

SUPREME COURT OF QUEENSLAND

CITATION: *Netstar P/L v Caloundra City Council* [2004] QCA 296

PARTIES: **NETSTAR PTY LTD** ACN 058 304 573 **AS TRUSTEE OF THE PALMER MOTEL UNIT TRUST**
(applicant/appellant)
v
CALOUNDRA CITY COUNCIL
(respondent/respondent)

FILE NO/S: Appeal No 9010 of 2003
SC No 6622 of 2003

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 August 2004

DELIVERED AT: Brisbane

HEARING DATE: 24 May 2004

JUDGES: McMurdo P, Williams JA and Atkinson J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs to be assessed**

CATCHWORDS: ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – POWERS ON APPEAL – DECLARATORY RELIEF – where appellant sought declaration in Supreme Court regarding lawfulness of land use and respondent later sought declarations in Planning & Environment Court regarding same matter – where appellant submitted that relief sought in Supreme Court was broader than simple declaration and largely outside jurisdiction of Planning & Environment Court and that Supreme Court was most convenient forum to hear the dispute – where appellant sought stay of Planning & Environment Court proceedings until determination of Supreme Court proceedings – whether Planning & Environment Court had exclusive jurisdiction under IPA to grant the declarations sought

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – whether Planning & Environment Court

was more appropriate forum for declaration regarding lawfulness of land use or development

Integrated Planning Act 1997 (Qld), s 4.1.2, s 4.1.21

Local Government Act 1936-1984 (Qld), s 33(6B)

Bathurst City Council v Saban (1985) 2 NSWLR 704, cited
Cameron v Noosa Shire Council [1998] 1 Qd R 124,
considered

CSR Ltd v Pine Rivers Shire Council [1995] 1 Qd R 234,
considered

COUNSEL: J W Peden for the appellant
D R Gore QC, with R S Litster, for the respondent

SOLICITORS: Blake Dawson Waldron for the appellant
Phillips Fox for the respondent

- [1] **McMURDO P:** The Palmer Motel Unit Trust has beneficially owned land at Ridgewood Road, Little Mountain, Caloundra since 1983. The appellant ("Netstar") is the present trustee and registered proprietor of the land. On 30 August 1984 the then trustee of the land¹ entered into an agreement under seal with the respondent Council² ("the Council") stating:

"(A) The Minister of Local Government has recommended to the Governor in Council that the [owner of the land] be granted approval pursuant to Chapter 49 of the Interim Development By-Laws of the said Council for the erection and use of up to 60 town houses ...; and

(B) This recommendation is in accordance with the power imposed for that purpose under Section 33(6B) of the Local Government Act 1936-1984; and

(C) The Council and the [owner of the land] have reached agreement on the development conditions that are to be imposed by the Council for the construction of the said development which conditions are contained in the Schedule hereto."

- [2] On 15 November 1984 the Governor-in-Council under s 33(6B) *Local Government Act* 1936-1984 (Qld) approved the recommendation of the Minister for Local Government that the land be developed on those terms and conditions. A further Order-in-Council of 6 December 1984 amended the earlier Order by omitting one development condition.
- [3] Despite the agreement and approval, there was no development on the land for many years. In May 2002 Netstar lodged with the Council a development application for the construction of eight townhouses, an office and a carport. The Council conditionally approved this application on 18 July 2002; it must also comply with the conditions of the 1984 Order-in-Council. Netstar lodged a further development application in December 2002 which was refused in February 2003 because it did not comply with the conditions of the 1984 Order-in-Council. On 16 April 2003, the Council's Councillor Cristaudo sent a letter to landowners concerned about the development, including Netstar, stating the Council intended to refer the

¹ Legal and Specialized Accounts Pty Ltd.

² Then the Council of the Shire of Landsborough.

matter to the Planning & Environment Court for "clarification as to its lawful requirements".

