SUPREME COURT OF QUEENSLAND

CITATION:	*Raftopoulos v Brisbane City Council* [2012] QCA 84
PARTIES:	**ROBERT RAFTOPOULOS** (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 9639 of 2011 P & E No 2617 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning* Act
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	5 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2012
JUDGES:	Muir and Chesterman JJA and P Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal is refused.** **2. Costs to be assessed on the standard basis.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – OTHER MATTERS – where applicant lodged application with the respondent for a development permit for multi-unit dwellings – where application approved with conditions – where applicant accepted decision and indicated would not exercise any right of appeal to the Planning and Environment Court – where applicant did not proceed with development – where applicant argued with respondent about conditions – where applicant sought $2.2 million in compensation from the respondent pursuant to s 5.4.5 of the *Integrated Planning Act* 1997 for an alleged erroneous planning and development certificate – where applicant filed a notice of appeal to the P & E Court – where Judge below found the applicant never applied for a planning certificate and never obtained one – where Judge below ordered a preliminary hearing – where Judge below struck out the applicant's appeal – where applicant seeks leave to appeal – where statutory conditions must be satisfied before a claim for compensation may succeed – whether the order

for a preliminary hearing of the question of the applicant's entitlement to claim compensation was warranted

Integrated Planning Act 1997 (Qld), s 4.1.34, s 4.3.3, s 5.4.5, s 5.4.6(c), s 5.4.7, s 5.4.8, s 5.7.9, s 5.7.10, s 5.7.11
Local Government Act 1919-1971 (NSW), s 342AS

Linley Investments Pty Ltd v Lane Cove Municipal Council (1971) 22 LGRA 21, cited

COUNSEL: The applicant appeared on his own behalf
T N Trotter for the respondent

SOLICITORS: The applicant appeared on his own behalf
Brisbane City Legal Practice for the respondent

[1] **MUIR JA:** I agree that the application for leave to appeal should be refused with costs for the reasons given by Chesterman JA.

[2] **CHESTERMAN JA**: The applicant owned land at 11 Ampthill Street, Highgate Hill in Brisbane which he hoped to develop by building townhouses. On 13 November 2006 one George Pascucci lodged an application with the respondent for a development permit for multi-unit dwellings. The applicant signed the application as owner of the land. The respondent acknowledged receipt of the application on 30 November 2006. On 8 August 2007 a decision notice approving the development was given on conditions, four of which have some relevance to the application. At the time, however, none of the conditions was thought to be contentious. Mr Pascucci wrote to the respondent on 20 August 2007 to notify his acceptance of the respondent's decision and to indicate that he would not exercise any right of appeal to the Planning and Environment Court ("P & E Court").

[3] The *Integrated Planning* Act 1997 ("IP Act") defined a "decision notice or a negotiated decision notice" as something which:

> "[A]pproves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it) …".

[4] The conditions of approval which later gave rise to concern were:

> "19. Provide a pedestrian prioritised pathway from the **Ampthill Street** frontage to the front door of each unit. The pathway is to be differentiated in colour and texture from the driveway surface.
>
> 25. Submit and receive approval for a Street Tree Plan that provides details of one (1) new street tree on the Ampthill Street footpath …
>
> 26(a) … [r]etention of the existing Poinciana … located within the proposed courtyard of Unit 3.
>
> 30. Submit a plan indicating any proposed retaining wall provisions for the New Access Road … [o]btain certification … of the existing concrete block and brick retaining walls on the south eastern side of the existing road reserve … the certification should refer to the impact of vibration from construction vehicles from operating in close

> proximity to both concrete block and brick retaining walls located immediately adjacent to the existing road reserve."

[5] The existing tree was a Jacaranda, not a Poinciana. The retaining walls were not on the applicant's property but on adjoining land.

[6] The applicant did not proceed with his development. The reasons are not apparent, but he seems to have found the conditions too onerous to comply with, and argued with the respondent about them.

