SUPREME COURT OF QUEENSLAND

CITATION:	*Gavin & Anor v Sunshine Coast Regional Council* [2021] QCA 217
PARTIES:	**MICHAEL IVAN GAVIN** (first applicant) **JDL INVESTMENTS PTY LTD** ACN 611 912 808 (second applicant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 511 of 2021 Appeal No 2659 of 2021 P & E No 125 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Maroochydore – [2020] QPEC 63 (Cash QC DCJ) Planning and Environment Court at Gympie – [2021] QPEC 2 (Cash QC DCJ)
DELIVERED ON:	8 October 2021
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2021
JUDGES:	Fraser and Morrison JJA and North J
ORDERS:	**1. Applications for leave to appeal refused.** **2. The applicants pay the respondent's costs of and incidental to the applications, to be assessed on the standard basis.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – BUILDING CONTROL – OTHER MATTERS – where the applicants constructed a building which was used contrary to s 162 and s 165 of the *Planning Act 2016* (Qld) – where the building was used as an "accommodation building" instead of a "dwelling house" – where the Planning and Environment Court made orders to prevent further unlawful use of the building including orders compelling significant changes to the building – whether the orders were within power of the Planning and Environment Court *Planning Act 2016* (Qld), s 162, s 165, s 180 *Planning and Environment Court Act 2016* (Qld), s 63

COUNSEL: G J Gibson QC, with M McDermott, for the applicants
R J Anderson QC, with G J Barr, for the respondent

SOLICITORS: Andrew Davis Planning Lawyers for the applicants
Heiner & Doyle for the respondent

[1] **FRASER JA:** I have had the advantage of reading in draft Morrison JA's reasons. Given the significance of the proper construction of s 180 of the *Planning Act 2016* (Qld) I will explain in my own words why I agree with Morrison JA that the applicants' challenge to order 5 made by the Planning and Environment Court should be rejected. In all other respects I agree with Morrison JA's reasons, and I agree with the orders proposed by his Honour.

[2] Order 5 is reproduced in [24] of Morrison JA's reasons. In summary, that order variously directs the applicants (who were the respondents in the Planning and Environment Court) to remove and not reinstall, to remove and replace, or to permanently discontinue the use of and remove, specified parts of or items installed in a building, which the applicants had caused to be constructed. The circumstances in which the primary judge made the order are set out in detail in Morrison JA's reasons. I will refer only to so much of that context as is necessary to explain my conclusion that the Planning and Environment Court was empowered to make order 5.

[3] The applicants were found to have committed two development offences, each of which was alleged by the respondent Council and found by the primary judge to have involved the unlawful use of the building as an "accommodation building". The layout of the building was eminently suitable for its (unlawful) use as an accommodation building and distinctly unconventional for its (lawful) use as a dwelling house. Even so, it was not alleged by the Council or found by the primary judge that the building had been erected unlawfully, and the building was capable of being lawfully used as a dwelling house without any of the alterations required by order 5.

[4] The primary judge found that the terms of order 5 were necessary, essentially for the following reasons: "strong terms are necessary to ensure compliance with the [*Planning Act 2016* (Qld)]; the first applicant's "very late willingness to accept that what he was doing was wrong ... is not such as to permit me to conclude he will, absent some strong incentive, comply with the [*Planning Act*] in the future"; notwithstanding that there would be orders prohibiting the applicants from unlawfully using the building other than as a dwelling house, or advertising or renting individual rooms or levels, it is "necessary to secure compliance" with the Act to impose terms of the order "that would make it harder for the building to be used as an accommodation building"; and it is "appropriate to require some modification of the building to make it less amenable to use as an accommodation building".[1] None of those findings are challenged.

[5] The applicants contend that the Planning and Environment Court lacked power to make an enforcement order in the form of order 5 in circumstances in which the building was not found to have been erected unlawfully and the building was capable of being lawfully used as a dwelling house without any of the alterations required by order 5. In support of that contention the applicants invoke the

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1 *Sunshine Coast Regional Council v Gavin & Anor* [2020] QPEC 63 at [43] and [45].

principle of legality; in particular, the applicants rely upon the endorsement by French CJ in *R & R Fazzolari v Parramatta City Council*[2] of the "general rule to be followed in the construction of Statutes … that they are not to be construed as interfering with vested interests unless that intention is manifest".[3]

[6] Paragraphs (a) and (b) of s 180(5) of the *Planning Act* authorise directions "to stop", or "not to start", "an activity that constitutes a development offence". Order 5 does not direct the applicants to stop or not to start an activity which constitutes a development offence. Paragraph (c) authorises a direction to do something that is required to stop committing a development offence. It was not necessary for the applicants "to do anything" to stop committing the development offences. All that was required was an omission of the kind described in paragraph (b), that the applicants "not … start an activity that constitutes a development offence".

[7] Paragraph (e) empowers a direction "to do anything to comply with this Act". The contrast between the precisely targeted language of paragraphs (a) – (c) and the more general language of paragraph (e) suggests that the latter paragraph conveys a power to make orders that extend beyond those which direct compliance with an obligation imposed by the Act. With that in mind, the word "to" in the expression "to comply with the Act" may connote the purpose of achieving a result. It is an available construction of paragraph (e) that it empowers a direction requiring something to be done for the purpose of bringing about compliance with the Act.

[8] Consistently with such a construction of paragraph (e), s 180(6) empowers the Planning and Environment Court to make an enforcement order "in terms the P & E Court considers appropriate to secure compliance with this Act". In the context in which the expression "to secure" appears it comprehends but is not confined to the provision of "security" of a kind that is analogous to something to which a creditor may have recourse if a debt is not honoured. An illustration of the power given by s 180(6) appears in the example below the provision: "An enforcement order may require the respondent to provide security for the reasonable cost of taking a stated action." (The operation of such an order is facilitated by the power conferred upon the enforcement authority by s 180(13) to take action required under an enforcement order and recover the reasonable costs of taking that action from the respondent if the enforcement order is not complied with within the period stated in the order.) The example uses the word "security" to convey the particular meaning I have mentioned, but that cannot be used to limit the broader meaning of "secure" in the provision. Under s 14D of the *Acts Interpretation Act 1954* (Qld), an example of the operation of a provision "is not exhaustive; and … does not limit, but may extend, the meaning of the provision …".

[9] The example makes it clear that the terms of an enforcement order may infringe upon a respondent's property rights in a way that extends beyond the effect of a direction of the kind described in paragraph (d) of s 180(5), which would more directly "remedy the effect of a development offence in a stated way" in terms of s 180(2)(b). That is consistent with the language of s 180(6).

