SUPREME COURT OF QUEENSLAND

CITATION:	*Stevenson Group Investments Pty Ltd v Nunn & Ors* [2012] QCA 351
PARTIES:	**STEVENSON GROUP INVESTMENTS PTY LTD** ACN 101 112 127 (applicant) **v** **GRAHAM NUNN** (first respondent) **CODD STENDERS** (second respondent) **TANGALOOMA PTY LTD** ACN 010 997 707 (third respondent) **TANGALOOMA ISLAND RESORT PTY LTD** ACN 010 170 902 (fourth respondent) **BRISBANE CITY COUNCIL** (fifth respondent) **R J & R M LEVER PTY LTD** ACN 065 450 231 (sixth respondent) **HIDEBOURNE PTY LTD** ACN 010 652 436 (seventh respondent) **TANGALOOMA PHOTO SHOP PTY LTD** ACN 113 674 427 (eighth respondent) **TANGALOOMA MORETON ISLAND RESORT PTY LTD** ACN 122 809 812 (ninth respondent)
FILE NO/S:	Appeal No 1117 of 2012 Appeal No 2670 of 2012 P & E Appeal No 1861 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	11 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 July 2012

JUDGES: Margaret McMurdo P and Fraser JA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **In Appeal No 1117/2012, the application for leave to appeal is refused with costs.**
2. **In Appeal No 2670/2012, the application for leave to appeal is refused with costs.**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – where applicant purchased units in a building in 2005-2006 – where other units in the building had now been on-sold – where the applicant applied for a declaration under s 4.1.21 *Integrated Planning Act* 1997 (Qld) (IPA) that building permit issued by a private certifier (first respondent) in 2004 was void and of no legal effect – where applicant continually amended its pleadings – where matter listed for a seven day trial but was adjourned when applicant's expert witness provided a new report two days before trial – where the respondents' application for summary judgment against the applicant was granted – whether alleged non-compliance with the IPA was a jurisdictional error such that it rendered the private certifier's building permit void and of no legal effect – whether the primary judge erred in finding that a court would not grant the declaration sought by the applicant in the exercise of its discretion

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where matter listed for a seven day trial but was adjourned when applicant's expert witness provided a new report two days before trial – where that judge also granted the respondents' application to adjourn the trial due to the new material – where s 4.1.23 IPA provides that in the ordinary course each party must bear their own costs for a proceeding – where primary judge ordered the applicant pay the costs of the fifth respondent (Brisbane City Council) thrown away by the adjournment of the trial – whether the primary judge erred in finding the proceeding was frivolous or vexatious pursuant to s 4.1.23 IPA – whether the primary judge erred in ordering the applicant to pay the costs of first to third and fifth to eighth respondents

Integrated Planning Act 1997 (Qld), ch 3, s 4.1.5A, s 4.1.23, s 5.3.4
Standard Building Regulation 1993 (Qld), s 22

Baevski v Gladstone Regional Council & Ors; Sea Breeze (Qld) Pty Ltd v Gladstone Regional Council & Ors (2009) 167 LGERA 375; [2009] QPEC 5, distinguished
Barro Group Pty Ltd v Redland Shire Council [2010] 2 Qd R 206; [2009] QCA 310, discussed

Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24, cited
Bundaberg Regional Council v Ross & Anor [2012] QPELR 322; [2011] QPEC 137, distinguished
Craig v South Australia (1994) 184 CLR 163; [1995] HCA 58, cited
Fawkes Pty Ltd v Gold Coast City Council [2008] 2 Qd R 1; [2007] QCA 444, discussed
Livingstone Shire Council v Brian Hooper & M3 Architecture & Ors [2004] QPELR 308; [2003] QPEC 63, discussed
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30, cited
Mudie v Gainriver Pty Ltd (No 2) [2003] 2 Qd R 271; [2002] QCA 546, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, considered
Stevenson Group Investments Pty Ltd v Nunn & Ors [2012] QPELR 392; [2011] QPEC, related
Stevenson and Ors v Nunn and Ors [2011] QPELR 718; [2011] QPEC 74, related
Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335; (1987) 63 LGRA 361, cited

COUNSEL: S Keim SC, with D Fahl, for the applicant
D Kelly SC, with M Johnston, for first to fourth, sixth, seventh and ninth respondents
M Williamson for the fifth respondent

SOLICITORS: Clinton Mohr Lawyers for the applicant
Hopgood Ganim Lawyers for first to fourth, sixth, seventh and ninth respondents
Brisbane City Legal Practice for the fifth respondent

[1] **MARGARET McMURDO P:** During 2005 and 2006, the applicant, Stevenson Group Investments Pty Ltd, purchased as sublessee six of 16 units in a development called "Deep Blue 1" ("the building") at Tangalooma on Moreton Island. The vendor was the developer, the fourth respondent, Tangalooma Island Resort Pty Ltd which has a perpetual lease over the land on which the building stands. Together with the third respondent, Tangalooma Pty Ltd, it conducts a resort on the land. Others have purchased subleases of units in the building, including the sixth respondent, R J & R M Lever Pty Ltd (unit 7); the seventh respondent, Hidebourne Pty Ltd (unit 6); the eighth respondent, Tangalooma Photo Shop Pty Ltd (a ground floor photo shop) and the ninth respondent, Tangalooma Moreton Island Resort (a ground floor real estate agency and conference facility). The applicant was concerned about aspects of the building's construction and commenced various unrelated proceedings. On 3 July 2009, it filed an application in the Planning & Environment Court seeking a declaration under s 4.1.21 *Integrated Planning Act* 1997 (Qld) (IPA) (now repealed)[1] that the building permit for the building dated 28 July 2004 and issued by the first respondent, Graham Nunn as a private certifier, was void and of no legal effect. The second respondent, Codd Stenders, was the

[1] It is common ground that the relevant reprint is Reprint No 5 and that IPA, although repealed, has application by way of the transitional provisions in s 818(1) *Sustainable Planning Act* 2009 (Qld).

architect who lodged the development application resulting in the permit. It is convenient to refer to the for first to fourth, sixth, seventh and ninth respondents, who have been represented by the same lawyers, as the Tangalooma respondents. The fifth respondent, the Brisbane City Council, was and is the local government authority for the land on which the building stands.

[2] On 11 September 2009, his Honour Judge Robin QC ordered the applicant to file and serve a statement of claim instead of further amending its originating application, which it had amended twice already (on 7 and 25 August 2009). The Queensland Fire and Rescue Service (QFRS) was at this time the 16th respondent. QFRS availed itself of Judge Robin's order that day granting liberty to it and others to signify in writing to the Registrar that it did not wish to participate in the proceeding.

[3] The applicant filed five further versions of its statement of claim before its application came on for an anticipated seven day hearing on 26 May 2011 before Judge Robin. His Honour gave leave to the applicant to further amend its statement of claim to reflect a new fire safety expert report it had sent the respondents on 24 May. Judge Robin also granted the respondents' application to adjourn the trial because of this new material and reserved the question of the respondents' costs thrown away by the adjournment. The applicant filed and served two further amended statements of claim on 30 May and 3 June 2011.

[4] On 14 July 2011, the Tangalooma respondents, with the Council's support, applied for summary judgment in the applicant's application or, in the alternative, to strike out the applicant's most recent amended statement of claim, in whole or in part, with no leave to replead. When served with that application, the applicant filed an application seeking leave to again amend its pleading.

[5] His Honour Judge Searles heard the applications on 17 and 18 October 2011. The parties agreed that the two applications should be heard together and that the judge should consider the summary judgment application by reference to the applicant's proposed amended statement of claim and on the basis that the applicant had established all its pleaded material facts.[2] On 22 December 2011, his Honour gave summary judgment for the Tangalooma respondents and dismissed the applicant's application to amend its pleadings. The applicant seeks leave to appeal from those orders under s 4.1.56 IPA (Appeal No 1117/2012).

[6] On 17 February 2012, Judge Searles ordered that the applicant pay the costs of the Tangalooma respondents of and incidental to the proceeding on a standard basis and the costs of the Council thrown away by the adjournment of the trial on 26 May 2011 on the standard basis. The applicant seeks leave to appeal from those orders[3] under s 4.1.56 IPA (Appeal No 2670/2012).

[7] With the consent of the parties, this Court considered the merits of the proposed grounds of appeal in determining whether to grant leave to appeal in each case.