[7] On 15 June 2009 the respondent's Chief Executive Officer wrote to the applicant:

> "… I have now received the report of the Chief Legal Counsel, who has investigated and reported … on your claims in relation to the illegality of Conditions 19 and 30 of your development approval.
>
> I understand and sympathise with your concerns about imposition of these conditions and your perceived effect on your family and your development.
>
> However, it is of significant concern … that you have not chosen to exercise your legal rights to challenge that decision by way of a negotiated decision notice, planning appeal or application for modification of your approval.
>
> …
>
> However if the conditions can be said to be unlawful it is still open for Council to recognise that fact and deal with the matter accordingly.
>
> Accordingly, I have had regard to the legality of those conditions in drafting this response.
>
> With respect to Condition 30 regarding your neighbours' retaining walls, it seems to me reasonable and relevant and within power for Council to impose conditions … requiring an investigation be undertaken of the ability of your neighbours' retaining walls to withstand the construction of your project.
>
> If the investigations … requires works to be carried on or near those walls, that again seems to be a reasonable and relevant condition … [in] regard to your statutory duty of support and Council's obligations to ensure that support.
>
> With respect to Condition 19 regarding the pedestrian pathway, it is of significance that the pathway can be restricted to residents of your proposed units and gated accordingly, that the requirement for that pathway cannot adversely affect your security and privacy any more so than exists without that development. …"

[8] By emails (not included in the Appeal Book) sent to the respondent on 6, 7, 8 and 9 July 2009 the applicant applied for $2.2 million compensation pursuant to s 5.4.5 of the *Integrated Planning Act* 1997 ("IP Act"). The amount was calculated on the basis that:

> "The total outlay for the project was $1.8M and the anticipated returns were $4.5M, the gross profits of $2.7M would have been realized and the net would have been $2.2M +."

[9] The respondent replied by letter of 14 July 2009:

> "Nothing in those emails alters the position taken by Council in relation to your claims as set out in my letter to you of 15 June 2009, and I do not propose to debate the issue with you anymore.
>
> I am not in a position to accept your claim for compensation under Section 5.4.5 … as it does not relate to a claim in relation to an error in a Planning and Development Certificate issued by Council. ..."

[10] The applicant renewed his claim eighteen months later by letter of 9 February 2011 addressed to the respondent. He wrote:

> "I am claiming $2.2 million as an Entitlement from BCC for suffering major losses due to an Erroneous Planning and Development Certificate issued on 080/08/2007
>
> IPA Act 1997 – 5.4.5 Compensation for erroneous planning and development certificates – States:
> If a person suffers financial loss because of an error or omission in a planning and development certificate, the person is entitled to be paid reasonable compensation by the local government.
>
> 1. Condition 30 – Erroneous.
>
> 2. Condition 25 – Erroneous.
>
> 3. Condition 19 – Erroneous.
>
> Council failed to amend the conditions in the Planning and Development Certificate causing major losses."

[11] The respondent replied on 7 March 2011:

> "Council denies that it has any liability to you as stated.
>
> You have never applied for a Planning and Development Certificate that would justify your claim.
>
> You received a development approval not a development certificate.
>
> Section 4.3.3 of the [IP Act] obliges the owner of the property to comply with conditions not Council.
>
> Condition 30 on any test is a lawful condition. You appear to have misinformed yourself of the true nature of that condition as it affected you.
>
> Council is not aware of any false certificate.
>
> Therefore I propose to reject your claim for compensation."

[12] One other piece of correspondence should be mentioned. On 30 May 2008 the then Lord Mayor had written to the applicant:

> "…
> In response to your concern regarding the need to structurally certify the retaining walls along the laneway; it is considered that this is not an unreasonable requirement.
>
> Your development necessitates earthwork and pavement construction within the laneway. Condition 30, requiring certification of the

existing private retaining walls located along the boundary of the laneway, is intended to ensure that the adjoining property owners' rights are protected.

… [T]he intent of this condition was to certify that road and building construction would not have an adverse impact on the current condition of these walls, that is, that the works can be constructed without damaging the existing retaining walls. …

With regard to your concern about the poinciana tree that is to be retained, I am advised that a landscape architect has visited the site and confirms that the tree is a jacaranda … This … error seems to have originated from a notation on [a] … [p]lan … submitted with your development application … I am also advised that notification of this error has been attached to the Council file and will be corrected …

I can advise … that the planting of a street tree … is no longer required."

[13] On 20 July 2011 the applicant filed a notice of appeal to the P & E Court:

"… against the decision by [the respondent] denying my claim of entitlement for loss under [IP Act] and seeks the following orders or other relief that the court upholds my claim for entitlement of loss … the amount of $2.2million dollars plus interest since the issue of Development Approval Certificate … on 7 August 2007."

