SUPREME COURT OF QUEENSLAND

CITATION:	*Driesen v Gold Coast City Council & Anor* [2015] QCA 85
PARTIES:	**KEITH DRIESEN** (applicant) **v** **GOLD COAST CITY COUNCIL** (first respondent) **RIDGE PROPERTIES PTY LTD** (second respondent)
FILE NO/S:	Appeal No 8590 of 2014 DC No 2203 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2014] QPEC 42
DELIVERED ON:	19 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2015
JUDGES:	Holmes and Morrison JJA and Dalton J Separate reasons for judgment of each member of the Court, Morrison JA and Dalton J concurring as to the orders made, Holmes JA dissenting
ORDERS:	**1. The application for leave to appeal is refused.** **2. The parties have 14 days within which to make submissions on costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – RIGHT AND AVAILABILITY OF APPEAL – where the applicant made a submission objecting to a development application for a material change of use, allowing a large commercial development – where the applicant travelled overseas knowing that a decision on the application was pending – where the applicant did not put in place an arrangement by which he would be informed of the decision, but made ad-hoc enquiries of his secretary, an architect and a town planner – where the applicant became aware that the Council's planning committee had approved the application, but did not receive the decision notice until some weeks later – where the applicant missed the deadline for filing an appeal in the

Planning and Environment Court – where the applicant sought an extension of time under s 497 of the *Sustainable Planning Act* 2009 (Qld) – where the primary judge dismissed the application for an extension of time and struck out the applicant's appeal – where the applicant argued that the primary judge took irrelevant considerations into account when exercising the discretion contained in s 497 of the *Sustainable Planning Act* 2009 (Qld) – whether the primary judge erred in his exercise of the discretion – whether the discretion ought to be re-exercised – whether the application for leave to appeal should be granted

Sustainable Planning Act 2009 (Qld), s 337, s 361, s 363, s 366, s 462, s 497, s 498

Décor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397; (1991) 104 ALR 621; [1991] FCA 655, applied
Driesen v Gold Coast City Council & Anor [2015] QPELR 4; [2014] QPEC 42, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Kadhem v Trinity Green Development Pty Ltd & Anor [2014] QPELR 720; [2014] QPEC 36, cited

COUNSEL: T Sullivan QC, with M Batty, for the applicant
J S Brien for the first respondent
R S Litster QC, with K W Wylie, for the second respondent

SOLICITORS: Thomson Geer for the applicant
McCullough Robertson for the first respondent
Minter Ellison Gold Coast for the second respondent

[1] **HOLMES JA:** The applicant seeks leave to appeal from a decision of a judge of the Planning and Environment Court. His application to extend time within which to appeal the grant by the first respondent, the Gold Coast City Council, of a development permit to the second respondent, a property developer, was dismissed, while his notice of appeal, which had been filed prematurely in advance of the application, was struck out. The first respondent did not seek to be heard on the appeal.

The giving of the decision notice and the filing of the appeal

[2] On 14 April 2014, the first respondent granted the second respondent a development permit for a material change of use, allowing a large commercial development. The applicant, through a firm of town planning consultants, had filed submissions against the proposed development.

[3] The *Sustainable Planning Act* 2009 contemplates that an applicant for development approval may, upon receiving a decision notice, make representations about matters contained in it, including the approval conditions.[1] If the applicant is successful in its representations, a negotiated decision notice will be given.[2] Section 337 of the Act requires the assessment manager to give a copy of the decision notice to each

1 Section 361.
2 Section 363(1).

"principal submitter" within five business days after the earliest of the three following events: the applicant for development approval giving notice that it does not intend to make representations; the applicant giving notice of an appeal; or the end of the applicant's appeal period.

[4] Submitters were sent copies of the decision notice (titled the "Decision Notice to Submitters Properly Made – Approval") dated 17 April 2014, under cover of a letter bearing the same date. In the applicant's case, the notice was sent to the town planning consultants he had engaged, and it was common ground that he was given the notice when it was provided to them. A copy of the submitters' decision notice the town planning consultants received, date stamped 30 April 2014, was in evidence.