- [4] On 22 April 2003 Netstar filed an application in the Supreme Court ("the first Supreme Court application") for a declaration that the 1984 agreement was valid and subsisting as between the parties.³
- [5] On 24 June 2003 the Council filed an application in the Planning & Environment Court ("the Planning & Environment Court application") for declarations that the 1984 Order-in-Council is of no continuing force and effect; that the land may not be lawfully used for the purpose referred to in the 1984 Order-in-Council; that the purported approval of building works on 18 July 2002 was ultra vires and such further or other declarations and orders as the Court considered appropriate.
- [6] On 25 July 2003 Netstar brought a further application in the Supreme Court ("the second Supreme Court application") seeking a declaration that the Planning & Environment Court does not have jurisdiction to make the declarations sought before it. At the hearing on 28 August 2003 Netstar amended its application to also seek an order that the Planning & Environment Court application be stayed until the first Supreme Court application was determined or that the Council be restrained from proceeding with the Planning & Environment Court application until both Supreme Court applications were determined.
- [7] The learned primary judge refused this application, holding that the Planning & Environment Court had exclusive jurisdiction to determine the matters raised in the earlier applications because the issues for determination in both courts were essentially the same, namely whether the Order-in-Council conferred on Netstar a right to develop the land;⁴ the agreement between the parties could have no legal effect if the 1984 Order-in-Council was no longer in force; both applications concerned "the lawfulness of land use or development" so that the Planning & Environment Court had exclusive jurisdiction under s 4.1.21 *Integrated Planning Act 1997* (Qld) ("IPA").⁵
- [8] Netstar appeals from that decision, contending that the learned primary judge erred in assessing the nature and extent of the dispute between the parties and in concluding that the Planning & Environment Court had exclusive jurisdiction to determine those issues. It has rights under the 1984 agreement and Order-in-Council; equitable rights preventing the Council from denying its right to develop in accordance with the agreement and Order-in-Council; rights of specific performance under the agreement and a claim for damages and for costs of its Supreme Court actions. Although Netstar's first Supreme Court application did not encompass those claims, they were included in Netstar's affidavit material and submissions to his Honour. Netstar's counsel has attached a draft statement of claim to his outline of argument on this appeal and, if successful, Netstar proposes to apply to proceed on the first Supreme Court application as a claim and to file the present draft statement of claim in that action. Netstar contends that the learned primary judge's decision has the consequence that it will now be required to litigate essentially the

³ The application also sought a declaration that the development could proceed at once or in stages under the agreement but Netstar later indicated its intention not to proceed with this part of the application.

⁴ Reasons for judgment, para 11.

⁵ Above, para 30.

same factual issues in respect of different claims in both the Planning & Environment Court and the Supreme Court because the Planning & Environment Court does not have jurisdiction to fully determine its damages claim and its costs claim.

- [9] Netstar also contends that s 4.1.21(5) IPA is confusing and suggests that the Planning & Environment Court's jurisdiction to make declarations is not exclusive; to find otherwise would create an absurd and unreasonable result so that reference may be made to the Explanatory Notes⁶ which make clear that the jurisdiction is not exclusive. Those relevantly provide:

"Court may make declarations

Clause 4.1.21 describes the power of the court to hear and decide declaratory matters under the Bill. The clause allows for any person to initiate a proceeding for a declaration. The court has jurisdiction to make declarations about [the matters listed in s 4.1.21(a)-(d)].

The court's jurisdiction under this clause does not fetter the jurisdiction of other courts to make declarations on the same matters where matters have been brought in that jurisdiction."

- [10] Netstar further contends that where, as here, the issues between the parties are broader than just a declaration under s 4.1.21 IPA, then the Supreme Court has concurrent jurisdiction and the primary judge should have exercised his discretion to determine that the more appropriate forum was the Supreme Court.

- [11] The first issue is whether the Planning & Environment Court had exclusive jurisdiction to hear and determine the application before it because, if so, the appeal fails. The jurisdiction of the Planning & Environment Court is conferred by IPA, s 4.1.2 of which relevantly provides:

"Jurisdiction of court

(1) The court has the jurisdiction given to it under any Act, including the jurisdiction to hear and decide every appeal made under this Act for the review of a decision of a tribunal.

(2) Subject to s 4.2.7,⁷ the jurisdiction given to the court under this Act is exclusive.

..."

- [12] The purpose of IPA is to seek to achieve ecological sustainability⁸ by coordinating and integrating planning at the local, regional and State levels; managing the

⁶ See *Acts Interpretation Act 1954* (Qld), s 14B.

⁷ IPA, s 4.2.7 concerns the jurisdiction given to building and development tribunals and has no relevance here.