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2 The proposed further third amended statement of claim sought for the first time a second declaration, that the construction of the building was a development offence under IPA. That declaration was not considered in the application before Judge Searles or in this application. At the hearing of this application, counsel for the applicant confirmed that the only relief sought was a declaration that the building permit was void and of no legal effect (T1-9).

3 *Stevenson Group Investments P/L v Nunn & Ors* [2012] QPELR 410; [2012] QPEC 7.

The application for leave to appeal from the summary judgment order (Appeal No 1117/2012)

The applicant's contentions

[8] Under s 4.1.56 IPA, the applicant must demonstrate that Judge Searles made an error or mistake of law and obtain this Court's leave before any appeal can be heard. The applicant contends that Judge Searles' decision granting the respondents summary judgment was materially affected by errors of law which concern important questions of statutory construction. The outcome of the proposed appeal is of importance to the applicant and raises safety issues of general concern. For those reasons, the applicant contends, leave to appeal should be given. In its proposed grounds of appeal it makes two broad contentions.

[9] The first broad contention is that the judge erred in not finding that the alleged non-compliances with IPA had the result that the permit issued by Mr Nunn was and has always been void and of no legal effect. That contention has three prongs.

[10] The first prong is that the developer failed to give QFRS, a referral agency under IPA, a copy of the development application before Mr Nunn decided whether to issue the permit as mandated by s 3.3.3 IPA. As a result, QFRS's response was not received and considered by Mr Nunn, as required by s 3.5.4(2) IPA read together with the definition of "common material" in sch 10 IPA, when he granted the permit. The importance of giving a referral agency a copy of the development application is demonstrated by the following aspects of IPA. The application lapses if it is not referred within three months (s 3.2.12(1) and (2)(a)). The developer must give the private certifier written notice of the day on which it gives the referral agency a copy of the development application (s 3.3.4(1)). The referral agency must assess the application against the laws administered and applied by the referral agency (s 3.3.14 and s 3.3.15). The referral agency may provide a response including advice and recommendations to the private certifier (s 3.3.16) and may recommend conditions or recommend that the application be refused (s 3.3.19). Section 3.5.1 IPA strongly suggests that completion of the referral stage is a precondition to the right of the private certifier to make a decision on the application so that s 4.1.5A IPA cannot operate: see *Barro Group Pty Limited v Redland Shire Council.*[4] It was of serious public concern that the permit did not meet fire safety requirements. The applicant has called this aspect of its claim the referral failure.

[11] The second prong is that Mr Nunn, in issuing the permit, purported to approve a development which was inconsistent with plans dated 26 August 1983. These plans were part of the existing planning approval which had not lapsed. Contrary to s 5.3.4 IPA, the building approval had to be generally in accordance with those plans. The applicant's proposed pleadings claimed that the permit allowed for three buildings, each with a greater footprint than any of the seven buildings in the 1983 approved plans. There was minimal space in between the three buildings, all of which were located closer to the beach and the ocean than in the 1983 plans. The permit provided less satisfactory landscaping than in the 1983 plans. It allowed for approximately 13,000 sq m of gross floor area, an increase of approximately 37 per cent on the 1983 plans. For these reasons, the permitted building works were not generally in accordance with the 1983 approved plans. Non-compliance with planning approval was a serious public concern. The applicant has called this aspect of its claim the inconsistency failure.

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4 [2010] 2 Qd R 206, 255-256 [54], 226 [57], 228 [64].

[12] Alternatively, the applicant contended in its proposed amended statement of claim[5] that it was a condition of the planning approval that the development would be carried out generally in accordance with the 1983 plans. The construction of the building breached a condition of the planning approval contrary to s 4.3.3 IPA, constituting a development offence under s 4.3.3(f). This alternative contention seems to relate to the declaration, sought for the first time in the proposed pleadings, that the carrying out of the building work constituted a development offence under IPA. It was not raised in the applicant's submissions and seems inconsistent with the concession made by the applicant's counsel at the hearing that it was seeking only a declaration that the permit was void and of no legal effect.[6] In any case, this alternative contention seems doomed to fail on the basis that such a declaration would be futile. That was because any proceeding for an offence against IPA must start within one year of its commission or within six months of the offence coming to the complainant's knowledge (s 4.4.2). I will not discuss this contention further other than to note that I am unpersuaded it has been made out.

[13] The third prong is that Mr Nunn did not comply with s 22 *Standard Building Regulation* 1993 (Qld) (SBR) made under the *Building Act* 1975 (Qld) when he issued the permit. Under s 3.5.13(3)(a), the permit must not conflict with the *Building Act*. This requirement is so unequivocally stated that any permit issued in contravention of it must be invalid. Non-compliance with the mandatory requirements of s 22 was not non-compliance with an inconsequential procedural matter. It involved the integrity and safety of the building. The applicant has called this aspect of its claim the condition failure.

[14] The applicant contends that, as a consequence of any or all of these non-compliances with IPA, the permit issued by Mr Nunn was void and of no legal effect. The non-compliance involved jurisdictional error so that the permit was always invalid; s 3.1.5(3) has no application and s 4.1.5A IPA cannot be invoked to waive the non-compliance.

[15] The applicant's second broad contention is that the judge erred in finding that a court would not grant the declaration sought by the applicant in the exercise of its discretion.

[16] The applicant contends that, as a result of these errors, Judge Searles wrongly concluded that it had no real prospect of success at trial. This Court should grant leave, allow the appeal, set aside Judge Searles' orders; instead, dismiss the application for summary judgment and order the Planning & Environment Court to determine the applicant's application for leave to amend its pleadings; and the respondents should pay its costs.

Relevant aspects of the IPA

[17] It is essential to the determination of these issues to understand the relevant aspects of the IPA scheme.

[18] IPA's purpose is to seek to achieve ecological sustainability by coordinating and integrating planning at the local, regional and State levels; managing the process by which development occurs; and managing effects of development on the environment (including managing the use of premises) (s 1.2.1). An entity, including an assessment manager or a referral agency exercising functions or powers under IPA, must have regard to IPA's purpose (s 1.2.2).

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5 AB 1018, paras 66-67.

6 Transcript of the appeal hearing 1-9.

[19] Chapter 3 deals with the integrated development assessment system (IDAS) for integrating State and local government assessment and approval processes for development (s 3.1.1). IDAS involves four possible stages. The first is the application stage. It is not suggested there was any flaw in the application stage in this case. The second is the information and referral stage. The third is the notification stage. And the fourth is the decision stage. Not all stages or parts of a stage apply to all applications (s 3.1.9). Under the information and referral stage, a development permit is necessary for assessable development (s 3.1.4). A development permit authorises assessable development to occur to the extent stated in the permit and subject to the conditions in the permit (s 3.1.5(3)(a) and (b)(i)).

[20] An application for development approval must be made to the assessment manager (here, Mr Nunn as private certifier under s 3.1.7 and Ch 5, pt 3). The development application lapses if the developer does not refer the application to a referral agency within three months (s 3.2.12(1) and (2)(a) and s 3.3.3(1)(a)). The applicant for a development approval "must give" a referral agency (here QFRS) a copy of the application and other specified material (s 3.3.3). The information and referral stage ends when, relevantly, "all referral agency responses have been received by the assessment manager or, if all the responses have not been received, all referral agency assessment periods have ended" (s 3.3.20(2)(c)). The developer must give the assessment manager written notice of the day on which it complied with this requirement (s 3.3.4(1)). A referral agency may provide a response during the referral agency assessment period if it wishes to recommend conditions that should attach to any approval, recommend that the application be refused, offer advice to the assessment manager about the application; or it may state that it has no advice to offer (s 3.3.14 to s 3.3.19).[7]

[21] The notification stage follows (s 3.4.1 to s 3.4.10). It is common ground that this development application did not require public notification as it was code assessable (as opposed to impact assessable where public notification is required). A private certifier like Mr Nunn must assess a code assessable development application against applicable codes and the common material (s 3.5.4(2)). IPA defines "**common material**" for a development application as including referral agency recommendations and contents of submissions that have been accepted by the assessment manager.[8]

[22] The final stage is the decision stage (s 3.5.1 to s 3.5.37). Section 3.5.1 provides:

> "**3.5.1 When does decision stage start**
>
> **(1)** If an acknowledgement notice or referral to a building referral agency for an application is required, the decision stage for the application starts the day after all other stages applying to the application have ended.
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> **(2)** If subsection (1) does not apply to an application, the decision stage for the application starts –
>
> (a) if an information request has been made about the application – the day the applicant responds to the information request; or

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7 "Referral agency" is defined in IPA's sch 10 dictionary as meaning "a concurrence agency or a referral agency". It is common ground that QFRS is not a concurrence agency.