[10] Also bearing in mind the circumstance that under s 180(3) an enforcement order may only be made where the court considers a development offence has been

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2 (2009) 237 CLR 603 at 619 [43].

3 *Clissold v Perry* (1984) 1 CLR 363 at 373, per Griffith CJ, Barton and O'Connor JJ concurring at 378.

committed or, but for the order, will be committed, I conclude that sections 180(5)(e) and 180(6) unambiguously confer upon the Planning and Environment Court a power to impose terms of an enforcement order which that court considers are apt to secure compliance with the Act by making it more difficult for the respondent to commit a development offence. That is so notwithstanding that an enforcement order in such terms may interfere with the vested property rights of the respondent in a way that extends beyond the effect of an order of the kind described in paragraphs (a) – (c) of s 180(5), which would more directly require a person to "refrain from committing a development offence" in terms of s 180(2)(a).

[11] The primary judge was therefore empowered to make order 5, the terms of which were found by the primary judge to be necessary to secure the applicants' compliance with the relevant provisions of the *Planning Act*.

[12] The powers given by s 180 are very broad. In a case of this kind it should only rarely be appropriate to impose terms of an enforcement order that will interfere with a respondent's vested rights in a way that extends beyond the effect of orders that more directly restrain the commission of the relevant development offence. The usual expectation is that a respondent to an enforcement proceeding will comply with the less intrusive orders, even where that respondent's conduct in relation to the relevant development offence merits strong criticism. I hasten to add that I do not mean to imply any criticism of the primary judge's exercise of the discretion in the quite extraordinary circumstances revealed by the evidence to which Morrison JA has referred. In any event, the applicants' challenge to order 5 was confined to the question whether that order was within power.

[13] **MORRISON JA:** Mr Gavin is an experienced builder/developer, having been involved in some 15 construction, renovation or redevelopment projects. In 2018 he constructed a building at Birtinya, on land owned by his company, JDL Investments Pty Ltd (**JDL**).

[14] Mr Gavin was very specific about his requirements for the building when the drawings were done. In short, he wanted a three-story, 17-bedroom building, with all bedrooms of the same size, and each bedroom having: (i) individual key-locks, (ii) thick walls for soundproofing, (iii) its own separate ensuite, (iv) solid self-closing doors, (v) individually controlled air conditioning, and (vi) individual water and electricity meters.

[15] He also specified that access to the three floors be via an internal stairway which was sealed off from each floor by a solid-core, self-closing door. And, balconies outside the living areas on the first and second floor were to have a tap and laundry sink.

[16] Mr Gavin told the architect retained to draw the plans that he intended to "get the house changed over to class 2" during the certification process. Class 2 referred to a building that had two or more sole-occupancy units as separate dwellings. He also spoke of renting the building out.

[17] Mr Gavin deceived Stockland Developments Pty Ltd when his plans were submitted to it under building covenants attached to the land.[4] He altered the architect's drawings to disguise the fact that the building was being constructed for use as an

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[4] These plans are referred to in the reasons below, and here, as the covenant plans.

accommodation building, which was a prohibited use in that area. The altered plans substantially misrepresented the architect's drawings, pretending that the building was to be a normal, if large, domestic dwelling.

[18] Mr Gavin deceived the Council twice when he applied for approval to construct the building. First, he told the private certifier that he intended to move his family from Yaroomba because of his concerns about "overdevelopment" resulting from the Sekisui proposal and its impact on local amenity.

[19] Secondly, when told by the Council that use as an accommodation house was prohibited, he replied that the proposed use was to be as a "dwelling house", and that the information given to the private certifier was for a "dwelling house".

[20] The building is on land that does not permit it to be used as an "accommodation building". The building has, in fact, been used as an "accommodation building" contrary to its "Residential A" zoning under the applicable planning provisions.

[21] Mr Gavin and JDL always knew that the building constructed could not lawfully be used for an accommodation building. Notwithstanding that, Mr Gavin and JDL always intended to use the building as an accommodation building and not as a dwelling house.

[22] Mr Gavin and his family moved in but after six weeks they moved out again, and he immediately advertised for rentals, letting it out to as many as 15 people at a time.

[23] By constructing the building as an "accommodation house" and by using it for that purpose both Mr Gavin and JDL committed development offences contrary to s 162 and s 165 of the *Planning Act 2016* (Qld) (**PA**).[5] The Council sought enforcement orders which would have the effect of preventing any further use of the building contrary to its lawful use.

[24] Enforcement orders were made by the Planning and Environment Court[6] in these terms:[7]

> "1. In the absence of an effective development permit authorising the making of a material change of use, the respondents must not at any time use, or permit or allow to be used, 9 Fortitude Place, Birtinya, properly described as Lot 144 on SP293310 ('the Premises'), as an 'Accommodation Building' or for any purpose other than as a 'Dwelling House' as those terms are defined in Part 9 of the *Caloundra City Planning Scheme* 1996;
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> 2. In the absence of an effective development permit authorising the making of a material change of use, the respondents must not at any time enter into any tenancy agreements, whether written or oral, for individual rooms or apartments or levels at the Premises;

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5 These development offences were admitted: outline below, AB 114-115, paragraphs 26, 28.

6 *Sunshine Coast Regional Council v Gavin & Anor* [2020] QPEC 63; *Sunshine Coast Regional Council v Gavin & Anor (No 2)* [2021] QPEC 2.

7 Orders 1-4 were made on 18 December 2020; order 5-7 were made on 12 February 2021.

3. In the absence of an effective development permit authorising the making of a material change of use, the respondents must not at any time advertise individual rooms or apartments or levels at the Premises for letting for any purpose;

4. In the absence of an effective development permit authorising the making of a material change of use, the Premises must not at any time be used, or be permitted or allowed to be used, as an 'Accommodation Building' or for any purpose other than as a 'Dwelling House' as those terms are defined in Part 9 of the *Caloundra City Planning Scheme* 1996;

5. Within 45 days the respondents must:

   (a) Remove and not reinstall the stairwell doors on the first floor identified as D213 on Jamin Architecture drawing 111FP ('111FP') and second floor identified as D313 on Jamin Architecture drawing 112FP ('112FP');

   (b) Remove and not reinstall the door to the ground floor 'Lounge' identified as D106 on Jamin Architecture drawing 110FP ('110FP');

   (c) Remove all other solid-core doors in the Premises, except for the front entrance door (identified as D102 on 110FP) and the garage to kitchen door (identified as D108 on 110FP), and replace with standard domestic hollow-core doors, and not reinstall solid-core doors;