[5] Section 462(4) of the *Sustainable Planning Act* requires a submitter to appeal against a decision within 20 business days "after the decision notice or negotiated decision notice is given to the submitter". The applicant's appeal was filed on 11 June 2014: 14 days out of time if the period were taken to commence to run from the date stamped on the received decision notice, or 27 days if the date on the notice itself were taken as the starting point.

The application to extend time

[6] The application to extend time for the appeal was made under s 497 of the *Sustainable Planning Act*, which provides:

> "**Court may allow longer period to take an action**
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> In this part, if an action must be taken within a specified time, the court may allow a longer time to take the action if the court is satisfied there are sufficient grounds for the extension."

[7] The applicant filed two affidavits for the purposes of the extension of time application. In the first, he deposed that he had left Australia for the Philippines on 7 April 2014, returning on 30 June 2014. In his absence, he had made arrangements for his personal assistant, Ms Ashburn, to check his letter box and post office box for mail, particularly any notification in relation to the development decision. A Mr Smith, the director of the town planning consultants who had acted on his behalf, was also aware of the fact that he was "frequently overseas during the first six months of 2014".

[8] The applicant deposed that he received a copy of a newspaper article indicating that the development application had been approved. (In fact, no decision had been made at this point. A copy of a newspaper article which the applicant put into evidence before the primary judge, dated 3 April 2014, indicated that the Council's planning committee had voted to approve the development, which was yet to go before a full council meeting.) However, the applicant's apparent misapprehension led him, on 11 April 2014, to send an email addressed to Mr Smith, to an architect friend, Mr Hardy, and to Ms Ashburn.

[9] In the 11 April email, the applicant says he has been advised the development has been approved by a full Council meeting, but has not received any formal advice from Council and is not sure if the recipients of his email have. He goes on to say that he would like an opinion from his solicitors, and from Mr Hardy and Mr Smith,

as to the prospects of success on any appeal and its cost, noting that Mr Smith has already advised that there is a good chance of success at an approximate cost of $40,000. The email concludes by asking Ms Ashburn to forward any notices arriving from the Council and saying that the applicant looks forward to Mr Smith's and the solicitors' assessments.

[10] The applicant deposed that he did not receive any response from those three individuals indicating that a notice had been received. In early May, he emailed Ms Ashburn on two occasions, enquiring whether any notification from the Council had been received. On 24 May 2014, he emailed both Mr Smith and Mr Hardy asking if the Council's decision notice had been sent, "so starting the clock", but was not advised that it had been. On 3 June 2014 he telephoned Mr Smith, who told him that he had previously received a copy of the Council notice and forwarded it to Mr Hardy. Mr Smith sent him an email on the same day, attaching the notice and again advising that it appeared it might have been posted to "Steve" (Mr Hardy). On 4 June 2014, the applicant instructed his solicitors to file an appeal. A notice of appeal was in fact filed on 11 June 2014.

[11] The applicant's affidavit was sworn on 2 July 2014. At the request of the second respondent's solicitors, he provided some of the material referred to in, but not annexed to, his affidavit: the newspaper article and copies of his 24 May 2014 email and Mr Smith's 3 June 2014 email, both with redactions said to have been made to preserve legal professional privilege. At the hearing, unredacted copies of the 24 May and 3 June emails were tendered. The applicant's email simply enquired as to whether his solicitors had been able to review his letter and "potentially have [a] second opinion", while Smith's email reassured the applicant that he had spoken to the applicant's solicitors, who had said that he should not worry about the ending of the appeal period, his delay being explained by his absence overseas.

[12] In a further affidavit filed at the hearing of the application, the applicant deposed that he had spoken to Mr Smith, who had apologised for the failure to inform him of the receipt of the decision notice and explained that he had been preoccupied with his daughter's illness.