8 Above, sch 10 dictionary.

(b) if an information request has not been made about the application – the day the application was received.

(3) However, the assessment manger may start assessing the application before the start of the decision stage."

[23] If the application is for building work the assessment manager's decision must not conflict with the *Building Act* (s 3.5.13(3)(a)). It is relevant to the applicant's contentions in this case that s 22 of the SBR made under the *Building Act* provided:

"**Engineering drawings required for certain developments**

(1) This section applies if, in relation to a building development application, engineer's drawings or other engineering details are required.

(2) If the drawings or details are not included with the application, the application must not be approved unless the approval is subject to the condition that:

(a) work on the footings must not start until the drawings and details for the footings have been approved; and

(b) the stage of the building work must not be started until the drawings and details for the stage have been approved."

[24] The assessment manager must give written notice of the decision to the developer, each referral agency and the local authority within five business days after the decision is made (s 3.5.15(1) and (2)). The development approval attaches to the land the subject of the application and binds the owner, the owner's successors in title and any occupier of the land (s 3.5.28(1)).

[25] Chapter 4 IPA deals with Appeals, Offences and Enforcement and its pt 1 with the Planning & Environment Court. In the event of non-compliance, s 4.1.5A gives the court wide powers where there has been substantial compliance:

"**4.1.5A How court may deal with matters involving substantial compliance**

(1) Subsection (2) applies if in a proceeding before the court, the court—

(a) finds a requirement of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with; but

(b) is satisfied the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred on the person by this or the other Act.

(2) The court may deal with the matter in the way the court considers appropriate."

[26] Appeals from a development approval to the Planning & Environment Court must be lodged within 20 business days after the submitter or advice agency (which includes a referral agency[9]) is given the decision notice (s 4.1.28 and s 4.1.29).

[27] A person may bring proceedings in the court for a declaration about a matter done or that should have been done for IPA and as to the construction of IPA (s 4.1.21(a)

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9 See definition "referral agency", sch 10 dictionary.

and (b)). A party to a proceeding may appeal a decision of the court on the ground of error or mistake of law on the part of the court (s 4.1.56(1)(a)) but only with leave of the Court of Appeal or a judge of appeal (s 4.1.56(2)). A referral agency may within the limits of its jurisdiction appeal from a development approval if the development application includes code assessment of building work to be assessed against the *Building Act* (s 4.2.10(1)).

[28] Chapter 4 pt 3 deals with development offences, notices and orders. It is an offence to carry out assessable development without a permit, punishable by a maximum penalty of 1,665 penalty units (s 4.3.1). A proceeding for an offence against IPA must start within one year after the commission of the offence or within six months after the offence comes to the complainant's knowledge (s 4.4.2).

[29] Chapter 5 (Miscellaneous) includes pt 3 which deals with private certification which applies to code assessable development (s 5.3.1). The assessment manager "must give written notice of the decision to … each referral agency" (s 3.5.15) which then has a right of appeal against the decision (s 4.2.10(1)). Section 5.3.4 provides:

> " **5.3.4 Application must not be inconsistent with earlier approval and self-assessable development**
>
> **(1)** If the application the private certifier is assessing relates to an earlier development approval that has not lapsed and was given by the assessment manager, the private certifier must not approve the application if it is inconsistent with the earlier approval.
> Maximum penalty—165 penalty units.

Was the building permit void and of no legal effect

[30] The application for summary judgment was considered on the hypothetical assumption that the applicant could establish its proposed pleaded contentions. A critical issue in determining those contentions is whether the permit, assuming it was issued in contravention of IPA, is and has always been invalid and of no legal effect. Determining such a question is seldom easy and turns on the construction of IPA.

[31] As McHugh, Gummow, Kirby and Hayne JJ explained in *Project Blue Sky Inc v Australian Broadcasting Authority*:[10]

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."[11] (citations omitted)

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10 (1998) 194 CLR 355, 388-391 [91]-[93].

11 Above, 388-389 [91].

[32] Their Honours noted that questions of whether a provision is mandatory or directory are not helpful in clarifying such a question and continued:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'." (footnotes omitted)[12]

[33] Citing *Montreal Street Railway Co v Normandin*;[13] *Clayton v Heffron*[14] and *TVW Enterprises Ltd v Duffy [No 3]*,[15] their Honours further noted:

> "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act".[16]

[34] These observations make clear that the use of "must" in the provisions in IPA relied upon by the applicant does not of itself demonstrate an intention that any act done in breach of those provisions renders the subsequently issued permit void and of no legal effect.

[35] Before discussing the three prongs of the applicant's argument, I will make some general observations relevant to all three prongs and also to the discretionary considerations when determining whether a court would grant the declaration. Mr Nunn issued the permit in mid-2004. The building has been constructed for about seven years. During that time units in the building have been on-sold to third parties as well as to the applicant. The applicant did not apply for a declaration of invalidity until five years after the permit issued and about four years after it purchased its units. It seems unlikely that the legislative intent in IPA was that a permit issued more than eight years earlier could be declared invalid because of non-compliance with IPA about which there was no complaint for years after the building was completed and on-sold. Such a construction would cause confusion and distress to many, including the Tangalooma respondents.

[36] The applicant's contention does not sit comfortably with IPA's stated purpose of managing the process by which development occurs in Queensland. The resultant uncertainty would be inconsistent with sound development policy. This is especially so where, as here, the code assessable nature of the development application did not require public notification. Certainty is a desirable outcome for all concerned in the development process. No doubt that is why appeals from development approvals (s 4.1.28 and s 4.1.29) and from decisions of the Planning & Environment Court (s 4.1.56) and the bringing of proceedings for offences against IPA (s 4.4.2) are subject to strict time limits. The fact that a development approval attaches to the land and binds the owner and successor in title and occupiers (s 3.5.28) is another factor significantly weighing against the applicant's contention.

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12 Above, 390-391 [93].
13 [1917] AC 170, 175.
14 (1960) 150 CLR 214, 247.
15 (1985) 8 FCR 93, 104-105.
16 *Project Blue Sky* (1998) 194 CLR 355, 392 [97].

[37] It is significant that there is no express provision in IPA to the effect that any non-compliance with IPA provisions (whether generally or as specified) results in the invalidity of a subsequent decision. It is true that many provisions of IPA, including many relating to IDAS, use the word "must". But as *Project Blue Sky* recognises, that does not mean non-compliance with those provisions would necessarily result in a subsequent decision approving a development application being liable to be declared void and of no legal effect. That is especially so where, as here, the declaration is not sought until many years after the decision was made and the development completed and on-sold.

[38] On the contrary, the legislature has given the Planning & Environment Court power in s 4.1.5A to excuse partial compliance or non-compliance with any provision in IPA where the absence of compliance has not substantially restricted the opportunity to exercise rights conferred under IPA or other Acts. This provision strongly militates against the applicant's construction.

[39] I am unpersuaded that any of the alleged contraventions were errors depriving Mr Nunn of jurisdiction under the IPA to issue the permit in the sense discussed in *Craig v South Australia*[17] and *Minister for Immigration and Multicultural Affairs v Yusuf*.[18] I consider the permit was not a nullity vitiated by jurisdictional error. It authorised the development to occur until the permit was set aside. Accepting that the applicant was able to establish its proposed case, the permit would remain valid and effective until the grant of the declaration. That is because s 3.1.5(3) states that a permit authorises assessable development to the extent stated in the permit. It follows that the permit was valid during the construction period: see *Calvin v Carr*.[19] And even if any of the alleged non-compliances amounted to jurisdictional error, I remain unpersuaded that the intention of IPA is that the permit was necessarily void and of no legal effect in the circumstances here where the declaration was not sought until long after the building was completed and on-sold.