   (d) Remove and not reinstall keyed internal locks to all doors except for:

      (i) The front entrance door, identified as D102 on 110FP;

      (ii) The garage to kitchen door, identified as D108 on 110FP;

      (iii) Two other doors on each level of the Premises as chosen by the respondents;

   (e) Permanently discontinue the use of and remove any range hood, sinks, taps and plumbing in the 'kitchen' on the first floor (the area marked as 'Rumpus' on 111FP);

   (f) Permanently discontinue the use of and remove any cooktop, oven, range hood, sinks, taps and plumbing in the 'kitchen' on the second floor (the area marked as 'Bar' on 112FP;

   (g) Remove, and not reinstall, the privacy screen separating the balcony adjacent to 'Child Bed 4' from the balcony adjacent to 'Multi-purpose Room' as identified on 111FP;

   (h) Permanently discontinue the use of and remove any laundry tubs, laundry basins or other laundry facilities

on the first and second floors and cap-off and decommission all associated plumbing, other than any floor wastes;

(i) Remove and not reinstall electricity sub-meters to all rooms in the Premises such that electricity supply to the Premises is measured by a single meter;

(j) Remove and not reinstall all water sub-meters such that water supply to the premises is measured by a single meter

6. Within seven days of the completion of the work required by order 5, but in any event within 52 days, the respondents must give written notice to the Co-ordinator of the applicant's Development Audit and Response Unit that the work has been completed;

7. The respondents must within seven days after such notice is given arrange and facilitate the inspection of the Premises by the Co-ordinator of the applicant's Development Audit and Response Unit or the Co-ordinator's nominees;"

[25] Orders 1-3 applied to Mr Gavin and JDL personally, and pursuant to s 180(9) were ordered not to attach to the premises. Order 4 attached to the premises and was registered on the title: s 180(10).

[26] Mr Gavin and JDL now seek leave to appeal against the orders, contending they are beyond the power of the Planning and Environment Court.[8]

[27] Section 63 of the *Planning and Environment Court Act 2016* (Qld) permits an appeal from that Court but relevantly only with the leave of this Court, and only on the grounds of error or mistake in law or jurisdictional error.

The proposed grounds of appeal

[28] The proposed grounds of appeal identify the relevant issues before this Court, which can be summarised thus:

(a) orders 1 and 4 are beyond the power of the P&E Court to the extent that they purport to prohibit a material change of use of the premises for uses that are authorised as "accepted" by the *Planning Regulation 2017* (Qld);

(b) orders 1 and 4 are beyond power to the extent that they purport to prohibit a material change of use of the premises for any uses that are "permitted uses" (namely uses for which a development approval is not required) under the Planning Scheme;

(c) orders 2 and 3 are beyond power to the extent that they prohibit entering into tenancy agreements, or advertising individual rooms, apartments or levels at the premises for letting, without any limitation on the operation of those orders;

(d) order 5 is beyond power because, on the proper construction of s 180 of the PA, the P&E Court does not have power to order the physical alteration of a building in circumstances where:

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[8] To which I shall refer in these reasons, as it is in the *Planning Act 2016* (Qld), as the P&E Court.

(i) the building is lawfully erected;

(ii) the building can (and has been) used lawfully without the physical alterations required by the order; and

(iii) the development offence in respect of which the order is made concerns only the use of the premises, not any physical aspect of the building as constructed.

[29] All findings of fact made by the learned primary judge are uncontested.

Nature of the building[9]

[30] The building is of an unusual type of construction for a residence.

[31] There are three storeys: a ground floor, first floor and second floor.

[32] The main entrance is into the ground floor, on which there is a two-car garage, a kitchen, two open common rooms and a patio. There are also five rooms, each with an ensuite fitted with a toilet, shower and basin. The doors of each of those five rooms are solid-core self-closing doors and are individually key-lockable.

[33] The first floor has a similar layout. There are six rooms each with an ensuite and solid-core, self-closing, lockable doors. There are two open common rooms and a covered balcony. In one area there is a space capable of being used as a kitchen; there is no oven or cooktop, but there is an extractor fan and lighting over a bench.

[34] The second floor contains a further six rooms, each with ensuites and solid-core, self-closing, lockable doors. On this floor there is a kitchen and two open common rooms.

[35] In total, across the three storeys, there are 17 rooms that might be properly considered to be bedrooms. Each bedroom has an ensuite bathroom, individually controlled air conditioning, a built-in wardrobe and lockable, solid-core, self-closing doors. Each of these rooms has an individual water and electricity meter. There are soundproofing and fire prevention measures that are unusual for a domestic dwelling house.

[36] Access between floors is via an internal stairway. The stairway is sealed off from each floor by a solid-core, self-closing door. Balconies outside the living areas on the first and second floor have a tap and laundry sink. There is laundry equipment in the garage. There are no toilet or bathroom facilities in what might be considered the common areas of the buildings. While the building has a surfeit of such facilities, they can only be accessed through the 17 individual bedrooms.

[37] The building appears to have been constructed in a manner that is generally consistent with the plans Mr Gavin caused to be drawn up by Mr Yarrow, an architect. Mr Gavin gave Mr Yarrow sketches setting out his intentions for the building. These sketches contain notations such as “BR1”, “BR2”, and so on for each of the 17 bedrooms with ensuites. Attached to the sketches was a table setting out Mr Gavin’s preferred specifications for walls and doors. The specifications were that internal walls were wider than is common and to be made of a

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9 What follows is drawn substantially from the reasons of the learned primary judge.

combination of block, battens and plaster; that manner of construction was typical of walls in between units. Thus the specifications seem consistent with an intention to "soundproof" the rooms.

[38] The specification sheet also had a notation "aim for even sized br". The building was constructed in a manner consistent with this aim, in that each bedroom is about the same size, which is an unusual feature for a dwelling house.

[39] The building is certified and approved as a "Class l(a)" dwelling house and can (and has been) used lawfully as a dwelling house without alteration. Mr Gavin and his family occupied the house for about six weeks from late 2018 until January 2019. Then, having moved out, Mr Gavin immediately advertised and rented some rooms in the building for a period of time, between January 2019 and March 2020.

The issue in dispute in the P&E Court

[40] The Council applied to the P&E Court for enforcement orders pursuant to s 180 of the PA.