[13] The hearing of the application proceeded on affidavit and tendered evidence. There was no cross-examination; the applicant's material was criticised for inadequacy, but not challenged as to its factual correctness. Significantly, the second respondent did not suggest that the appeal period should be regarded as running from any earlier date than 30 April 2014. However, it pointed out that the applicant's material was vague as to what responses his emails had received and what was occurring in Australia as between Ms Ashburn, Mr Hardy and Mr Smith. The applicant had not explained what he knew about the operation of the appeal period. No affidavit had been provided from any of the three people to whom the applicant referred, particularly Mr Smith and Mr Hardy, and no explanation had been given as to why they had not sworn to what they knew. Nor had it been explained why it took seven days to prepare and file a notice of appeal, though it seemed from the material that the solicitors had been involved in preparing submissions and had been asked for an assessment of prospects.

The reasons for judgment

[14] In an ex tempore judgment, the learned primary judge observed that there was no evidence as to when the decision notice and covering letter were received by the applicant's planning consultants; instead there was a "bare allegation" in the

application that it was "on or about 30 April 2014". His Honour referred to a decision of another judge of the Planning and Environment Court as to relevant considerations in the exercise of the discretion under s 497, which included the explanation for delay, prejudice to the respondents, public interest considerations, the merits of the appeal and considerations of fairness as between the applicant and other parties.[3]

[15] The judge noted that the applicant did not explain what arrangements he had made with the planning consultants or Mr Hardy to keep him informed of the outcome of the development application. The emailed correspondence of 24 May and 3 June 2014 suggested that the applicant had received legal advice, but its details and when it was received were not made clear. Nor had the applicant given any detail of whether there had been any relevant difficulty associated with his loss of electronic communications while residing in the Philippines which could be said to have had any impact on his deciding whether to file a notice of appeal.

[16] His Honour continued,

> "Indeed, there are a number of areas where there has been a lack of candour on the part of the appellant in stating precisely why he did not instruct his agents or his lawyers to appeal a decision he states he was aware of from 11 April 2014".[4]

The applicant had failed to "state unequivocally" whether he had become aware of the decision notice before 3 June 2014 through any other means. On this subject his Honour concluded:

> "In circumstances where he was aware that he had a right of appeal and believed that a decision had been made adverse to the submissions he had made, in my view, the appellant was obliged to clearly explain to the court why he did not then proceed to exercise his appeal rights. In my view, it is not sufficient for him merely to say that he was abroad through his own choice at a time when a decision was likely, and that his agents did not give him a copy of the decision notice until 3 June 2014."[5]

[17] As a result, the primary judge concluded that no satisfactory explanation had been given for the delay. He turned to other discretionary considerations. No prejudice on the part of the first respondent was suggested. As to the second respondent, the developer, no specific prejudice from an extension of time was identified. His Honour continued:

> "However, self-evidently, the prospective appeal has the potential to frustrate the co-respondent's program for developing the subject site. Whilst this is not specific prejudice it is certainly something which, in my view, comes within the concept of public interest considerations.
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> Developers who invest large sums in significant development projects need certainty in order to make commercial decisions. It is not in the public interest that large development projects are subject to the uncertainties of submitter appeals outside the submitter's

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3 *Kadhem v Trinity Green Development Pty Ltd & Anor* [2014] QPEC 36 at 11.

4 *Driesen v Gold Coast City Council & Anor* [2014] QPEC 42, at [8].

5 At [9].

> appeal period unless the considerations relevant to the exercise of the discretion pursuant to section 497 are rigorously applied and found to justify an extension of time for a submitter to appeal. Certainty to parties undertaking large projects is an important consideration."[6]

In the absence of a clearer explanation for the reasons for the delay in appealing, such public interest considerations would weigh heavily against an appellant.

[18] His Honour accepted that the appeal, on so much of a preliminary enquiry as could be undertaken, disclosed merit. He turned to the question of fairness and said,

> "The appellant engaged consultants to advance his position in opposition to the development application. He clearly, being someone who lives opposite the development site, has a legitimate interest in the outcome of the development application. However, the material before me, and, in particular, the email dated 11 April 2014 and the email which is exhibit 4, reveals that the appellant was very much weighing up whether he was committed to appealing the decision to approve the development application. In these circumstances, I am of the view that a decision refusing the application cannot be said to be unfair to the appellant."[7]

Having regard to all of those factors, his Honour said, he had reached the view the application should be dismissed.