[40] In support of its contention the applicant placed reliance on *Barro Group Pty Ltd v Redland Shire Council*.[20] In *Barro* the development application was not a "properly made application" as it did not comply with s 3.2.1(5) IPA (as it then was) so that the assessing authority could not treat it as properly made under s 3.2.1(8) and (9) (as those provisions then were).[21] The absence of any properly made application initiating the IDAS process meant that the discretion conferred by s 4.1.5A was not invoked so that the Planning & Environment Court could not approve the development application despite non-compliance. Similarly, in *Fawkes Pty Ltd v Gold Coast City Council*[22] the application was not a properly made application because it did not contain the written consent of the owners of the land to which the application applied. Consent was required by s 3.2.1(9) (as it then was) before the excusatory provision in s 3.2.1(8) (as it then was) was to apply. In *Fawkes* and *Barro*, there was no properly made initiating process or deemed properly made initiating process, so that the IDAS process had never started and s 4.1.5A could not apply. It is not contended that the development application in the present case was flawed. For that reason *Fawkes* and *Barro* are properly distinguishable. Here, the

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17 (1994) 184 CLR 163, 179.
18 (2001) 206 CLR 323, 350-351 [81]-[82] (McHugh, Gummow and Hayne JJ).
19 [1980] AC 574, 589-590.
20 [2010] 2 Qd R 206.
21 Section 3.1.2 in its then form is set out in *Barro* above at [20].
22 [2008] 2 Qd R 1, esp [45].

IDAS process was successfully initiated. It follows that s 4.1.5A could be invoked in respect of the three non-compliances relied upon by the applicant.

[41] The applicant also placed considerable reliance on *Livingstone Shire Council v Brian Hooper & M3 Architecture & Ors*[23] which, it asserted, was indistinguishable from the present case; *Bundaberg Regional Council v Ross & Anor*[24] and *Baevski v Gladstone Regional Council & Ors; Sea Breeze (Qld) Pty Ltd v Gladstone Regional Council & Ors*.[25]

[42] In *Hooper*, Judge Robin declared that the private certifier's approval of a development application was invalid. The Council established that the proposed development use was wrongly categorised with the result that the private certifier was not empowered to approve the application without the Council first approving a material change of use.[26] Judge Robin was also concerned that QFRS had not been involved as a referral agency so that it had "lost not only its entitlement to have its input considered by the private certifier, but also (or had compromised) any right of appeal". His Honour was also concerned with "numerous other aspects of the proposed building, including parking, landscaping, water supply and sewerage"[27] as well as the final engineering of the building. Accordingly, Judge Robin was not satisfied there had been, under s 4.1.5A(1)(b), substantial compliance with the requirements of IPA.

[43] Judge Robin was also concerned in *Hooper* that s 22 SBR had not been met as the necessary engineering drawings and details were not included with the development application. The statutory prohibitions in the SBR had been ignored as had those in s 5.3.5(4) IPA. The certifier had proceeded to the decision stage without doing what was contemplated in the earlier referral stage and had approved plans which were merely the architect's concept for the building.[28] Judge Robin noted that it was highly undesirable to use the declaratory power in s 4.1.21 to declare development approvals invalid, but this was a clear case where the assessment manager both overlooked the failure of others and failed to comply with required legislative steps, deciding the development application in the face of specific statutory prohibitions. The maintenance of confidence in the IDAS process made it undesirable as a matter of public policy to declare an approval void. The developer had attempted to by-pass the Council. No third party rights had arisen or been affected. There would be no significant wasted expenditure of money or effort if the court interfered. If the decision was set aside the development application remained before the private certifier who could process and decide it.[29] An additional important factor was protecting the integrity and public standing of the new private certifier system introduced by IPA.[30] It followed that the balancing of the relevant considerations favoured the granting of the declaration.

[44] I reject the applicant's contention that *Hooper* is indistinguishable from the present case. The distinctions between the two cases are manifest. The building work the subject of the development application in *Hooper* had not been completed and on-

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23 [2003] QPEC 63, [2004] QPELR 308, [46].
24 [2011] QPEC 137; [2012] QPELR 322.
25 [2009] QPEC 5; (2009) 167 LGERA 375.
26 [2004] QPELR 308, 290 [29].
27 Above, 328 [48].
28 Above, 331 [59].
29 Above, 333 [63].
30 Above, 334 [70].

sold for many years before the declaration was sought. There were no public policy considerations applicable in *Hooper* (such as confidence in the IDAS process and the undesirability of diminishing the rights of innocent third parties applicable here) militating against the exercise of the discretion to grant a declaration. The developer in *Hooper* had attempted to by-pass the Council and the applicant for the declarations was the relevant local authority, whereas here the Council does not support the application. Unlike in *Hooper,* it is not contended here that the land on which the building was constructed required a material change of use. It is true that in *Hooper*, Judge Robin was concerned that QFRS had not been involved as a referral agency. But it was not the case, as it is here, that QFRS was unconcerned with the fire safety aspects of the completed building and did not wish to be a party to the proceeding. In this case, unlike in *Hooper*, a court would almost certainly excuse the alleged non-compliance with IPA and the SBR under s 4.1.5A.

[45] *Ross* is also clearly distinguishable. The applicant there was again the Council; the case turned on questions of use of the land and the declaration concerned the possible demolition of a prefabricated shed which could be demounted and used elsewhere.[31]

[46] *Baevski*, too, is easily distinguishable. The applicant there was also the Council which had not given the development permit required before the private certifier could issue the building permit for a house still under construction.

[47] In light of all these matters, I note that it even if the applicant established the building permit was void and of no legal effect as a result of any of the alleged contraventions of IPA, there would seem to be very limited utility in granting the declaration. Any concerns as to the fire and structural safety of the seven year old building are no longer planning and development issues. They are best dealt with in ways other than under IPA.

[48] Having made those many general observations, none of which favour the applicant, I will now consider in turn the three prongs of the applicant's contention.

[49] The first prong is the alleged referral agency failure. Accepting that the developer, contrary to the mandatory terms of s 3.3.3, did not provide a copy of its material to the QFRS, it is difficult to understand why this made the subsequently issued permit void and of no legal effect. The scheme of IPA,[32] does not envisage that failure to provide a copy of the development application to a referral agency like QFRS is an absolute prohibition on the assessment manager deciding the application. The four stages of IDAS are only "possible stages" and not all stages or parts of a stage apply to all applications (s 3.1.9). The information and referral stage is not always critical. As an advice agency under s 3.3.19, QFRS had a discretion to consider a building application, to make recommendations and to offer advice but it had no power to direct that a development application be refused. Mr Nunn as assessment manager was not obliged to adopt any QFRS recommendation or advice. This may be contrasted with the powers of a concurrence agency which may impose conditions on or refuse the development application under s 3.3.18. I do not accept that the terms of s 3.5.1[33] support the applicant's contentions. Indeed, s 3.5.1(2)

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31 Cf *Retirement Properties of Australia Pty Ltd v Maroochy Shire Council & Ors* [2007] QPEC 87; [2008] QPELR 17.

32 As set out at [18] to [29] of these reasons.

33 Set out at [22] of these reasons.

suggests the decision stage may sometimes be as soon as the application is lodged without strict compliance with earlier stages and provisions. It seems unlikely the legislature intended the use of "must" in s 3.3.3 to have the effect that non-compliance necessarily resulted in the invalidity of a subsequently issued permit. And it also seems unlikely that the legislature intended non-compliance with s 3.3.3 to be a matter depriving Mr Nunn of jurisdiction to make his decision.

[50] The applicant does not contend that QFRS was not notified of the issue of the permit (s 3.5.15). QFRS had a right of appeal in respect of the permit (s 4.2.10) which it did not exercise. It is clear from the transcript of proceedings before Judge Robin on 11 September 2009 that QFRS is not concerned about the fire safety of the building and for that reason has elected not to be a respondent to the application for a declaration. In those circumstances, it seems almost certain that the Planning & Environment Court would have excused any non-compliance with s 3.3.3 under s 4.1.5A, were this necessary.

[51] Mr Nunn's granting of the permit in circumstances where the application had not been provided to the QFRS prior to his assessment did not make the permit void and of no legal effect.