[41] The Council contended, and Mr Gavin and JDL ultimately accepted, that during the period between January 2019 and March 2020 the building had been used as an "accommodation building" as defined in Part 9 of the *Caloundra City Planning Scheme 1996* and that the use was a prohibited use in the zone in which the premises are situated. Council sought orders that would require significant changes to be made to the interior of the building, including structural changes involving the removal of walls to combine rooms and create a different interior layout, and the removal of eight of the 17 bathrooms.

[42] The applicants opposed any orders that would alter the internal structure of the building as well as most of the other alterations sought by the Council.

Central findings at trial

[43] The learned primary judge made a number of findings concerning the conduct of Mr Gavin and, through him, JDL. Those findings were not challenged before this Court. The findings were relevant to the P&E Court's confidence, or rather lack of confidence, that any orders it made would be obeyed by Mr Gavin and JDL.

[44] Mr Gavin practiced or participated in a deception by having covenant plans prepared which substantially misrepresented the working drawings prepared by Mr Yarrow.[10] The conclusion was that the covenant plans were prepared in this way to avoid concerns that the building as it was actually planned was not a normal domestic dwelling. The primary judge found that:[11]

> "The willingness of [Mr Gavin] to practice, or at least participate in, a deception of this kind, is relevant to deciding what orders are appropriate to ensure compliance with the PA. That he would do so suggests any assurance he offers as to future compliance should be viewed with scepticism."

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10 Reasons below [24].
11 Reasons below [24].

[45] His Honour also concluded that Mr Gavin's answers in cross-examination on this topic showed he was "attempting in cross-examination to come up with a plausible explanation for what appeared to be deliberately deceptive conduct in submitting the covenant plans as they were".[12]

[46] Mr Gavin altered the working drawings prepared by Mr Yarrow so that the covenant plans submitted to Stockland Development Pty Ltd disguised the fact that he planned to build a house with so many bedrooms and which he intended to use an accommodation building.[13]

[47] During the certification process Mr Gavin was told by the retained private certifier that the building could only be assessed as a dwelling house, that any change in use would require further building and town planning applications, that the approval was limited to use as a dwelling house, and that any contrary use would not be lawful. When the certifier received advice from Mr Gavin that he wanted to move his family there, the certifier issued a decision notice approving the building as a "single dwelling unit and associated garage". Mr Gavin and JDL were plainly aware before the building was finished that it could not be used as an accommodation building.[14]

[48] By mid-May 2018 the Council sent a letter to Mr Gavin confirming that use as an accommodation building would be a prohibited use. Mr Gavin wrote back in these terms:[15]

> "I confirm the proposed use of the building is a 'Dwelling House.'
>
> I confirm the information provided to the private certifier for the Building Approval in relation to the proposed use of the building is a 'Dwelling House.'"

[49] Mr Gavin and his family moved into the building for six weeks, from late 2018 to early January 2019. Immediately after moving out he began advertising and renting rooms in the building to individuals. Over more than a year from January 2019 to March 2020 Mr Gavin and JDL rented out rooms in the building to as many as 15 different people living in the building. This use of the building had a significant adverse impact on the amenity of others in the area, including because of parking issues and traffic congestion.[16]

[50] Under cross-examination Mr Gavin demonstrated an unwillingness to give an honest answer to a question because he was concerned it would not reflect well on his case.[17] His Honour's ultimate finding as to Mr Gavin's credit was:[18]

> "On the whole, [Mr Gavin] was not an impressive witness. He was garrulous, unresponsive and, at times, mendacious. I do not accept his evidence that he did not set out to use the house as an accommodation building."

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12 Reasons below [24].
13 Reasons below [25]-[26].
14 Reasons below [27]-[28].
15 Reasons below [29].
16 Reasons below [31].
17 Reasons below [34].
18 Reasons below [37].

[51] The primary judge referred to the evidence concerning the development of the working drawings and the changes made to disguise the real intended use, and continued:[19]

> "[40] … Based upon this evidence, I am comfortably satisfied that [Mr Gavin] intended from an early stage to use the building as an accommodation building. That is, to let individual rooms in the manner of a guest house.
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> [41] [Mr Gavin's] representation to council in May 2018 that he intended to use the building as a dwelling house was deceptive. I am satisfied that this, and other actions taken by [Mr Gavin], were intended by him to reduce suspicion that he intended to use the building for a prohibited purpose. This is a relevant matter to consider when deciding what terms are appropriate to secure compliance with the PA. So too is the fact that [Mr Gavin] was no neophyte when it comes to building. He deposed that he has been involved in some 15 construction, renovation or redevelopment projects. His interaction with the council concerning the duplex and Coolum confirms he is not naïve. The actions of [Mr Gavin] in the present case are to be regarded as deliberate and considered. They were not the product of inadvertence or inexperience."

[52] The primary judge then turned to the impact of those findings on the appropriate orders:[20]

> "[43] There is much on the conduct of the first respondent to suggest strong terms are necessary to ensure compliance with the PA. The first respondent's very late willingness to accept that what he was doing was wrong, which even then he qualified by saying he thought he was 'doing it correctly', is not such as to permit me to conclude he will, absent some strong incentive, comply with the PA in the future. Terms that would make it harder for the building to be used as an accommodation building are, in my view, necessary to secure compliance. That is so even though there will be orders prohibiting the respondents using the building other than as a dwelling house, or advertising or renting individual rooms or levels. The terms I propose will require the respondents to carry out some remedial work and will prevent the use of measures, like the electricity sub-meters, that might otherwise have some beneficial use. This is appropriate in the circumstances."

The relevant legislation

[53] The orders sought by the Council were enforcement orders to ensure compliance with the PA. Section 180 of the PA relevantly defines an enforcement order:

> "**180 Enforcement orders**

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19 Reasons below [40]-[41].

20 Reasons below [43]; internal citations omitted.

…

(2) An ***enforcement order*** is an order that requires a person to do either or both of the following—

(a) refrain from committing a development offence;

(b) remedy the effect of a development offence in a stated way.

…

(3) The P&E Court may make an enforcement order if the court considers the development offence—

(a) has been committed; or

(b) will be committed unless the order is made.

…

(5) An enforcement order or interim enforcement order may direct the respondent—

(a) to stop an activity that constitutes a development offence; or

(b) not to start an activity that constitutes a development offence; or

(c) to do anything required to stop committing a development offence; or

(d) to return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed; or

(e) to do anything to comply with this Act.

…

(6) An enforcement order or interim enforcement order may be in terms the P&E Court considers appropriate to secure compliance with this Act.

…

(7) An enforcement order or interim enforcement order must state the period within which the respondent must comply with the order."