The application for leave to appeal

[19] A party to a proceeding in the Planning and Environment Court may appeal a decision of the Court to this Court only with leave and only on the ground of error or mistake in law or error of a jurisdictional kind.[8] (No jurisdictional error was argued here.) The applicant acknowledged that, the refusal of the application being interlocutory in nature, the Court was unlikely to grant leave unless it was of the view that a substantial injustice would otherwise result, and the decision was attended with sufficient doubt to warrant it being reconsidered.[9] However, he pointed to the distinction between an interlocutory decision on a point of practice and one concerning a substantive right, such as the present, in relation to which leave would more readily be granted.

[20] The applicant's proposed grounds of appeal, alleging *House*[10]-type error, fell into four broad groups. The first was that the primary judge had constrained his exercise of the statutory discretion by treating developers of large projects as a class of respondents entitled to certainty as a public interest consideration and by requiring that the relevant considerations be "rigorously applied". The concept of "rigorous application" was similar to one of "exceptional circumstances", carrying the vice of artificially distorting the weighing of relevant considerations. It had also led his

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6 At [10]-[11].
7 At [13].
8 *Sustainable Planning Act* (Qld) s 498.
9 The *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 104 ALR 621 test applied by this Court in *Westpac Banking Corporation v Klef Pty Ltd* [1998] QCA 311 at [11]; *Apap v Treanor* [2003] QCA 406 at [11]; *Webb v Pursell* [2013] QCA 199 at [6].
10 *House v The King* (1936) 55 CLR 499.

Honour to err by considering the benefit of finality divorced from other relevant considerations: that the delay in this case was short and no prejudice was identified.

[21] I do not think that the primary judge was attempting to elevate developers into a particular class to whom different "public interest considerations" applied. There is nothing remarkable about an acknowledgement that the policy underlying the setting of a fixed period for the exercise of appeal rights entails a recognition of the disadvantages of uncertainty. In referring to a rigorous application of the relevant considerations, his Honour did not, in my view, purport to say anything more than that the discretion was not to be exercised without proper justification.

[22] Another set of grounds contended that the primary judge had both taken into account irrelevant considerations and failed to take into account relevant considerations in dealing with his explanation for delay. The applicant complained that the primary judge had failed to have regard to the uncontradicted evidence when he concluded that there was no specific evidence as to arrangements made with Mr Smith and Mr Hardy to keep him informed of the result of the development application. In that regard, the applicant referred to the email of 11 April 2014 sent jointly to Mr Smith, Mr Hardy and Ms Ashburn; the emails with Ms Ashburn of 6 May 2014 and 7 May 2014; the email to Mr Smith and Mr Hardy of 24 May 2014 and the applicant's telephone call of 3 June 2014 to Mr Smith.

[23] The applicant's anxiety to be informed is evident from those communications, but his efforts were neither systematic nor effective. (Indeed, he seems, from his enquiries of Ms Ashburn, to have laboured under a misapprehension that a copy of the decision notice would be sent to him personally.) None of those ad hoc enquiries amounted to an arrangement with Mr Smith or Mr Hardy by which he would be kept informed. I do not think the criticism of the primary judge in this respect is warranted.

[24] With rather more justice, the applicant complained of the primary judge's criticism of him as having failed to "state unequivocally" whether he was aware of the decision notice before 3 June 2014 through other means than its provision by Mr Smith. As the applicant points out, he had deposed in his affidavit to being concerned on that date because he had not been advised of the receipt of the Council's notification by Mr Smith, Mr Hardy or Ms Ashburn, which seems a clear indication that he was not aware of it. There was no reason to suppose that his concern was not genuine; it was not suggested to the applicant, nor was there any evidence, that he was for some nefarious reason purporting to wait to hear from them while in some other way being apprised of the decision.