The grounds of the appeal were said to be:

"1. On 6 July 2009 by email I submitted a claim to [the respondent] … for an entitlement for loss under [IP Act] 5.4.5.
2. On 14 July 2009 [the respondent] responded by letter denying my claim …
3. The decision to deny my entitlement for compensation … was not made in accordance with the [IP Act], 5.4.7…
4. Ex-Lord Mayor … in a letter … on 30 May 2008 contains admissions of errors in the Development Approval Certificate.
5. …
6. The reason for denying my claim … is "The development approval issued to you after the negotiation phase is not a Planning and Development Certificate".
7. This reason is incomprehensible as the … Certificate is issued before the negotiation phase starts.
8. …
9. [The respondent] has a statutory duty under [IP Act] 5.4.5 to provide a Development Approval Certificate free from errors and omissions.
10. …
11. …
12. The errors were of such a serious nature that they could not be complied with to obtain building approval."

[14] Section 5.4.5 of the IP Act provided:

> "If a person suffers financial loss because of an error or omission in a planning and development certificate, the person is entitled to be paid reasonable compensation by the local government."

[15] By s 5.4.6(c) a claim could be made any time after the issue of the certificate. Section 5.4.8 provided that the local government to whom a claim for compensation was made might grant all or part of it, or refuse it. Section 4.1.34 gave a claimant dissatisfied with a decision made under s 5.4.8 the right to appeal to the P & E Court. Any appeal had to be started within 20 business days from the day notice of the decision was given to the applicant.

[16] Division 3 of Part 7 of Chapter 5 of the IP Act had as its subject matter "Planning and development certificates". Section 5.7.8 identified three types of certificate; limited certificates, standard certificates and full certificates. The section provides that upon payment of a prescribed fee a local authority was to issue a certificate of the type applied for. Sections 5.7.9, 5.7.10 and 5.7.11 set out the information which must be contained in each of the three types of certificate.

[17] A limited planning and development certificate had to contain a summary of the provisions of any planning scheme and infrastructure charges schedule which applies to the land enquired about, as well as a description of any state planning regulatory provision that applied, and any designations relevant to the property. A standard planning and development certificate had to contain that information and, as well, such things as copies of decision notices for development approvals, details of approvals or refusals of applications to amend a planning scheme, judgments or orders of the P & E Court affecting development approvals or conditions included in a master plan of the property, copies of agreements to which a local government or a concurrence agency was a party and copies of infrastructure agreements applying to the premises. A full planning and development certificate had to contain all the information required in the other certificates and other information it is not necessary to identify.

[18] As the respondent's correspondence to the applicant pointed out the IP Act contained provisions which conferred rights on dissatisfied applicants for development approval allowing them to challenge the refusal of an application or conditions imposed on an approval. The applicant did not exercise any such right. Nor did he ever apply to the respondent for the issue of a planning and development certificate.

[19] These latter facts led the respondent to apply to have the applicant's appeal to the P & E Court dismissed summarily on the basis that an essential pre-condition to the right to claim compensation did not exist. The determination of that point was heard on 4 October 2011. Judge Griffin SC accepted the respondent's arguments and ordered that the applicant's appeal be dismissed. His Honour said:

> "It is immediately obvious that, as part of the statutory scheme, … the ingredients … in the statutory cause of action conferred by … section [5.4.5] are an error in the certificate, the loss which is financial and which is a loss because of an error or omission and that this is an error which is contained within a planning and development certificate.
>
> The question which has been raised … concerns whether there was, in fact, a planning and development certificate in existence. I am of

> the opinion that this statutory remedy is available only in circumstances where there is or was in existence a planning and development certificate.
>
> Sections 5.7.8 and following deal with such certificates and with the regulation and issue of such a planning and development certificate. The certificate contemplated by those subsections appears to codify all manner of things which relate to those who would make use of and rely upon such certificates …
>
> Their purpose, I think, is obvious, that is, to provide interested parties with information about the state of planning matters, the subject of the certificate, and include, amongst other things, the existence of approvals, if applications are refused, and details of decision notices, infrastructure charges and other matters.
>
> The evidence in this matter clearly demonstrates that there was an approval for a development at the subject property, subject to conditions. The second matter … which is pellucidly clear, is that there is no and there has never been in existence a certificate of the type contemplated by the statutory regime …".

[20] The claim for compensation allowed by s 5.4.5 arises where:

(a) a local authority has issued one of the three sorts of certificates identified in Chapter 5 Part 7 Division 3 of the IP Act;

(b) the certificate contains a wrong statement of fact, or omits something the Act required it to state;

(c) the applicant for the certificate suffered financial loss because of the error or omission.

The words "because of" clearly connote a causal connection between the error or omission and the loss. That is to say the mistake in the certificate must have caused the person to whom it was issued to act in some way which caused him financial loss.