[54] There are two relevant features of an enforcement order. The first is that unless otherwise ordered by the P&E Court an enforcement order attaches to the premises and binds any subsequent owner or occupier: s 180(9). The second is that contravention of an enforcement order is an offence punishable by a fine or imprisonment for up to two years: s 180(8).

[55] The powers of the P&E Court are the subject of s 181:

"**181 P&E Court's powers about enforcement orders**

(1) The P&E Court's power to make an enforcement order or interim enforcement order may be exercised whether or not the development offence has been prosecuted.

(2) The power to order a person to stop, or not to start, an activity may be exercised whether or not—

(a) the P&E Court considers the person intends to engage, or to continue to engage, in the activity; or

(b) the person has previously engaged in an activity of the same type; or

(c) there is danger of substantial damage to property or injury to another person if the person engages, or continues to engage, in the activity.

(3) The power to order a person to do anything may be exercised whether or not—

(a) the P&E Court considers the person intends to fail, or to continue to fail, to do the thing; or

(b) the person has previously failed to do a thing of the same type; or

(c) there is danger of substantial damage to property or injury to another person if the person fails, or continues to fail, to do the thing."

The planning provisions applicable to the land

[56] There was no dispute at the trial as to the relevant planning provisions that govern the use of the land on which the building is placed. The following synopsis is taken from the reasons of the learned primary judge.[21]

[57] The lawful use of the land is informed by the "Use Definitions" found in the *Caloundra City Planning Scheme 1996*. So far as it presently relevant these definitions include a definition of an "accommodation building" and a "dwelling house":

> "**'Accommodation building'** means premises used or intended for residential use for a boarding house, guest house, hostel, unlicensed residential club, services apartments, services room, and the like.
>
> **'Dwelling House'** means premises used or intended for a single dwelling unit on any one allotment …
>
> The term does not include Accommodation Building, Caretakers Residence, Duplex Dwelling or Multiple Dwelling."

[58] The land is in a location where its permitted use is as a "dwelling house" and use as an "accommodation building" is not permitted. Section 162 makes it an offence to carry out a prohibited development, and s 165 makes it an offence to use premises other than for a lawful use. A prohibited development is one "for which a development application may not be made": s 44(2).

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21 Reasons below [14]-[16].

[59] In this case the location of the land and the applicable planning provisions mean that there could be no development application to allow the use of this land other than the permitted use, namely a dwelling house. That is, in part, because use as an accommodation building was a prohibited use under the planning documents.

Agreed development offences by Mr Gavin and JDL

[60] There was no dispute that Mr Gavin and JDL had committed development offences in relation to the development and use of the building.

[61] By carrying out the development of an "accommodation building" instead of a "dwelling house" both s 162 and s 165 were contravened. The only permitted lawful use for this land, at least so far as any intended use was identified by Mr Gavin and JDL, was as a "dwelling house". Instead, Mr Gavin and JDL used the land as an accommodation building. They did so over a significant period of time and after the Council brought concerns about the use of the land to their attention. Further, the learned primary judge found that Mr Gavin had decided to use the land as an accommodation building as early as when the development was being planned.

Issues on the application for leave to appeal

[62] The central contentions advanced to challenge the orders were that they were beyond the power of the P&E Court. In order to consider that contention one needs to examine the impact of the *Planning Regulation 2017* (Qld).

[63] The PA provides that a Planning Scheme is a "local planning instrument": s 8(3)(a). The PA also provides that a Planning Scheme is a "local categorising instrument": s 43(3). Because it is a local categorising instrument the Planning Scheme can categorise development as (i) "prohibited development", (ii) "assessable development", or (ii) "accepted development": s 44(1). Prohibited development needs no further discussion. Assessable development is development for which a development approval is required: s 44(3). Accepted development is development for which a development approval is not required: s 44(4).

[64] If a Planning Scheme does not categorise a particular development into one of those three categories, the development is taken to be accepted development: s 44(6)(a).

[65] The PA contains provisions which enable the *Planning Regulation* to prescribe the requirements for the contents of a local planning instrument. Thus, s 16(2) and (3) of the PA provide:

> "**16 Contents of local planning instruments**
>
> (1) …
>
> (2) A regulation may prescribe requirements (the ***regulated requirements***) for the contents of a local planning instrument).
>
> (3) The contents prescribed by regulation apply instead of a local planning instrument, to the extent of any inconsistency."

[66] Further provision is made in respect of what a "local categorising instrument" may state or may not state. Thus, s 43(5) and (6) relevantly provide:

> "(5) A local categorising instrument—

(a) may state that development is prohibited development only if a regulation allows the local categorising instrument to do so; and

(b) may not state that development is assessable development if a regulation prohibits the local categorising instrument from doing so; and

(c) …

(6) To the extent a local categorising instrument does not comply with subsection (5), the instrument has no effect."

[67] Schedule 6 of the *Planning Regulation* is entitled "Development local categorising instrument is prohibited from stating is assessable development". Within Schedule 6, Part 2 is headed "Material change of use". Item 2(1) of Part 2 provides:

"**2 Material change of use for particular buildings or structures**

(1) A material change of use of premises for a class 1 or 2 building, if the use is providing support services and temporary accommodation for persons escaping domestic violence."

[68] On its face, Item 2(1) prohibits the Planning Scheme from stating that a material change of use for a class 1 building to provide support services and temporary accommodation for persons escaping domestic violence is assessable development.

[69] Item 6 in Schedule 6, Part 2, is a provision to the effect that a Planning Scheme may not state (subject to certain requirements) that a material change of use for "community residence" is assessable development. The term "community residence" is defined by Schedule 24 to the *Planning Regulation* as follows:

"(a) means the use of premises for residential accommodation for—

(i) no more than—

(A) 6 children, if the accommodation is provided as part of a program or service under the *Youth Justice Act 1992*; or

(B) 6 persons who require assistance or support with daily living needs; and

(ii) no more than 1 support worker; and

(b) includes a building or structure that is reasonably associated with the use in paragraph (a)."

[70] Item 6 sets out the material change of use for a community residence which the *Planning Regulation* prohibits a Planning Scheme from stating is assessable development:

"**6 Material change of use for community residence**

(1) A material change of use of premises for a community residence, if—

(a) the premises are included in a prescribed zone under a local categorising instrument; and

(b) no more than 7 support workers attend the residence in a 24-hour period; and

(c) at least 2 car parks are provided on the premises for use by residents and visitors; and

(d) at least 1 of the car parks stated in paragraph (c) is suitable for persons with disabilities; and

(e) at least 1 car park is provided on the premises for use by support workers."