[25] In a similar vein was his Honour's reference to the assertion that the decision notice was received "on or about 30 April 2014" as a "bare allegation". There was some evidence of the time of receipt in the form of the date received stamp on the decision notice. It was, no doubt, documentary hearsay of receipt on 30 April 2014, but, importantly, counsel for the second respondent had made the concession "we don't suggest that the appeal period runs any earlier than the 30th of April".

[26] His Honour's references to a "lack of candour" on the applicant's part as to why he did not give instructions to appeal a decision that he stated he was aware of from 11 April 2014 and the lack of an explanation as to why, when he believed an adverse decision had been made, he did not then exercise his appeal rights do not seem to recognise the fact that an appeal when the applicant first apprehended a decision had been made would have been premature. Even had the applicant been

right in thinking that the development application had then been approved, no appeal could regularly have been filed in advance of at least the expiry of the period referred to in s 337(1). Until that time, the possibility existed of variation of the existing decision notice. In my view, the fact that the applicant had not explained a failure to give instructions for an appeal at the point when he believed a decision to have been made was not a relevant consideration.

[27] Those concerns expressed by his Honour aligned with his conclusions on the issue of fairness, as to which the applicant contended he had also taken an irrelevant consideration into account. It was submitted that the primary judge's finding that the applicant had sought and received legal advice in order to weigh up whether he ought to appeal could not be a relevant consideration, because it occurred before the applicant had been advised of the receipt of the decision notice. Where the applicant did not know that the notice had been given, so that the appeal period was running, and had not knowingly delayed lodging the appeal, his seeking of legal advice and weighing up whether he would appeal was irrelevant.

[28] Counsel for the second respondent conceded that the applicant's weighing up of whether he would appeal prior to his becoming aware of the decision notice as issued was an irrelevant consideration, but argued that it did not affect the balance of the decision. In my view, the concession was properly made. There was nothing unreasonable or blameworthy in the applicant's considering his position, as long as he was not aware that the appeal period had started to run. His doing so had no bearing on the question of whether it was fair as between him and the second respondent to grant an extension of time.

[29] Those errors require the setting aside of the decision at first instance and the re-exercise of the discretion. The applicant's delay in filing a notice of appeal was relatively short; on the concession made by the second respondent at first instance, 14 business days. There is no reason to suppose that the delay was anything other than inadvertent. The applicant was, on the evidence, at pains to find out whether the decision notice had been received and the time for appeal had started to run, although he was not particularly competent in doing so. He acted promptly once he became aware of the true position. The experienced primary judge's assessment was that the proposed appeal had merit. No specific prejudice was identified by the respondent. The application for an extension of time should, in my view, have been granted, and should now be granted. There was a significant injustice to the applicant in its refusal, warranting the granting of leave to appeal.

Orders

[30] The application for leave to appeal should be granted, the appeal allowed, the orders at first instance set aside and time extended for the applicant's filing of his notice of appeal in the Planning and Environment Court to 11 June 2014. The parties should have 14 days within which to make submissions on costs.

[31] **MORRISON JA:** I have had the considerable advantage of reading the draft reasons of Holmes JA and Dalton J. I agree with what Holmes JA has said in paragraphs [1]-[25] and [27]-[28] of her reasons, and that the primary decision must be set aside with the consequence that the discretion must be re-exercised. That means that this Court must be positively satisfied that there are sufficient grounds for the extension of time under s 497 of the *Sustainable Planning Act* 2009 (Qld).

[32] Mr Driesen objected to the development proposed by Ridge Properties Pty Ltd. For the purpose of advancing his objections he retained a town planner, Mr Smith of Planit Consulting, and an architect (Mr Hardy) to assist Planit Consulting. An objection was lodged on 23 September 2013, stating that Planit Consulting acted for Mr Driesen in respect of the objections.

[33] When the development proposal was changed, Mr Driesen retained solicitors to lodge a further objection, on 6 March 2014.

[34] Mr Driesen left for the Philippines on 7 April 2014. At that time he had already resolved to appeal if the development was approved. He did not return until 30 June.