⁸ See IPA, s 1.3.3; ecological sustainability is a key definition, defined in s. 1.3.3: "'**Ecological sustainability**' is a balance that integrates –

- (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
- (b) economic development; and
- (c) maintenance of the cultural, economic, physical and social wellbeing of people and communities."

process by which development occurs and managing the effects of development⁹ on the environment (including managing the use of premises¹⁰).¹¹

- [13] Whilst the definition of many terms is contained in the dictionary in sch 10 to IPA, the following key definitions are contained within IPA itself:

"Division 2 – Key definitions

1.3.2 Meaning of 'development'

'Development' is any of the following –

- (a) carrying out building work;¹²
- (b) carrying out plumbing or drainage work;
- (c) carrying out operational work;¹³
- (d) reconfiguring a lot;¹⁴
- (e) making a material change of use¹⁵ of premises.

...

1.3.4 Meaning of 'lawful use'

A use of premises is a 'lawful use' of the premises if –

- (a) the use is a natural and ordinary consequence of making a material change of use of the premises; and
- (b) the making of the material change of use was in accordance with this Act."

- [14] Section 4.1.21 IPA gives the court power to make declarations in these terms:

"(1) Any person may bring proceedings in the court for a declaration about –

- (a) a matter done, to be done or that should have been done for this Act ...; and
- (b) the construction of this Act and planning instruments¹⁶ under this Act; and
- (c) the lawfulness of land use or development; and
- (d) an infrastructure charge.¹⁷

...

(5) The court has jurisdiction to hear and decide a proceeding for a declaration about a matter mentioned in subsection (1).

(6) If a person starts a proceeding under this section, the person must, the day the person starts the proceeding, give the chief executive written notice of the proceeding."

- [15] Ordinarily, where two courts have overlapping jurisdiction, it is presumed that the jurisdiction of a superior court such as the Supreme Court of Queensland, which has jurisdiction over any and every justiciable matter within its territorial jurisdiction, will prevail. This presumption can be rebutted by the clear words of statutes.

⁹ Above, s. 1.3.2.

¹⁰ Above, sch 10, which defines "premises" as "(a) a building or other structure; or (b) land (whether or not a building or other structure is situated on the land)."

¹¹ Above, s 1.2.1.

¹² Defined in s 1.3.5 IPA.

¹³ Above.

¹⁴ Above.

¹⁵ Above.

¹⁶ Above, sch 10.

¹⁷ Above, s 5.1.5.

- [16] The Planning & Environment Court application concerned the effect of the 1984 agreement and Order-in-Council as to the building and use of 60 townhouses. It was plainly an application for a declaration about "the lawfulness of land use or development" under s 4.1.21(1)(c) in the light of the definitions of "development"¹⁸ and "lawful use".¹⁹ The distinction between s 4.1.21(1) which allows a party to bring proceedings in the Planning & Environment Court for such a declaration and the jurisdiction conferred on that court to hear and decide the application under s 4.1.21(5) once made under s.4.1.21(1) is significant. IPA's predecessor, the *Local Government (Planning & Environment) Act 1990 (Qld)* ("the previous Act") made a similar distinction.²⁰ Once a person brings an application under s 4.1.21(1), the Planning & Environment Court has exclusive jurisdiction because of s 4.1.21(5) and s 4.1.2(2). Nothing in IPA excludes a person from bringing an application in the Supreme Court which could have been made under s 4.1.21(1), if no like application has been brought in the Planning & Environment Court. This means that where all parties consider a declaration which could also be brought in the Planning & Environment Court is most conveniently and sensibly determined in the Supreme Court, then the Supreme Court will have jurisdiction. The jurisdiction conferred by s 4.1.21 IPA is specific and limited and will be strictly construed so as to minimise its impingement on the wide jurisdiction of the Supreme Court of Queensland: *Bathurst City Council v Saban*.²¹ The clear combined effect of the wording of s 4.1.2(2) and s 4.1.21(1) and (5) is that, because the Council has brought an application for a declaration about the lawfulness of land use or development, the Planning & Environment Court has exclusive jurisdiction to hear that application.
- [17] One potentially unattractive result of this construction is that it could encourage parties to forum-shop. In this respect I am cognisant of the Planning & Environment Court's limited jurisdiction to award costs,²² but the legislature intended that responsible individuals should not be deterred from having access to the Planning & Environment Court by the threat of a crippling costs award against them: see *Mudie v Gainriver Pty Ltd & Anor*.²³ In any case, that court has a limited discretion to award costs, for example, if the proceeding was instituted merely to delay or obstruct.²⁴
- [18] The construction I would give s 4.1.21 is consistent with that given by this Court to the similar provisions in the previous Act in *Cameron v Noosa Shire Council*,²⁵ impliedly overturning the single judge decision in *Makucha v Albert Shire Council & Anor*.²⁶ It also seems consistent with the observations of Macrossan CJ and Fitzgerald P in *CSR Ltd v Pine Rivers Shire Council*.²⁷ This construction seems in harmony with the legislative intent discernible from the purpose and scheme of IPA,