[52] The second prong is the alleged inconsistency failure, that the permit was inconsistent with a current development approval and could not be approved under s 5.3.4.[34]

[53] The question whether the application was inconsistent with the current approval involved matters of degree and judgment for Mr Nunn as assessment manager. It follows that, consistent with *Buck v Bavone*,[35] the applicant could only succeed in overturning his decision if it showed one of the following: that he did not act in good faith; that he acted arbitrarily or capriciously; that he misdirected himself in law; that he failed to consider relevant matters or took irrelevant matters into account;[36] or that his decision was one that no reasonable assessment manager could have arrived at it.[37] It follows that any error made by Mr Nunn in issuing the permit on the basis that he wrongly considered the building works to be consistent with the earlier approved plans was not an error amounting to the exceeding of his jurisdiction thereby depriving his decision to grant the permit of legal effect: cf *Clayton v Miriam Vale Shire Council and Webb*[38] and see *Craig v South Australia*[39] and *Minister for Immigration and Multicultural Affairs v Yusuf*.[40]

[54] True it is that non-compliance with a development approval is of public concern. But the delay in not applying for a declaration until years after the building was completed and on-sold, at least absent proof of fraud or public corruption or other extraordinary circumstances, makes it almost certain that the Planning & Environment Court, if now called upon, would exercise its discretion under s 4.1.5A to either waive non-compliance or re-issue the permit despite the non-compliance.

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34 Set out at [29] of these reasons.

35 (1976) 135 CLR 110, Gibbs J (as his Honour then was) 118-119.

36 See also the observations of Mason J (as his Honour then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985) 162 CLR 24, 39-41.

37 See *Timbarra Protection Coalition Inc v Ross Mining NL and Others* (1999) 46 NSWLR 55, 63-65 [37]-[44] (Spigelman CJ).

38 [2000] QPELR 320, McLauchlan QC DCJ, 323 [13], 324[16].

39 (1994) 184 CLR 163, 179.

40 (2001) 206 CLR 323, 350-351 [81]-[82] (McHugh, Gummow and Hayne JJ).

[55] The third prong is the alleged condition failure, that the permit has always been invalid because it did not comply with s 3.5.13(3)(a) in that it did not contain the condition required by s 22 SBR.[41] Certainly a significant non-compliance with s 22 would be of serious public concern but this could be expected to be identified during construction. Any non-compliance with s 3.5.13(a) was not an issue amounting to jurisdictional error removing Mr Nunn's jurisdiction to grant the permit. It, too, was a non-compliance in respect of which and in light of the extraordinary delay in applying for the declaration years after the building was completed and on-sold, the Planning & Environment Court would invoke its power under s 4.1.5A to waive non-compliance or reissue the permit.

[56] For these reasons, I do not consider Judge Searles erred in concluding that the permit was not void and of no legal effect.

The exercise of discretion

[57] The applicant's second broad contention is that, if I am wrong and the permit was void and of no legal effect, Judge Searles erred in declining to find that a court would not exercise its discretion to make the declaration. The applicant contended first that his Honour's reasons for so finding were inadequate. Second, it contended his Honour made factual errors concerning QFRS's present position as to the state of the building and that this affected his determination. Third, it contended his Honour wrongly placed weight on the history and course of its application. I will discuss each of these contentions in order.

The adequacy of the reasons

Judge Searles' reasons

[58] In discussing the contention that Judge Searles' reasons were inadequate, it is necessary to refer in some detail to this aspect of his Honour's reasons.[42] Judge Searles commenced with a consideration of the judicial discretion in s 4.1.21,[43] referring to *Textor v Brisbane City Council*[44] which distilled from Justice Kirby's observations in *Warringah Shire Council v Sedevcic*[45] the following guidelines to exercising that discretion:

> "(a) The discretionary power is wide and as wide as the discretion enjoyed by the Supreme Court in its equitable jurisdiction;
> (b) Whilst it is helpful to consider the other cases where the discretion has been exercised, it is undesirable to attempt to catalogue or classify all circumstances which may enliven the discretion.
> (c) The discretion is not fettered or limited to any particular classes of cases or limited to special cases;
> (d) Whether the breach was purely technical;
> (e) Whether there had been delay in bringing the relevant application;

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41 Set out at [23] of these reasons.

42 *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2011] QPELR 718; [2011] QPEC 74, [91]-[108].

43 Above, [92].

44 [2008] QPELR 625, [46]-[47].

45 (1987) 10 NSWLR 335, 339-341.

(f) Whether the environment has been adversely affected;

(g) The restraint sought jurisdiction is the enforcement of a public duty imposed by parliament and is not in the nature of the enforcement of a private right;

(h) The power in the relevant legislation to grant the relief indicates a legislative purpose of upholding, in the normal case, the integrated and co-ordinated nature of planning law. Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy.

(i) Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid. It is only in that sense that 'special' circumstances need to be established to secure a favourable exercise of the discretion which is not fettered or limited to 'special cases'.

(j) The obvious intention of planning and environment legislation is that, normally, those concerned in development and use of the environment will comply with the terms of the legislation. Otherwise, if unlawful exceptions and exemptions become a frequent occurrence, condoned by the exercise of the discretion, the equal and orderly enforcement of the law could be undermined. A sense of inequity could then be felt by those who complied with the requirements of the legislation or who failed to secure the favourable exercise of the discretion.

(k) Where an application for enforcement is made by the Attorney General, or a council, a court may be less likely to deny equitable relief than it would be in litigation between private citizens because the Attorney General or the Council are seen as the proper guardians of public rights and their interest is deemed to be protective and beneficial, not private or pecuniary;

(l) The discretion may be more readily exercised in relation to a continuing breach of the law rather than a static development (i.e. the erection of a building) which, once having occurred, can only be remedied at great cost or inconvenience. But this observation is simply a reflection of the judicial perception in balancing, on the one hand, the public interest in equal compliance with the law and, on the other, the degree of irremediability occasioned by the breach and the expense of inconvenience which could follow the law's enforcement;

(m) The wide discretion has been described as an adequate safe guard against abuse of a salutary procedure. It permits the court to soften, according to the justice of particular circumstances, the application of rules which, though right in the general, may produce an unjust result in the particular case. Sometimes this softening can be achieved by postponing the effect of injunctive relief. …"[46]

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[46] *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2011] QPELR 718; [2011] QPEC 74, [92].

[59] His Honour next detailed the arguments of the Tangalooma respondents which were supported by the Council. The building was completed years ago and was now occupied. Reconsidering the issue of the permit would cause inconvenience and cost but had no utility: the declaration would not make the permit always void or affect the lawfulness of the now completed development.[47] The Council as guardian of the public interest in planning matters opposed the declaration.[48] The applicant was seeking to enforce a public duty rather than a private right.[49] Prior to the issue of the permit, the Council endorsed the proposed building work as being generally in accordance with the 1983 planning approval on 5 December 2003 so that no further town planning approval was required.[50]

[60] His Honour noted that the Tangalooma respondents emphasised that QFRS, as guardian of the public interest on fire safety, did not seek or support the declaration and had not raised any concerns on the issues agitated by the applicant. The matter was referred to QFRS in January 2005 so that it then had the opportunity to review the building application and plans. It provided a response on 1 March 2005. It did not recommend refusal or conditions or otherwise raise any concern with the proposed building work. It had a further opportunity to comment when it inspected the building and gave its Advice to Building Certifier for Special Fire Services Inspection on 1 November 2005. QFRS then noted that the building work complied with SBR Sch 4. Innocent third parties have since relied on the legitimacy of the permit and could be detrimentally affected if the declaration were granted. The applicant signed most of its contracts to purchase units in the building after the permit issued in July 2004. It signed two contracts after the issue of the Certificate of Classification on 1 November 2005. The applicant's delay in bringing this application may be contrasted with the *Judicial Review Act* 1991 (Qld) where any challenge to an administrative decision must be brought within 28 days.[51]

[61] The Tangalooma respondents contended that they would suffer material prejudice if the declaration were made as it was difficult to establish after 28 years which plans constituted the 1983 approved plans. The applicant's sole director, Mr Peter Gregory Stevenson, in his affidavit of 15 April 2011, swore that his main concern in asking for a declaration was to rectify building defects. But the Tangalooma respondents contended that those concerns would not be addressed by the declaration. The applicant lacked a sufficient interest to seek the declaration which could have been pursued in other ways, for example, under s 69(1) *Fire and Rescue Service Act* 1990 (Qld), or by the remedying of building defects by way of the statutory powers of the Queensland Building Services Authority.[52] The applicant has not alleged the Tangalooma respondents did not act in good faith and did not reasonably rely upon the assumed validity of the permit.[53] For all these reasons, the Tangalooma respondents contended a court would exercise its discretion to refuse to make the declaration.