[35] While he was overseas Mr Driesen was still represented here by Mr Hardy and Mr Smith. As well, his personal assistant, Ms Ashburn, regularly checked his letterbox and post office mailbox, specifically on the alert for any Council notification about the development.

[36] Sometime before 11 April Mr Driesen received a copy of a newspaper report dated 3 April stating that the development had been approved by the Council's planning committee, and that it was due to "go before a full council meeting tomorrow". That led to his contacting Mr Smith, Mr Hardy and Ms Ashburn to enquire whether they had received "formal advise (sic) from council". In the same email he sought advice from Mr Smith, and his solicitors, as to: the prospects of success on any appeal; how long it would take; the costs involved; and the costs recovered or to be paid at the end. Mr Smith had given some views on the prospects and cost before.

[37] Just what response was received is quite unclear. Mr Driesen deposed:

> "I did not receive any response from Smith, Hardy or Ashburn that indicated that any of them had received a notification from the Council of its decision to approve the development application."[11]

[38] The email of 11 April makes it reasonably clear that Mr Smith was to liaise with the solicitors to obtain the advice. That was consistent with what had occurred when the objections to the changed development proposal were prepared. They were to be done by Planit Consulting but Mr Smith advised that they should be done by a solicitor. He was instructed to engage solicitors on Mr Driesen's behalf, which he did.

[39] The Council's decision notice for submitters was dated 17 April 2014. The one for Mr Driesen was sent to him via Mr Smith at Planit Consulting. That was to be expected given that Planit Consulting had lodged the initial objections. The notice was received on 30 April 2014.

[40] On 6 and 7 May Mr Driesen had email contact with Ms Ashburn as to whether any letters from the Council had been received by her. He did not have any similar contact with Mr Smith, Mr Hardy or his solicitors. Just what response was received is

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11 Mr Driesen's affidavit, paragraph 16, AB 32.

unclear,[12] as Mr Driesen only deposed that "I was not advised in response that any notification from the Council had been received".

[41] On 24 May Mr Driesen emailed Mr Smith and Mr Hardy to ask whether they had received any letter from the Council as to its decision "so starting the clock". That was about six weeks after he had become aware that the development might imminently be approved. He also asked Mr Smith whether the solicitors had been able to review Mr Driesen's letter[13] and whether the solicitors had a second opinion to give. Once again the nature of any responses are not clear as Mr Driesen only deposed that "I was not advised in response that any notification from the Council had been received".

[42] The first time that Mr Driesen telephoned any of his contacts was 3 June, at which time he said he was "concerned over the fact that I had still not been advised by Smith, Hardy or Ashburn of the receipt of Council's notification of its decision". He phoned Mr Smith who revealed that he had received the notice, and sent it on to Mr Hardy.

[43] When the application for an extension of time was made, and Mr Driesen's first affidavit was served, the developer's solicitors asked for particulars of some of the things that were said in the affidavit. One was as to the email on 11 April to Mr Smith, Mr Hardy and Ms Ashburn. The request sought copies of "each response received" to that email. The answer to that request was:

> "As indicated in paragraph 16 of the affidavit, we are instructed that no response was received "from Smith, Hardy or Ashburn that indicated that any of them had received a notification from the Council of its decision to approve the development application"."[14]

[44] The application to extend time accepts that the Council's notice was given "to [Mr Driesen's] consultant" on or about 30 April 2014, but the application was made on the ground that the appeal could not be filed before 28 May 2014 "As a result of circumstances beyond the control of [Mr Driesen]".[15]

Sufficient grounds to extend time?

[45] This question must be addressed in light of the relevant facts of this case. They are these:

(a) before he left for the Philippines on 7 April 2014, Mr Driesen had decided to appeal any approval of the development;

(b) he retained a town planner (Mr Smith), and an architect (Mr Hardy) to assist the planner, but gave them no instructions to prepare an appeal when the time came;

(c) knowing an approval was imminent, on 11 April he emailed his town planner and architect asking whether they had received a formal notice from the Council; he also asked for advice about an appeal, including from his solicitors, who

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12 There was a response from an email address that may or may not have been Ms Ashburn's email address: AB 91. It was dated 6 May and said "There were not letters like that last week".