[71] The contention advanced was that notwithstanding the provisions in Schedule 6, Part 2 of the *Planning Regulation*, orders 1 and 4 prohibited:

(a) a material change of use of the premises for the uses identified in Items 2(1) and 6 of the *Planning Regulation*, which cannot not be stated to be assessable development under the Planning Scheme; and

(b) a material change of use of the premises for any development that may be "accepted development" under the Planning Scheme, for which no application for material change of use was necessary.

[72] This was because each order prohibits use of the building as an accommodation building "or for any purpose other than a dwelling house", in the absence of an effective development permit. A development approval is only required for assessable development. It is not required for accepted development.

[73] Further, it was contended that to the extent that orders 1 and 4 prohibited a use for any purpose other than a dwelling house, it went beyond what the Planning Scheme could do by itself. Because of the *Planning Regulation*, Schedule 6, the Planning Scheme could not provide that the uses in Item 2(1) and Item 6 should be "assessable development", which would require a development approval.

Consideration

[74] In my respectful view, there are a number of difficulties which confront the grant of leave to appeal in respect of the grounds concerning orders 1 and 4.

[75] First, while it is true to say that it was contended at first instance that the orders should permit a use of the building that was "accepted development", no use was identified as being one to which the building might sensibly be put, and which would fall into the category of accepted development. So much was plain to the learned primary judge, who said:[22]

> "I should also mention that in written and oral submissions the respondents proposed that the orders should permit a use of the building that is 'accepted development'. This term describes a type

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22 Reasons below at [48]; internal citations omitted.

> of development for which a development approval is not required. Some forms of it are categorised by regulation and others might by default be accepted development. The respondents did not suggest any use to which the building might sensibly be put which would fall into the category of accepted development. In these circumstances [it is] unnecessary to include such a qualification in the orders to be made. If some issue arises in the future there can be an application to change the enforcement order."

[76] It is thus the case that the particular uses now identified (under Items 2(1) and Item 6 of Schedule 6 to the *Planning Regulation*, and any permitted uses under Council's Development Control Plan 1 – Kawana Waters (**DCP1**)) were not advanced for the consideration of the learned primary judge. This Court therefore does not have the benefit of the P&E Court's consideration of, and rulings upon, the contention now sought to be advanced.

[77] Secondly, there was no evidence at first instance to suggest that Mr Gavin was ever interested in using the building for either of the uses identified in Schedule 6 of the *Planning Regulation*. One is use of a class 1 or class 2 building "if the use is providing support services and temporary accommodation for persons escaping domestic violence". The other is use as a "community residence" but only where no more than seven support workers attend the residence in a 24-hour period, at least two carparks are provided on the premises for use by residents and visitors, at least one of those carparks is suitable for people with disabilities, and at least one carpark is provided for use by support workers.

[78] Thirdly, the failure to identify any use such as those referred to in Schedule 6 of the *Planning Regulation* has the necessary consequence that no planning evidence was called to identify whether that use was actually available to be achieved in the particular building. For example, under Item 2(1) questions could well arise as to the "support services" that would need to be provided for persons escaping domestic violence. Under Item 6 questions may well arise as to the provision of carparks and frequency of support worker attendance. In particular, given that a "community residence" means the use of premises for residential accommodation for children under a program pursuant to the *Youth Justice Act*, or persons who require assistance and support with daily living needs, together with a support worker, questions may well arise as to the sufficiency of the current building for that purpose.

[79] Fourthly, it is apparent from the reasons below that whilst there was mention of "accepted development" in the proceedings below, nothing whatever was said about a carve out for a possible "permitted use" under the DCP1.[23] However, what was said about "accepted development" was not what is now argued, nor helpful. The carve out for "accepted development" in orders 1-4 was raised below in the form of the draft order.[24] In the course of oral address, counsel then appearing for Mr Gavin and JDL referred to a carve out for "accepted development" but not for a "permitted use".[25] Counsel was pressed to identify what the suggested accepted development was, and identified that it was those in Schedule 7 to the *Planning Regulation*.[26]

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23 Reasons below [48].
24 AB 135.
25 AB 739 lines 41-46.
26 AB 740 line 1 to AB 742 line 2.

Subsequently his Honour referred to the provisions of Schedule 7, noting that it referred to matters such as building work declared under the *Building Act*, State or public sector work, prescribed aquaculture, and taking or interfering with fish habitat areas. His Honour said that he was struggling to see what item in Schedule 7 was of relevance.[27] Counsel did not advance any.[28]

[80] Those permitted uses identified before this Court, for the first time, were "bed and breakfast – homestay" and "home occupation" (at least where it was in accordance with Probable Solutions contained in Master Plan No 92, part of DCP1).[29] It is true that each of those uses are "permitted " uses under DCP1, but the learned primary judge was not asked to consider them, no evidence was led to suggest Mr Gavin of JDL had them in mind, nor was there the opportunity for town planning evidence to be adduced as to their relevance.

[81] Essentially it seems the proceedings were conducted, in substance, on the basis that the two relevant uses were "accommodation building" or "dwelling house". As his Honour noted in the second judgment,[30] from an early time the Council had asserted that the planning documents limited the use of the land to a dwelling house. That was done when the Council filed its Grounds,[31] paragraph 11 of which said:[32]

> "The defined uses for Precinct 1, including the Land, were residential uses limited to Bed & Breakfast – Homestay, Caretakers Residence, Display Home, Dwelling House, Home Occupation, Temporary House and Land Sales Office and terrace Housing, **the relevant use being Dwelling House**."

[82] As his Honour found at [39] of the second judgment, that was initially not admitted by Mr Gavin and JDL, but by the end of the hearing it was not challenged.

[83] Fifthly, the learned primary judge found it was unnecessary to include a qualification for accepted development but only because no uses had been identified. Inferentially, had any such uses been identified his Honour would have made a different order. The same can be said of the "permitted use" argument raised for the first time before this Court. Thus the form of the orders was directly affected by the way the proceedings were conducted below, and in particular by the fact that Mr Gavin and JDL did not raise why any such consideration mattered to them.

[84] Sixthly, his Honour went on to say that if some issue in that regard arose in the future, an application could be made under s 181(4) of the PA, to change the enforcement order. The issue now having arisen in respect of Item 2(1) and Item 6 of the *Planning Regulation*, and certain permitted uses under DCP1, the first step would be to apply to the P&E Court under s 181(4), as the learned primary judge foreshadowed. It is, in my respectful view, inappropriate that such issues be raised for the first time before this Court, given the P&E Court's specialist jurisdiction and the learned primary judge's ruling that such matters be raised by application to that Court under s 181(4). That there is an existing avenue to modify the orders in the

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27 AB 749 lines 9-19.
28 AB 749 lines 21-40.
29 Appellants' outline paragraph 32.
30 *Sunshine Coast Regional Council v Gavin & Anor (No 2)* [2021] QPEC 2, at [39].
31 The document his Honour referred to in [39] of the second judgment.
32 Emphasis added.