[21] Statutory provisions for compensation arising from the issue of erroneous town planning certificate are common enough. Section 342AS of the *Local Government Act* 1919-1971 (NSW) is one. *Linley Investments Pty Ltd v Lane Cove Municipal Council* (1971) 22 LGRA 21 concerned an application for compensation under that section. The local authority issued a certificate containing a material omission. The applicant for the certificate knew of the omitted fact and was not misled by the omission. His development failed because of the circumstance which the certificate omitted. A claim for compensation was dismissed. Hardie J said (26):

> "… [T]he claimant has failed to establish that it incurred any expenditure pursuant to the certificate. The same conclusions of fact negative one other essential ingredient of the statutory claim, namely, that the expenditure was rendered abortive by reason of the error in the certificate. The certificate was in error, but that error in no way caused the expenditure to be incurred or to become abortive or valueless."

[22] The applicant, as Judge Griffin noted, never applied for a planning certificate and never obtained one. Any loss he suffered with respect to his development was not

"because of" any error or omission in a certificate. No certificate was issued in which an error or omission could have appeared. Taking the applicant's assertion at face value the failure of his development, and his lost profits, were caused by his inability to proceed with his development, because there were conditions he could not comply with.

[23] The applicant's submissions do not come to grips with the statutory conditions which must be satisfied before a claim for compensation may succeed. The applicant confuses his development approval, or decision notice, with planning certificates. He remarks, for example, that details of his approval are contained in a planning certificate so "the development approval package … is part and parcel of the Planning and Development Certificate." He says, as well, "The Development Permit is the working instrument of the planning and development certificate that contains the same conditions with the same errors … and this working instrument was rendered useless by … errors in the conditions … the Development Permit … is an evidentiary aid that confirms the errors in the conditions that Council have admitted to being in the Development and Planning Certificate."

[24] It is apparent that the applicant confuses and conflates the nature and function of a decision notice with the notice and function of a planning certificate, apparently because a planning certificate respecting his land contains information about the decision notice and its attendant conditions. Because the planning certificate reveals the conditions which the applicant found objectionable he considers the two documents are identical, and that the "errors" in the conditions are errors in the certificate thereby giving him a right to claim compensation.

[25] The applicant's assertion that the decision notice of 8 August 2007 is the same as and identical with a Planning and Development Certificate because it contains the same information and, more importantly the objectionable conditions, is an obvious mistake. Not every planning certificate will contain information about planning decisions made with respect to the land the subject of the certificate. A limited planning and development certificate does not contain any information about decision notices which affect the land. From this alone it is apparent that there is no necessary identity between the two types of document.

[26] Decision notices and planning certificates are quite separate documents which perform entirely separate functions and give rise to different rights. A decision notice authorises the applicant for it to undertake development in accordance with the terms of the notice. A certificate confers no such rights. It provides information about what might be called the planning status of the land to which it relates. If the information contained in a certificate is wrong, or incomplete, the Council which issued it may incur liability to pay compensation for losses caused by the error or omission. Most claims will occur in circumstances where the person obtaining the certificate acts in reliance on the information it contains and suffers financial loss. He may pay too much for land, or may underestimate the costs of development, because of the error or omission.

[27] The right to claim compensation, the subject of s 5.4.5, is limited to financial loss caused by erroneous or incomplete information in a certificate of the type described in Chapter 5 Part 7 Division 3 of the IP Act, and no other document which may come into existence pursuant to any other Division of the IP Act. So much is obvious from the express terms of section 5.4.5.

[28] The applicant's argument has two basic premises:

(i) that a decision notice and a Planning and Development Certificate are identical in content and function;

(ii) the conditions he objected to in the decision notice of 8 August 2007 (in particular condition 30) are "errors".

[29] Premise (i) is plainly wrong for the reasons just expressed. The second premise is equally fallacious. Taking condition 30 as the example, the applicant contends it is an error because it required him to build and/or repair a retaining wall on someone else's land, the condition and the activity being unlawful. In order to advance that contention the applicant had to ignore the plain effect of the condition, which required no such activity. It required only the submission of a plan and the obtaining of a certification. That fact apart, the second premise is in itself erroneous because the condition did not contain information that fitted the description "error or omission".

[30] The approval which the respondent gave to the applicant's development in the decision notice authorised the applicant to proceed with his proposed development subject to the conditions imposed. The conditions complained of were not "errors". They were certainly not omissions. Apart from the misdescription of the tree there was nothing erroneous in the contents of the decision notice or the conditions. The approval accurately set out the conditions on which the development was allowed to proceed. To the extent that the approval contained information what it said was correct. The conditions did not wrongly state what had to be done to comply with them. The conditions may have made the development uneconomic and may have been unreasonable. The imposition of the conditions may have been amenable to challenge. But they were not for that reason errors of information.