[62] His Honour next set out the applicant's submissions. As the owner of a substantial interest in the building, it had a proper interest in seeking the declaration. The non-

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47 Above, [93]-[97].
48 Above, [98].
49 Above, [99].
50 Above, [100].
51 Above.
52 Above.
53 Above, [101].

compliance with the IDAS process and other mandatory requirements under IPA and related legislation should not go unchecked. A private certifier charged with a duty to act in the public interest must act lawfully and his failure to do so has created potential hazards to health and safety.[54] The applicant had no knowledge of the lack of compliance during the building's construction phase. Any delay must be weighed against the inherently serious non-compliance. It had been actively pursuing its concerns about the building work since 2006. The applicant was not seeking demolition. Were the declaration granted, a further building approval could be sought by Tangalooma Pty Ltd in which important public safety considerations could be properly addressed, with long term benefits to owners and occupiers outweighing short term inconvenience.

[63] The applicant submitted that QFRS's lack of involvement was unexplained. The fact that the Council opposed the granting of the declaration did not mean it was not acting in error.[55] The Council should be concerned with correcting the non-compliance. It was possible the oversights on the part of Tangalooma Pty Ltd and Mr Stenders in making the development application, and Mr Nunn in granting the permit, were deliberate. The fact that Mr Nunn may be exposed to legal action is a reasonable consequence of his failure to act in accordance with his duties. There was no evidence that the sixth, seventh and eighth respondents had suffered resultant costs expenditure and inconvenience. They were in the same position as the applicant and other unit owners. The fact that Tangalooma Pty Ltd had incurred costs was irrelevant because these flowed from its failure to seek a lawful approval.[56]

[64] His Honour determined that "the balance of discretionary considerations overwhelmingly favours Tangalooma and militates strongly against the granting of any declaratory relief".[57] In making that decision his Honour stated that he was influenced primarily by the fact that the building had been constructed, was presently occupied and had been the subject of a Certificate of Classification on 1 November 2005. The declaration would be futile. If it were granted, the attitude of the Council and QFRS meant that a further permit would certainly issue. The Council, as guardian of the public interest on planning matters, had actively supported the Tangalooma respondents. QFRS, as guardian of the public interest on fire safety matters, did not take an active part in the proceedings and was "satisfied with the state of the building from the perspective it is concerned with". The application proceeded in a slow and convoluted manner.[58] His Honour concluded that, even if the applicant were able to establish the permit was always void, in the exercise of its discretion a court would not grant the declaration sought.[59] Whilst granting summary judgment was a serious step,[60] the applicant had no real prospect of succeeding at a trial of its application.[61]

Conclusion as to the adequacy of the reasons

[65] The obligation of a judge to give reasons for a decision is founded in large part on the principle that, in the absence of adequate reasons, a losing party would not

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54 Above, [102].
55 Above, [103]-[105].
56 Above, [106].
57 Above, [107].
58 Above.
59 Above, [108].
60 Above, [109].
61 Above, [110].

understand why the judge made the decision and would have a resulting and real sense of grievance. The giving of reasons promotes accountability, transparency and rational decision-making and reduces impulsive or arbitrary decision-making. It also enables an appellate court to understand how the judge reached the decision so that any significant errors in that process may be identified and corrected. See *Mirage Resorts Holdings P/L v Brellen P/L*.[62] Whether a decision-maker's reasons are inadequate will depend on the circumstances of the particular case.

[66] Judge Searles rightly identified the considerations relevant in this case to a court's exercise of discretion in determining whether to grant the applicant's declaration before detailing the competing contentions of the parties. His Honour did not simply adopt the Tangalooma respondents' contentions but it is clear that he accepted their thrust. He explained the most influential issues in his determination, all of which were relevant and, unsurprisingly, were relied upon by the Tangalooma respondents. These considerations, as his Honour correctly identified, mitigated so strongly against the granting of the declaratory relief sought by the applicant that there was no real prospect a court would grant the declaration.

[67] My summation of Judge Searles' careful reasoning in itself demonstrates that the applicant's complaints as to the adequacy of those reasons are unfounded. They clearly and rationally explained to the applicant and to this Court why Judge Searles considered a court would not exercise its discretion to grant the declaration. They made transparent his reasoning process, listing the primary factors he took into account in reaching his ultimate conclusion. This aspect of the applicant's contentions is not made out.

Judge Searles' findings about QFRS

[68] The applicant contended that his Honour was not entitled to find that QFRS was "satisfied with the state of the building from the perspective it is concerned with" and that this error infected his Honour's determination of the discretionary question.

[69] The difficulty with that contention is that the agreed bundle of material before his Honour included the application for an assessment of special fire services of the building work dated 11 January 2005 which was assessed by QFRS as compliant with the requirements of sch 3 and sch 4 SBR.[63] This is consistent with para 47(a) of the applicant's proposed further amended statement of claim.[64] The transcript of the hearing before Judge Robin on 11 September 2009 was before Judge Searles. On that occasion, QFRS's lawyers stated that QFRS did not wish to be involved in the proceeding and had "actually looked at [the building] and assessed it and they have dealt with it so it's not like they have been bypassed at all".[65] In these circumstances, his Honour was entitled to conclude that QFRS was presently satisfied with the fire safety aspects of the building, at least for the purposes of IPA. His Honour was entitled to take that matter into account in determining whether a court would grant the declaration sought in the exercise of its discretion.

Did the judge err in considering the history and course of the application

[70] The applicant contends that Judge Searles erred in giving considerable weight to the delay and convoluted manner with which the application had proceeded.

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62 [2003] QCA 579, [55]-[57].

63 AB 140-144.

64 AB 1009-1010.

65 Transcript 11 September 2009, T1-26.

[71] One factor relevant to the exercise of the discretion to grant a declaration under s 4.1.21 is whether there has been delay in applying for the declaration: *Warringah Shire Council v Sedevcic*.[66] The discretionary power is as wide as that enjoyed by the Supreme Court in its equitable jurisdiction so that relevant considerations will turn on the particular circumstances of each case.[67] The application for the declaration was an extraordinary form of relief to seek five years after the permit was issued and more than three years after the building was completed. The applicant's hapless prosecution of its application caused even more delay. Its recurring difficulty in pleading its case was no doubt related to its poor prospects of success. This delay was likely to cause the Tangalooma respondents to suffer prejudice in answering the applicant's allegations, particularly as to the inconsistency failure. It was now difficult for them to establish precisely which set of plans constituted the 1983 approved plans. The delay also meant there were persuasive public policy reasons for not granting the declaration. Judge Searles did not err in taking these matters into account in determining whether a court would exercise its discretion in favour of making the declaration. This contention is not made out.

[72] For these reasons, it follows that the applicant has not demonstrated that Judge Searles erred in determining that a court would not exercise its discretion in favour of making the declaration, even if the permit was, as the applicant contended, void and of no legal effect.

Granting summary judgment

[73] Judge Searles was entitled to give summary judgment under *Uniform Civil Procedure Rules* 1999 (Qld) r 293 only if satisfied that the applicant had no real prospect of succeeding on all or part of its claim and there was no need for a trial of the claim or the part of the claim.[68] The power to dismiss an action summarily is not to be exercised lightly: *Spencer v Commonwealth of Australia*.[69]

[74] For the reasons I have given, in the highly unusual matrix of circumstances pertaining here Judge Searles was right to conclude that the applicant had no real prospect of succeeding in its application for a declaration as, first, the permit was not void and of no legal effect and, second, even if it was, a court would not exercise its discretion to make the declaration.

Order in Appeal No 1117 of 2012)

[75] The applicant has not demonstrated any error of law justifying the grant of leave to appeal. In Appeal No 1117 of 2012 I would refuse the application for leave to appeal with costs.

The costs appeal (Appeal No 2670/2012)

[76] Costs of proceedings in the Planning & Environment Court are dealt with in s 4.1.23 IPA which relevantly provides:

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66 (1987) 10 NSWLR 335, 339 (Kirby P).

67 Above.

68 Rule 3(2) *Planning & Environment Court Rules* 2010 applies the UCPR to applications for summary judgment.

69 (2010) 241 CLR 118, 131 [24] (French CJ and Gummow J), 141 [60] (Hayne, Crennan, Kiefel and Bell JJ);

"**4.1.23 Costs**

(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding.