P&E Court, and one identified by the judge who made the orders, is a relevant factor to whether this Court should grant leave.

[85] Such an application could be brought not only by Mr Gavin and JDL, but also any successor to them. Further, if what was then intended as a use was either "accepted development" or a "permitted use" no doubt the Council's attitude to a change in the orders would reflect that.

Orders 2 and 3

[86] Orders 2 and 3 are directed at Mr Gavin and JDL. The effect of the orders is that they must not at any time enter into any tenancy agreements for individual rooms or apartments or levels in the building, nor advertise individual rooms, apartments or levels for letting.

[87] The attack made on these orders not only adopts the contention advanced in respect of orders 1 and 4, but then includes:

(a) the learned primary judge considered that these orders should be made under s 180(6) and that they were necessary "to secure compliance with the PA"; the learned primary judge also considered that the orders "… would make it harder for the building to be used as an accommodation building", and were therefore, "necessary to secure compliance";[33]

(b) on its proper construction, s 180(6) was not a source of power, independent of or in addition to the power otherwise conferred on the P&E Court by s 180; and

(c) the absence of any limitations on the operation of orders 2 and 3 puts them beyond the power of the P&E Court; they prohibit conduct, even though that conduct may be associated with a use of the premises that is a lawful use because it is an accepted development under the *Planning Regulation* or a permitted use under the Planning Scheme.

Consideration

[88] Examination of s 180(5) reveals the different scope of each permitted order.

[89] The first two are relatively simple, being concerned with directing a person to either stop an activity that constitutes a development offence, or not to start such an activity: s 180(5)(a) and (b).

[90] The third alternative, under s 180(5)(c), is broader in scope. It is a power to direct a person "to do anything required to stop committing a development offence". It is plainly broader than subsection (5)(a), but still requires the existence of a development offence. It would naturally contemplate an order directing ancillary steps to be taken to stop committing a development offence.

[91] Section 180(5)(d) then extends the scope of an enforcement order, enabling the P&E Court to direct someone to "return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed". That is evidently broader again than the power under s 180(5)(c), as it contemplates restoration to a status quo prior to a development offence being committed.

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[33] Reasons below at [43] and [51].

[92] Finally, s 180(5)(e) provides that enforcement order can direct someone "to do anything to comply with this Act". On its face that is a very broad power, and goes beyond the scope of the previous subsections.

[93] In that context one finds the provisions in s 180(6) which provide:

> "An enforcement order or interim enforcement order may be in terms the P&E Court considers appropriate to secure compliance with this Act."

[94] As the learned primary judge noted, there was no dispute before him that enforcement orders of some kind should be made.[34] Each side put forward their suggested orders. The Council's proposed orders were in essentially the same terms as orders 2 and 3.[35] The orders proposed by Mr Gavin and JDL provided an embargo on: (i) letting individual rooms in, or levels of, the premises; and (ii) advertising individual rooms in, or rooms of, the premises for letting for any purpose; in each case unless the purpose was for a use approved by a development permit or that is accepted development.[36]

[95] Understanding that, it becomes apparent that the learned primary judge's references to s 180(6) in paragraphs [3] and [19] of the reasons below were applicable not to orders 2 and 3, but rather order 5.

[96] Further, the only material difference between the proposed orders which became orders 2 and 3, was the carve out for use for an accepted development. In that respect the contentions confront the same difficulties that I have identified above in respect of orders 1 and 4. There was simply no suggestion of any use to which the building might be sensibly put which would fall into the category of accepted development.

[97] The learned primary judge was confronted with particular features that hopefully would not be present in many cases. The unchallenged findings were that Mr Gavin has always intended to use the building for an unlawful purpose and embarked on a course of deception to achieve that outcome. More relevant, and even more concerning to this current issue, are the findings that Mr Gavin was, at times, lying in his evidence,[37] and the particular findings relevant to the orders:[38]

> "There is much on [sic] the conduct of [Mr Gavin] to suggest strong terms are necessary to ensure compliance with the PA. [Mr Gavin's] very late willingness to accept that what he was doing was wrong, which even then he qualified by saying he thought he was 'doing it correctly', is not such as to permit me to conclude he will, absent some strong incentive, comply with the PA in the future."

[98] The learned primary judge made a finding that orders beyond those in orders 1-4 were needed to ensure compliance with the PA.[39] That finding was underpinned by the finding that, absent the orders he intended to make, Mr Gavin and JDL would act in contravention of the PA in the future.[40] The latter finding is a finding of fact

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34 Reasons below at [3] and [19].
35 AB 131 paras 4(b) and (c).
36 AB 135 paras 3 and 4.
37 Reasons below at [37].
38 Reasons below at [43]; internal citations omitted.
39 Reasons below [46], [47], [51].
40 Reasons below [37], [40]-[43].

that is not challenged. The former finding (that further orders were required to ensure compliance) is also a finding of fact, which cannot be challenged.

[99] It is that lack of confidence about the willingness to comply with the provisions of the PA which justifies, in my view, the breadth of orders 2 and 3 as being orders "in terms the P&E Court considers appropriate to secure compliance with this Act".

[100] Leaving aside the contentions concerned with the carve out for "accepted development", I consider the orders to have been within power.

Conclusion – Orders 1-4

[101] For the reasons expressed above each of orders 1-4 are affected by the way in which the proceedings below were conducted and the fact that the relief underlying the contentions is relief that can and should be sought at first instance in the P&E Court and not inappropriately for the first time before this Court. For those reasons I would refuse leave to appeal in respect of orders 1-4.

Consideration – Order 5

[102] The essential contention in relation to order 5 is that it was beyond power to make orders requiring physical alterations to the building, as well as discontinuing the use of kitchens and laundry facilities on the first and second floors, when the only development offence was concerned with the use of the building and not its construction. Given that the learned trial judge accepted that the building could be lawfully used as a dwelling house, albeit that its construction was unusual for such a purpose, an order to carry out physical alterations was not within any of the provisions in s 180(2), (3), (5) and (6).