[31] Judge Griffin rightly struck out the applicant's appeal. His Honour relied upon the absence of a certificate to conclude that the statutory right to compensation had not arisen. His Honour was, with respect, quite right in that regard. More fundamentally the applicant's claim failed because the alleged loss of profits was not caused by any error in information provided by the respondent. Any loss was caused by the applicant's incapacity to comply with the conditions for his development which were accurately stated in the decision notice.

[32] The applicant had some miscellaneous complaints about the hearing of the application on 4 October 2011. He complains that he was denied a fair hearing. The complaints seem to be:

1. That a registrar of the P & E Court importuned the applicant to withdraw his appeal. The judge of the P & E Court who set down the respondent's challenge to the appeal for determination as a preliminary issue declined to entertain the applicant's complaint about the registrar's conduct.

2. That there should not have been a summary determination of the respondent's objection.

3. The respondent "ambushed" the applicant by delivering an outline of argument the evening before the hearing and delivering an affidavit on the morning of the hearing, the affidavit containing "a false document".

4. The applicant was denied procedural fairness and the opportunity of an adjournment.

[33] The first complaint is not relevant. Even if the registrar over-stepped the mark and too strongly urged the applicant to withdraw his appeal, his importunity was unsuccessful and the matter proceeded to a hearing.

[34] The third complaint is also without substance. The submissions were given to the applicant the evening before the hearing to assist him to understand the respondent's argument in advance of the hearing. There was no direction for the exchange of submissions. The provision of the submissions was meant to be, and no doubt was, helpful to the applicant.

[35] The complaint about the affidavit is without substance. It exhibited two letters and the results of two title searches. The "false document" was one of the letters. The exhibit was a copy of an unsigned letter of 9 June 2009 from the respondent to the applicant. It appears to be a draft of the letter of 15 June 2009 referred to in paragraph [7]. The difference between draft and final version was immaterial. When leave was sought to read and file the affidavit, the applicant was asked for his attitude and he indicated no opposition. He was offered the opportunity to read the documents but declined saying that he was, "happy with it". When asked a third time if he objected to the affidavit's receipt he replied in the negative.

[36] The second and fourth complaints can be considered together. The applicant appears to have had no objection to the separate determination of the question whether he had a right to claim compensation after the purpose of the procedure was explained to him by Judge Rackemann who, on 19 September 2011 made the order. His Honour said:

> "… [T]here are two issues … The first is do you have an entitlement to compensation, that is, was there an error or omission in a planning and development certificate. That's the first issue. And then the second … is if that's correct, if you do have an entitlement to compensation, what is the reasonable amount … whether it's $2.2 million or some other figure … So they're the two issues?"

The applicant answered in the negative. He said he had a letter from the respondent "denying [him] a claim for compensation which [he] believe[d] is not a valid decision". He said the Council was not denying "any amounts" but were "denying [him his] entitlement for compensation", and he wished to contest the validity of that decision. Judge Rackemann then said:

> "[W]hat I was going to do was set down for hearing as soon as I can the question of are you entitled to compensation or not. I call that a preliminary point because if the answer to that is yes, then we'll have to worry about how much the compensation is. … But before we go into assessing how much the compensation is, the first question is are you entitled to compensation, and I was going to set that matter down for determination, whether you are entitled to compensation."

[37] The Judge asked if the applicant understood. He said he did. This exchange then occurred:

> "Judge: And if the Judge says no, well …
> Applicant: Yeah, that's fair enough.
> Judge: If the judge says yes, then there would need to be a separate hearing to decide how much, okay?
> Applicant: Yeah, that's fair enough.
> Judge: And so that first hearing … the preliminary point, I was going to set that down … in … October …

Applicant: That's fine by me, your Honour."

[38] It was only after Judge Griffin had given judgment and reasons *ex tempore* that the applicant complained about the procedure and the result of the hearing. He said he would like "another chance to bring into … Court … independent witnesses who'd be able to verify … where I stand. … All I was given was … a preliminary point of law …".

[39] The order for a preliminary hearing of the question of the applicant's entitlement to claim compensation was both appropriate and sensible. All the relevant facts were known; the point turned upon the meaning of a few sections in the IP Act. The applicant's appeal was misconceived and it was rightly dismissed.

[40] The application for leave to appeal should also be refused, with costs to be assessed on the standard basis.

[41] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Chesterman JA, with which I agree. I also agree with the orders proposed by his Honour.