¹⁸ IPA, s 1.3.2.

¹⁹ Above, s 1.3.4. The application may also arguably have been made under either s 4.1.21(1)(a) or (b) but it is unnecessary to discuss this aspect further.

²⁰ The previous Act, s 2.24(1) and s.2.24(3).

²¹ (1985) 2 NSWLR 704, 709.

²² IPA, s 4.1.23.

²³ [2002] QCA 546, [2003] 2 QdR 271, [34].

²⁴ Above, s 4.1.23(2)(a).

²⁵ [1998] 1 QdR 124, Pincus and Davies JJA, Shepherdson J agreeing, 131-132.

²⁶ [1995] 1 QdR 518; (1993) 81 LGERA 243. I note that Pincus JA's obiter remarks in *Council of the Shire of Noosa v T M Burke Estates Pty Ltd & Anor* [2000] 1 QdR 398; (1998) 100 LGERA 318, 323 were not agreed with by the other members of the court and his Honour does not seem to have been referred to the passage in *Cameron* cited above.

²⁷ [1995] 1 QdR 234, 242 at [16].

namely that the Planning & Environment Court should have exclusive jurisdiction on those matters conferred on it by the legislature under IPA, whilst recognising that in some instances it will be in the best interests of all concerned to have applications for declarations which could have been brought under IPA determined by another court.

- [19] In my view, the ordinary meaning of the words contained in s 4.1.21 and s 4.1.2(2) is unambiguous and does not provide a manifestly absurd and unreasonable result. I agree with the learned primary judge that it is therefore unnecessary to refer to the Explanatory Notes to construe them.²⁸ The construction I would give s 4.1.21, however, sits comfortably with the Explanatory Notes.
- [20] It follows that the learned primary judge was right to refuse to declare that the Planning & Environment Court does not have jurisdiction to make the declarations sought by the Council and the appeal should be dismissed with costs.
- [21] If I am wrong in my construction of IPA and it does not give exclusive jurisdiction to the Planning & Environment Court here, a choice must be made as to the more appropriate forum. The Planning & Environment Court is a specialist court set up by the legislature to deal with questions such as those raised in Netstar's first Supreme Court application and by the Council in its application to the Planning & Environment Court. If the Council is successful in obtaining the declaration it seeks, then it is difficult to see that Netstar will have any significant claim for damages because the Order-in-Council giving approval for the erection and use of up to 60 townhouses would be ineffectual. The determination of the validity and currency of the 1984 agreement and Order-in-Council is essential before the determination of the other issues which Netstar has indicated it now intends to pursue in the Supreme Court. It is common for a central matter, which could finally determine the outcome of the issues between the parties, to be determined first. These matters all favour the determination of the preliminary issue, the application for the declaration, in the specialist Planning & Environment Court. On this alternative basis I would also dismiss the appeal with costs.

ORDER:

Appeal dismissed with costs to be assessed.

- [22] **WILLIAMS JA:** In my view the essential matters which the parties wish to litigate are within the exclusive jurisdiction of the Planning and Environment Court given s 4.1.2 and s 4.1.21 of the *Integrated Planning Act 1997*. I agree generally with the President's reasons for judgment which I have had the advantage of reading. The appeal should be dismissed with costs to be assessed.
- [23] **ATKINSON J:** I agree that the appeal should be dismissed, with costs to be assessed, for the reasons given by McMurdo P.

²⁸ *Acts Interpretation Act 1954 (Qld)*, s 14B.