13 It is not clear what letter this refers to; it may be a reference to the email of 11 April.

14 AB 155.

15 AB 190, 193.

had prepared objections for him; but still he did not instruct them to prepare an appeal;

(d) he received no response to that email;

(e) then six weeks later on 24 May he emailed them again, asking whether any notice had been received from the Council; Mr Driesen asked Mr Smith whether the solicitors had reviewed a letter from him; but still he did not instruct any of the planner, architect or solicitor to prepare an appeal when the time came;

(f) he received no response to that email;

(g) on 3 June Mr Driesen became concerned that he had not been advised by Mr Smith or Mr Hardy of receipt of the Council's notice, and he phoned Mr Smith, who advised that it had been received and sent on to Mr Hardy; that day Mr Smith sent him a copy;

(h) the next day he instructed the solicitors to file an appeal;

(i) Mr Driesen did not return to Australia until 30 June 2014.

Explanation of the delay

[46] In my view any explanation of the delay must include the delay between when the notice was first in the hands of Mr Driesen's agents, and 28 May when the appeal period ran. Mr Driesen retained Mr Smith to perform responsibilities during the period whilst awaiting the notice. When the notice was received it was sent to Mr Hardy, though not, it seems, to Ms Ashburn or to the solicitors who were retained to advise on the efficacy and cost of an appeal.

[47] The material is quite deficient when it comes to any explanation from Mr Smith or Mr Hardy as to what, if anything, they did or were instructed to do in the period between Mr Driesen's leaving for the Philippines and 28 May. Likewise Mr Driesen's evidence is bare when it comes to gleaning what they were instructed to do. The most one can draw is what was emailed on 11 April and 24 May. Those emails say nothing about preparing a notice of appeal.

[48] That absence of evidence was part of what the primary judge referred to as a lack of candour on the part of the applicant. Not only was Mr Driesen's evidence bare, there was none from Mr Smith or Mr Hardy. Given that: (i) Mr Smith was given instructions on 11 April to take steps to further Mr Driesen's interests, (ii) he was told that Mr Driesen believed the full Council had approved the development, and (iii) the approval was actually given three days later, it is difficult to believe that someone in Mr Smith's position would not have been aware of the fact of approval, even if not of the formal terms. That makes the absence of any evidence by Mr Smith even more stark.

[49] The basis of the objections taken by Mr Driesen were on issues fundamental to the development application.[16] In my view it was unlikely that they would be substantially abandoned or modified by the developer in a negotiated process under ss 361, 363 and 366 of the *Sustainable Planning Act* 2009 (Qld). As it happens it seems the

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16 They included conflicts with the planning scheme in terms of height, retail area, plot ratio, light, set-backs, site coverage and excessive GFA.

developer did not engage in that process. The notice to submitters, which can only issue under s 337 at the end of that process,[17] issued on 17 April and stated that the approval was given on 14 April.[18] It is not a negotiated decision notice under s 363.

[50] A submitter can appeal under s 462 against the approval. The right to appeal, itself, is not triggered by receipt of a decision notice, but by the council's approval of a development. A submitter's appeal period must be lodged "within 20 business days … after the decision notice … is given to the submitter": s 462(4). That must be seen as setting the end date by which an appeal must be lodged. I do not read that as setting a date (the date of receipt of the decision notice) before which an appeal cannot be lodged.

[51] Therefore I respectfully do not agree with the view that the failure to explain why Mr Driesen had not given instructions to appeal, in the period between 11 April and 4 June, was irrelevant.

[52] In my view the explanation for the delay was wholly insufficient. I agree with what Dalton J has said in paragraphs [60] and [61] of her reasons.

Failure to instruct that an appeal be prepared

[53] Mr Driesen deposed, and contended, that he had "acted as quickly as reasonably possible to issue instructions from overseas for an appeal to be filed."[19] I do not consider that the contention can be sustained.