(2) However, the court may order costs for the proceeding (including allowances to witnesses attending for giving evidence at the proceeding) as it considers appropriate in the following circumstances—

…

(b) the court considers the proceeding (or part of the proceeding) to have been frivolous or vexatious;

(c) a party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;

(d) a party has incurred costs because the party is required to apply for an adjournment because of the conduct of another party;

…

(f) without limiting paragraph (d), a party has incurred costs because another party has introduced (or sought to introduce) new material;

…"

[77] The Tangalooma respondents sought their costs of the proceeding below on an indemnity basis, contending that the proceeding was frivolous or vexatious under s 4.1.23(2)(b). The Council applied under s 4.1.23(2)(d) for its costs thrown away on the adjournment of the trial on 26 May 2011. Judge Searles ordered that the applicant pay the Tangalooma respondents' costs of and incidental to the proceeding on the standard basis and the costs of the Council thrown away by the adjournment of the trial on 26 May 2011 on the standard basis. The applicant seeks leave to appeal under s 4.1.56 from those orders, contending that the judge erred in law and that the matter involves important public policy considerations warranting this Court's grant of leave.

Did the judge err in finding the proceeding was frivolous or vexatious under s 4.1.23(b)?

The applicant's contentions

[78] The applicant contended that the judge erred in concluding that the proceeding was frivolous or vexatious under s 4.1.23(2)(b) as he wrongly considered that the alleged non-compliances with IPA did not render the permit void and of no legal effect. This error clearly infected his Honour's finding that the applicant had no reasonable basis for starting the proceeding. For the reasons I have given in Appeal No 1117 of 2012, I reject that contention.

[79] The applicant next contends that his Honour erred in categorising the applicant's conduct as frivolous or vexatious. His Honour failed to consider the applicant's highly relevant reasons for commencing the litigation. His Honour accepted the applicant acted in good faith[70] and did not have any ulterior or improper motive. As an owner of units in the building, the applicant had a legitimate interest in seeking the declaration. Its concern about the potential danger to others of the consequences of the alleged non-compliance involved questions of public interest. It had an

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70 *Stevenson Group Investments P/L v Nunn & Ors* [2012] QPELR 410; [2012] QPEC 7, [34].

arguable and properly pleaded case. The mere fact that it was unsuccessful on a summary basis did not make the proceeding frivolous or vexatious. Alternatively, his Honour should have given more weight to the Tangalooma respondents' conduct of the proceedings and their delay in bringing their application for summary judgment when the basis for that application must have been known to them from an early stage. This delay excluded them from now contending the proceeding was frivolous or vexatious. His Honour's reasons were infected by error of the kind identified in *House v The King*.[71]

Judge Searles' reasoning

[80] In order to discuss the first contention it is necessary to examine Judge Searles' reasons for finding the proceeding frivolous or vexatious in terms of s 4.3.23(2)(b). His Honour observed that the applicant's proceeding was based on its contention that the permit was void and of no legal effect and that the building was therefore unlawfully constructed. This argument had no reasonable prospects of success from the outset and had caused the Tangalooma respondents serious and unjustified trouble and harassment. It was, therefore, frivolous or vexatious within s 4.1.23(2)(b): *Department of Transport and Main Roads v Brisbane City Council and Orb Holdings Pty Ltd*.[72]

[81] His Honour next considered whether he should exercise his discretion under s 4.1.23(2)(b) to order the applicant to pay the Tangalooma respondents' costs. On 29 July 2009, 26 days after the proceeding was commenced, they first put the applicant on notice that they would seek costs. They did so again on 17 August, 8 and 14 September, 27 November 2009 and on 17 September and 10 December 2010. In some of that correspondence, they informed the applicant that they considered the proceeding to be frivolous or vexatious under s 4.1.23. On 27 November 2009, they informed the applicant of the meaning of frivolous and vexatious proceedings under s 4.1.23(2)(b) consistent with this Court's decision in *Mudie v Gainriver Pty Ltd (No 2)*.[73] The applicant continued with the proceeding in the face of that notice.

[82] The judge noted that the Tangalooma respondents did not seek summary judgment in a timely way. But they were faced with the applicant's repeated pleading amendments right up to the listed trial on 26 May 2011. This delay, without more, did not disentitle them to a favourable costs award. Their exasperation at the adjournment of the trial on 26 May 2011 following the applicant's changed expert report was the catalyst which finally caused them to apply for summary judgment. Even after the trial was adjourned, the applicant sought to further amend its claim outside the limited leave given by Judge Robin.

[83] After acknowledging the importance of the public policy considerations behind s 4.1.23, Judge Searles ultimately determined that, in all the circumstances, the applicant should pay the costs of the Tangalooma respondents. His Honour declined to order that they be paid on an indemnity basis.

Conclusion as to whether the judge erred in finding the proceeding was frivolous or vexatious under s 4.1.23(b)

[84] Ordinarily, orders for court costs follow the event (that is, they are paid by the losing party) but costs are a statutory entitlement. The ordinary rule does not apply

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71 (1936) 55 CLR 499.

72 [2011] QPEC 108, Unreported, Robin QC DCJ, 22 July 2011.

73 [2003] 2 Qd R 271, 283-284 [35], 290-292 [59]-[62].

in the Planning & Environment Court where, under s 4.1.23(1), the ordinary rule is that each party must bear its own costs. It seems likely that the legislature intended in enacting s 4.1.23(1) to ensure that those acting in the public interest were not discouraged from seeking relief in the Planning & Environment Court by the fear of a crippling costs order against them: *Mudie v Gainriver Pty Ltd (No 2)*.[74] This Court in *Mudie* discussed the meaning of the term "frivolous or vexatious" in s 7.6(1A) *Local Government (Planning & Environment) Act* 1990 (Qld) (repealed), a provision in broadly comparable terms to s 4.1.23 IPA which replaced it. The plurality noted:

> "The words 'frivolous or vexatious' are not defined in the Act and should be given their ordinary meaning, unfettered by their meaning in the very different context of striking out or staying proceedings for an abuse of process. … *The Macquarie Dictionary* defines 'frivolous' as 'of little or no weight, worth or importance; not worthy of serious notice: a frivolous objection. 2. characterised by lack of seriousness or sense: *frivolous conduct* ...' and 'vexatious' as '1. causing vexation; vexing; annoying ...'.
>
> Unquestionably, something much more than lack of success needs to be shown before a party's proceedings are frivolous or vexatious. Although in a different context, some assistance can be gained from the discussion of the meaning of these words in *Oceanic Sun Line Special Shipping Company Inc. v. Fay* where Deane J. states that 'oppressive' means seriously and unfairly burdensome, prejudicial or damaging and 'vexatious' means productive of serious and unjustified trouble and harassment, meanings apparently approved by Mason C.J. Deane, Dawson and Gaudron JJ. in *Voth v. Manildra Flour Mills Pty Ltd*. Those meanings are apposite here.
>
> Whether proceedings are vexatious or oppressive will turn on the circumstances of the case and will include public policy considerations and the interests of justice." (citations omitted)[75]

[85] The applicant raised novel arguments of law which had not previously been definitively determined. The judge was entitled to summarily reject those arguments, but that does not make the proceedings which raised them frivolous or vexatious. It would be unfortunate if litigants were discouraged from applying to courts to incrementally develop the law because of a fear that their proceedings may be labelled frivolous or vexatious, with all that flows from that label.

[86] Mr Stevenson deposed that his main concern from early 2006 was to have the alleged building defects rectified.[76] He expressed concern about the alleged failure to properly undertake the assessment process and that aspects of the building's fire safety system were, as he alleged, not to an acceptable standard. He was not renting out his units until satisfied that they were safe.[77] He was also concerned that the building was not in accordance with the 1983 planning approval. He stated that his concerns were consistent with the advice he obtained from his then lawyers,[78] so

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74 Above, 283 [34].
75 Above, 283-284 [35]-[37].
76 AB 287, [34].
77 AB 288, [35],[36].
78 AB 287-288, [35], [37].

that it may be inferred he commenced the present proceedings on legal advice.[79] He changed his lawyers in September 2009 to those who represented him in May 2011 before Judge Robin, in the proceeding before Judge Searles, and in this application. It may be inferred that he has acting on legal advice in his conduct of the proceeding. That advice must have been that his case was arguable. There is no evidence that the proceeding amounted to an abuse of process and Judge Searles found the applicant acted in good faith.[80]

[87] Whether a case is frivolous or vexatious under s 4.1.23(b) is primarily a factual issue. In a borderline case such as this, different courts might reasonably reach different conclusions in determining that question. Only if the conclusion is one that could not be made on the evidence or there was error in the *House v The King* sense, does it amount to an error of law invoking this Court's discretion under s 4.1.56 to give leave to appeal.

