely that "established" was intended to qualify the abstract noun "use" rather than the concrete noun "premises".

[29] The erection of buildings or other structures is not a "use" of the land in this legislation. "Use" is defined in s 1.4 of the *P&E Act* to include in relation to land, the carrying out of excavation work in or under the land and the placing on land of any material or thing which is not a building or structure and any use which is incidental to and necessarily associated with the lawful use of the relevant land. That use has clearly commenced. The words "pursuant to the permit" merely identify the use as one which is in accordance with the permit.

[30] His Honour rejected the alternative view that the use is established when the whole development is up and running. While he accepted that was a possible meaning of the expression, it suffers from a lack of clarity and certainty which makes it unlikely that meaning was intended by the legislation. Secondly, it would leave a lacuna in the operation of subsection (18) because there would be no provision for lapse of the permit once the use had commenced, unless and until the use became "established" in that sense, which might not occur for a very long time, if at all. If it were otherwise, the use could be commenced and then the site abandoned indefinitely without the permit ever lasping. This hardly seems consistent with proper planning principles.

[31] Arguments have been put forward by the applicant as to an alternative construction of the section which would mean that a permit does not lapse if on-site work ceases for one year once construction in accordance with the permitted use has commenced. The permit would only lapse if, after all of the development envisaged by the town planning permit had been completed, that use of the land ceased for at least 12 months. The applicant argues that the ambiguity of the terminology used in s 4.13(18)(b), means that the applicant has a reasonable prospect of showing an error or mistake of law on the part of the primary judge and that such error, if there be one, could have materially affected the outcome. However, in my view, any ambiguity in the section, if there is any, was correctly resolved by the learned primary judge. The construction of s 4.13(18)(b) preferred by the learned primary judge appears to me to be correct. Accordingly leave to appeal should be refused.

[32] If leave were to be granted, in accordance with the reasons of the majority it would be appropriate to allow the respondent to cross-appeal.

Orders

1. Refuse leave to appeal.
2. The applicant pay the respondent's costs of the application for leave to appeal.