[54] Evidence could have been called from Mr Smith, Mr Hardy or the solicitors, yet Mr Driesen was the only deponent on the application. On his own account he had decided to appeal but did not instruct anyone to prepare an appeal, let alone file it, until 4 June 2014. In other circumstances choosing to leave instructions until a notice had been received may be understandable, but where Mr Driesen was going overseas to a place where he knew that the telephone and internet communication was unreliable,[20] that demonstrates an unsatisfactory approach to dealing with the appeal. The fact is that Mr Driesen did not give anyone timely instructions to prepare an appeal, or lodge it.

[55] Mr Driesen was applying for an extension of time which would normally call for the explanation to be given to the court as fulsomely as could possibly be done. It is singular that no evidence was called from Mr Smith, Mr Hardy or the solicitors, when that evidence was in the control of Mr Driesen's side of the case. That is particularly so when the evidence as to what responses, if any, were made to the emails on 11 April and 24 May was confined to Mr Driesen's evidence set out above in paragraphs [37], [40], [41] and [43]. That evidence seems to me to be deliberately coy as to what was exchanged between Mr Driesen and the others. That leaves the evidence as being that there were no relevant responses, hence the facts in paragraphs [45](d) and [45](f) above.

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17 Under s 337(1), on the earliest of: the developer telling the Council that it does not wish to make representations towards a negotiated decision; the developer giving a notice of appeal; or the end of the developer's appeal period of 20 business days.

18 AB 92.

19 Mr Driesen's affidavit, paragraph 22, AB 33.

20 Mr Driesen's affidavit, paragraph 12, AB 32.

[56] Mr Driesen's application was brought on the basis that the appeal could not be filed before 28 May 2014 "As a result of circumstances beyond the control of [Mr Driesen]".[21] That contention cannot be sustained for the same reasons as given above. The circumstances were entirely within Mr Driesen's control. Before he went overseas he could have left instructions to prepare and file a notice of appeal, and those instructions could have been given once he knew an approval was imminent, and certainly by 24 May when, on his own account, he became concerned at the lack of receipt of a notice.

[57] In the circumstances where Mr Driesen intended to appeal but was going to be out of the country and problematically in touch, the failure to instruct anyone to prepare and lodge an appeal and the absence of evidence from Mr Smith, Mr Hardy and the solicitors, combined with the coy exposition of the responses, compels the conclusion that sufficient grounds to extend time have not been shown.

[58] I would refuse the application for leave to appeal. The parties should have 14 days within which to make submissions on costs.

[59] **DALTON J:** I agree with the analysis of facts and the decision of the primary judge given by Holmes JA. I agree that the discretion ought to be re-exercised. I would not extend time for the applicant to file the notice of appeal. In my view, insufficient grounds are shown within the meaning of s 497 of the *Sustainable Planning Act* to justify an extension.

[60] The applicant knew that his rights to appeal were limited by a time running from the receipt of the decision pursuant to s 337(1) of the *Sustainable Planning Act* – he said as much in his email of 24 May 2014. He left Australia on 7 April 2014 knowing that a decision pursuant to s 337(1) was pending and without making proper arrangements to be informed when that decision was made. He had town planners and solicitors retained in the matter. He made no sensible arrangement with either of them which would ensure he was informed of the receipt of the s 337(1) notice. He made no attempt even to ascertain to whom the notice would be sent.

[61] He misinterpreted the decision of the Council's planning committee as one of the Council itself, which caused him to make enquiries on 11 April 2014 as to whether a s 337(1) notice had been received. He received no satisfactory response, but made no proper attempt to follow this up until 24 May 2014. His communications of 11 April 2014 and 24 May 2014 were by email. It was not until 3 June 2014 that he became sufficiently concerned to telephone his town planning consultant and receive accurate information. The applicant says the matter is important to him. There is no reason why the applicant could not have made reasonable attempts to pursue the matter. It was, literally, as easy as picking up the telephone.

[62] Having regard to my view of the merits, I would refuse the application for leave to appeal. The parties should have 14 days within which to make submissions on costs.

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[21] AB 190, 193.