[88] Although the Tangalooma respondents informed the applicant that they considered the proceeding was frivolous and vexatious soon after it was commenced, they did not bring an application for summary judgment until two years after the proceeding was filed. As Judge Robin's reasons for adjourning the trial on 26 May 2011 demonstrate, the Tangalooma respondents had prepared for trial that day and engaged an expert witness. They did not bring their application for summary judgment until July 2011. This delay was unfortunate but, as Judge Searles identified, it does not prohibit a finding that the proceeding was frivolous or vexatious under s 4.1.23(2)(b).

[89] For the reasons I have given in Appeal No 1117/2012, the applicant's proceeding was always without real prospects of success. The construction of the building was authorised by the permit (s 3.1.5(3)). In challenging the permit so long after it was issued, the building completed and its units on-sold, the applicant's contentions were of little substance. They unfairly burdened the Tangalooma respondents and caused them serious and unjustified trouble and harassment. The applicant's persistent inability to clearly frame its case and its constant amendments to its pleadings certainly would have vexed and annoyed them. Although the contrary conclusion could have been reached, Judge Searles was entitled to consider that the applicant's contentions were of so little merit and its conduct in bringing and prosecuting its application was so seriously and unfairly burdensome and productive of such unjustified trouble and harassment as to be frivolous and vexatious under s 4.1.23(2)(b). The applicant has not demonstrated any error of law in the judge's reasoning on this issue.

[90] It follows that this aspect of the application for leave to appeal from the costs order is not made out.

The costs order concerning the adjournment of 26 May 2011

[91] The applicant contends the judge erred in finding in terms of s 4.1.23(2) that the adjournment of the proceeding on 26 May 2011 was caused by its conduct. The adjournment was the result of the applicant's expert witness changing his mind and this was not the fault of the applicant.

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79 AB 287, [32].

80 *Stevenson Group Investments P/L v Nunn & Ors* [2012] QPELR 410; [2012] QPEC 7, [34].

Judge Robin's reasons for the adjournment on 26 May 2011

[92] Judge Robin's reasons for adjourning the matter on 26 May 2011 are set out in *Stevenson and Ors v Nunn and Ors*.[81] The matter was listed for a seven day hearing. His Honour noted that the applicant, in seeking to establish its pleaded case concerning QFRS, alleged that a certificate obtained from QFRS some months after Mr Nunn's permit issued was unhelpful to the Tangalooma respondents. This was because the applicant had an expert report to the effect that fire safety issues remained a problem with the existing building. The Tangalooma respondents' expert fire engineer, Mr Olsson, declined to confer with the applicant's private building certifier, Mr Kennedy, from whom the applicant originally sought to lead evidence about fire engineering matters. Mr Olsson asserted that Mr Kennedy lacked the relevant expert qualifications. For that reason, the applicant engaged Dr Clancy relatively late.[82] Mr Olsson and Dr Clancy met on 21 March 2011 and produced a joint report on 4 April 2011 which was unhelpful to the applicant.[83] The applicant had Mr Kennedy review this joint report. He raised matters which resulted in Dr Clancy changing his opinion. The applicant informed the Tangalooma respondents of this on 6 May 2011 but they received Dr Clancy's full report only two days before trial.[84] When the applicant's counsel opened the case, he applied for leave to adduce new expert evidence from its fire engineer, Dr Clancy.[85] The Tangalooma respondents and the Council submitted it was then too late to adduce this evidence.[86]

[93] Judge Robin found that Dr Clancy had apparently genuinely changed his view and frankly acknowledged that he had failed to notice relevant matters. His new report dealt with safety issues which the court must approach seriously. An expert has a duty to assist the court. It was not proper for the court to shut out Dr Clancy's revised view.[87] The respondents predicted a challenge to the genuineness of Dr Clancy's changed opinion, part of a general challenge to the applicant's good faith. But for the moment the court must treat Dr Clancy's change of mind as genuine.[88] In those special circumstances it was essential that the applicant's new case be clearly pleaded. Accordingly, his Honour gave leave to the applicant to further amend its statement of claim.[89] Mr Olsson had prepared a response statement of evidence asserting that Dr Clancy was wrong but Mr Olsson claimed to require several weeks to prepare a comprehensive response. Whilst the court understood the applicant's scepticism, the Tangalooma respondents should be allowed this time. The application concerned extremely serious matters involving the Tangalooma respondents' property and other economic interests and Mr Nunn's reputation and professional standing.[90]

[94] To avoid losing allotted court time, Judge Robin and the applicant were prepared to commence the hearing and deal with other evidence before adjourning to take the fire engineers' evidence in early August. The Tangalooma respondents strongly

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81 [2011] QPELR 718; [2011] QPEC 74.
82 Above, [7].
83 Above, [8].
84 Above, [9].
85 Above, [6].
86 Above, [10].
87 Above, [11].
88 Above, [12].
89 Above, [13].
90 Above, [15].

opposed a bifurcated hearing. They did not want the court's site inspection, scheduled for the following Monday, to be separated from the fire engineers' evidence. They argued that credit issues were crucial to Dr Clancy's changed position, the allegation relating to the 1983 plans, and the applicant's overall motivation and conduct. These matters, they contended, warranted a single, cohesive hearing.[91] The judge reluctantly acceded to the Tangalooma respondents' urgings and adjourned the hearing "solely on the basis that the respondents requested [the adjournment] and supported their request with some reasons".[92]

[95] Judge Robin declined to deal with the respondents' application for costs thrown away by the adjournment, noting that although it might be unremarkable for costs to be awarded in these circumstances, he was troubled that they might use a favourable costs order against the applicant for tactical advantage. The reasonableness of the respondents' costs application would be better considered after the hearing of the substantive application.[93]

Conclusion as to the costs order concerning the adjournment of 26 May 2011

[96] Judge Searles determined that the Council was entitled to its costs under s 4.1.23(2)(d)[94] as that provision:

> "allows costs to be awarded to *a party* where it *has not been given reasonable notice of intention to apply for an adjournment of the proceeding*, in this case the trial. There is no doubt that no reasonable notice was given by [the applicant] and I consider the Council is entitled to its costs for that reason." (emphasis added)

[97] Whilst referring to s 4.1.23(2)(d), Judge Searles' italicised words mistakenly quoted the terms of s 4.1.23(2)(c).[95] It seems certain that his Honour was intending to convey that the Council incurred additional costs because it was required to apply for an adjournment because of the applicant's conduct in providing Dr Clancy's report only two days before the proceeding was to commence before Judge Robin. The applicant claims that its conduct did not require the respondents to apply for an adjournment; it was the changed opinion of their expert witness, Dr Clancy.

[98] It is clear from Judge Robin's reasons summarised above that the respondents acted reasonably in requesting an adjournment to enable the fire engineer, Mr Olsson, to understand and respond to the report so recently received from the applicant's fire engineer, Dr Clancy. The respondents unquestionably incurred additional costs because they were required, by the applicant's conduct in seeking to adduce new evidence from Dr Clancy, to apply for an adjournment (s 4.1.23(2)(f)). It was reasonable for them to seek the adjournment of the whole proceeding rather than to split the hearing. Judge Searles was entitled to find that s 4.1.23(2)(d) as informed by s 4.1.23(2)(f) allowed him to exercise the discretion invoked to order the applicant to pay the Council's costs thrown away by the adjournment on 26 May 2011 on a standard basis. Whilst Judge Searles mistakenly cited the wrong subsection of s 4.1.23, if required to re-exercise the discretion I would, for the reasons given, make the same order as Judge Searles.

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91 Above, [16].
92 Above, [18].
93 Above.
94 Mistakenly cited as s 4.1.23(d).
95 See [76] of these reasons where these provisions are set out.

[99] It follows that this aspect of the application for leave to appeal from the costs orders is not made out.

[100] The applicant has not demonstrated any error of law in the costs appeal justifying the grant of leave to appeal. In Appeal No 2670/2012, I would refuse the application for leave to appeal with costs.

ORDERS:

1. In Appeal No 1117/2012, the application for leave to appeal is refused with costs.
2. In Appeal No 2670/2012, the application for leave to appeal is refused with costs.

[101] **FRASER JA:** I have had the advantage of reading the reasons for judgment of the President. I agree with those reasons and with the orders proposed by her Honour.

[102] **MULLINS J:** I agree with the President.