[103] I pause to note the competing positions that were put to the learned trial judge on this issue. The Council contended for an order compelling physical alterations to a greater degree than was eventually ordered.[41] Mr Gavin and JDL proposed an order requiring limited physical alterations, namely decommissioning the water sub-meters in all ensuited rooms in the premises, and removing the keyed internal locks from the stairwell doors.[42]

[104] Thus it can be seen that, contrary to the position now taken, Mr Gavin and JDL effectively conceded that it was within power to make enforcement orders that required physical changes to the premises.

[105] I have referred above to the findings by the learned trial judge in relation to Mr Gavin, and his Honour's assessment of whether Mr Gavin (and through him, JDL) could be trusted to comply with the PA. Mr Gavin's deceitful approach towards the construction of the building and what he intended to use it for were the predominant reasons why the learned trial judge reached the conclusion that strong terms were necessary to ensure compliance with the PA, and Mr Gavin's conduct in finally accepting that what he had done was wrong was "not such as to permit me to conclude he will, absent some strong incentive, comply with the PA in the future".[43] His Honour concluded that it was necessary in order to secure compliance with the PA that terms be imposed "that would make it harder for the building to be used as

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41 AB 131 para 4.
42 AB 135 para 5.
43 Reasons below at [43].

an accommodation building". That was a separate issue from the orders prohibiting use other than as a dwelling house, advertising or renting parts of the building.[44]

[106] His Honour was well aware, when considering orders that would require work done to a substantial part of the building, that the building itself was constructed and approved in compliance with the Planning Scheme, and capable of being used lawfully without alteration. As his Honour noted, it was the use of the building, rather than the building itself that gave rise to the present proceedings.[45]

[107] His Honour concluded that it was appropriate to require some modification to the building "to make it less amenable to use as an accommodation building",[46] and that such measures when combined with the more general orders prohibiting unlawful use of the building, were "sufficient to ensure compliance with the PA".[47]

[108] His Honour then described the effect of the orders he intended to make:[48]

> "[51] First, to make it clear that the building cannot be used other than as a dwelling house. These orders will include prohibitions on letting, or advertising to let, individual rooms or floors within the building. It is not intended to prohibit letting the building as a whole, but it is not to be used as an 'accommodation building'. In order to make the building less attractive as an accommodation building some doors will be removed or changed. The doors on the first and second floors that separate the stairwell from the rest of the building will be removed, as will the door separating the ground floor lounge room from the entranceway. All other internal solid-core doors are to be replaced with standard domestic cavity doors. The individual keyed locks on most of the internal doors will be removed.
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> [52] The areas on the first and second floors capable of use as kitchens are not to be used for that purpose and the plumbing in those areas is [to] be capped-off. Any fittings that would allow the balconies on the first and second floors to be used for laundry are to be removed and the plumbing capped-off. The privacy screens across parts of the northern balcony that separates the balcony space outside some of the room[s] are to be removed. The exception to this is the one screen that is fixed where there is a step on the balcony. The capacity to individually measure the water and electricity use in each bedroom is to be removed. There is to be only a single electricity and water meter for the building."

[109] Section 180(2)(a) provides that an enforcement order is an order that requires a person to refrain from committing a development offence. It is clear that there does not need to be an extant development offence for such an order to be made. Section 180(3)(b) provides that the court may make an enforcement order if the

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44 Reasons below at [43].
45 Reasons below at [44].
46 Reasons below at [45].
47 Reasons below at [46].
48 Reasons below at [51]-[52].

court considers the development offence "will be committed unless the order is made". Here the relevant development offence is unlawful use of premises. Thus, the P&E Court has power to make an enforcement order if it considers that the building will be put to unlawful use unless the order is made. The unlawful use in contemplation in this case was use as an accommodation building rather than a dwelling house.

[110] Section 180(5) provides that an enforcement order may direct a person not to start an activity that constitutes the development offence,[49] to do anything required to stop committing a development offence,[50] or "to do anything to comply with this Act".[51] Sections 180(5) gives examples of what a person might be directed to do, and they include demolishing or removing a building. Plainly something less than demolition or removal is also within contemplation.

[111] Finally, s 180(6) provides that an enforcement order may be in the terms the P&E Court considers appropriate "to secure compliance with this Act".

[112] Order 5 was directed to preventing unlawful use of the building in the future. It was thought warranted by the learned trial judge because of his conclusion that absent strong orders it was highly likely that Mr Gavin would put the building to unlawful use in the future. In doing so his Honour recognised that it was the use of the building which gave rise to the potential development offence.

[113] Once his Honour determined that compliance with the PA could only be secured if there were terms imposed in the orders that would make it harder for the building to be used as an accommodation building, order 5 was justified. In my respectful view, power to make that order derives from s 180(5)(b), (c) and (e). Once it is understood that an enforcement order can be made if the P&E Court considers a development offence "will be committed unless the order is made", modifications to prevent or hinder the use of this building as an accommodation building are part of an order "not to start an activity [unlawful use as an accommodation building] that constitutes a development offence".

[114] Equally, such an order directs the respondent to do something required to stop committing a development offence, even though the development offence is not currently being committed but will be committed unless the order is made: s 180(3)(b) and s 180(5)(c).

[115] Such an order is open under s 180(5)(e) because such an order may be made if a development offence [unlawful use of the building] will be committed unless the order is made, and that order requires that something be done to comply with the Act, that is, not to use the building for an unlawful use.

[116] Order 5 was in terms which his Honour (sitting as the P&E Court) considered appropriate to secure compliance with the PA. Thus, they come within s 180(6). Plainly his Honour considered that such an order was necessary, in light of his findings that Mr Gavin and JDL would likely put the building to unlawful use or permit that to occur. Order 5 was designed to make it harder for the building to be used as an accommodation building, and to make it less attractive as an accommodation building.

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49 Section 180(5)(b).
50 Section 180(5)(c).
51 Section 180(5)(e).

[117] In my respectful view, order 5 was within power, and appropriate in the circumstances to secure compliance with the PA by preventing the use of the building as an accommodation building. Put simply, it is apparent that his Honour formed the view that Mr Gavin and JDL could not be trusted, absent order 5, to abstain from putting the building to unlawful use.

Conclusion

[118] I agree with the additional reasons prepared by Fraser JA.

[119] For the reasons I have given above I would make the following orders:

1. Applications for leave to appeal refused.
2. The applicants pay the respondent's costs of and incidental to the applications, to be assessed on the standard basis.

[120] **NORTH J:** I agree with Fraser JA.

[121] In all other respects I agree with Morrison JA's reasons, and I agree with the orders proposed by his Honour.