

HIS HONOUR: The appellant seeks orders for costs in relation to the application. That application is opposed by the respondent. The jurisdiction of the Planning and Environment Court in relation to appeals under the Queensland Heritage Act is somewhat novel and the application which was made seeking further and better particulars enlarges upon the statutory matters referred to. In those circumstances, I do not propose to make an order for costs.

...

HIS HONOUR: I order that the appellant, by 4 p.m. on 27 October 1993, give further and better particulars of ground 6 of the notice of appeal.

I further order by consent that grounds 2, 3, 5, 7 and 8 of the notice of appeal be struck out.

I adjourn the further hearing of the application to a date to be fixed.

I reserve the costs of the respondent's application to be taxed.

TRANSCRIPT OF PROCEEDINGS

(Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.)

PLANNING AND ENVIRONMENT P & E Appeal No 169 of
COURT 1993

JUDGE ROW

ADVANCE BANK AUSTRALIA LTD Appellant

and

QUEENSLAND HERITAGE COUNCIL Respondent

BRISBANE

..DATE 01/10/93

JUDGMENT

HIS HONOUR: I publish my reasons.

IN THE PLANNING AND ENVIRONMENT P & E Appeal No. 169 of
COURT 1993

HELD AT BRISBANE

QUEENSLAND

Before Row DCJ

[Advance Bank Aust. Ltd. v. Qld. Heritage Council]

BETWEEN:

ADVANCE BANK AUSTRALIA LTD. Appellant

- and -

QUEENSLAND HERITAGE COUNCIL Respondent

REASONS FOR JUDGMENT

Judgment delivered: 01/10/1993

Catchwords:

Counsel: Mr J E Gallagher QC for the Appellant

Mr P J Lyons QC for the Respondent

Solicitors: McCullough Robertson for the Appellant

Crown Solicitor for the Respondent

Hearing Date(s): 14 September 1993

IN THE PLANNING AND ENVIRONMENT P & E Appeal No. 169 of
COURT 1993

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

ADVANCE BANK AUSTRALIA LIMITED

Appellant

AND:

THE QUEENSLAND HERITAGE COUNCIL

Respondent

14th September 1993

REASONS FOR JUDGMENT - ROW D.C.J.

Delivered the 1st day of October 1993

The appellant appeals herein pursuant to s.30(5) of the Queensland Heritage Act 1992 (the Act) against the decision of the respondent to enter the premises of the appellant situated at the corner of Edward and Queen Streets, Brisbane and known as "Ascot Chambers" (the place) in the Heritage Register on a permanent basis, which decision was communicated by the respondent to the appellant by letter dated 18th May 1993.

Two preliminary issues of law, namely the nature of the appeal and the determination of onus were argued.

It was submitted by senior counsel on behalf of the appellant that the appeal was a rehearing de novo and that, in those circumstances, the onus lay on the respondent to establish such facts as would warrant the permanent listing of the place in the Heritage Register. On behalf of the respondent it was submitted that the appeal was a rehearing but one which is limited having regard to the legislation and that the onus on the hearing of the appeal lay on the appellant to establish its grounds of appeal.

Whilst many decisions of various Courts were cited during argument as to the nature of the appeal, the principle to be applied relates to the requirement to ascertain the legislative intent under the Queensland Heritage Act as to the nature of the appeal. In those circumstances, that issue is to be resolved by analysis

of the Statute which confers the jurisdiction on the Court.

The statutory provisions envisage a significant procedure for arriving at that decision of the Queensland Heritage Council (the Council) which includes an independent enquiry with a statutory requirement that any objector be heard. The statutory procedures further involve a process designed to achieve a decision, after determining certain matters, namely, that the place is of cultural heritage and satisfies one or more of the criteria for entry in the Register, whereby the owner of a place and the Local Authority for the area in which the place is situated are to be given written notice of certain matters as prescribed by s.24(4) of the Act. In addition, public notice is required to be given under s.24(4)(b). Objections can be made by the owner of a place or any other person as prescribed by s.26. Such an objection is limited under s.26(3) to the contention that a place is not of cultural heritage significance or does not satisfy the criteria for entry in the Register. Where an objection is lodged, the respondent is obliged under s.28 to refer the objection to an assessor duly selected by it. The assessor is obliged to enquire into and report to the Council on the objection. Within a stipulated time, the Council, after receiving the assessor's report, must decide whether to proceed with its proposal. Under s.30(1), if the Council, after considering the assessor's report, decides to proceed with a proposal for entry of a place in the Heritage Register on a permanent basis, the place may be entered in the Register accordingly. Notice of the entry of a place in the Register is to be given by written notice to the owner and to the Local Authority and by public notice. Under s.30(5), if the owner is dissatisfied with the decision he may, within the time therein specified, appeal to the Planning and Environment Court against the decision. If the appeal is against the decision to enter a place in the Register on a permanent basis, the appeal may only be made on the basis that the place is not of cultural heritage significance or does not satisfy the criteria for entry in the Register.

An analysis of the various statutory provisions are indicative that the process involved prior to the entry of a place in the Register on a permanent basis concerns many issues which are much broader than those issues which can be raised by the appellant on the appeal under s.30(6) of the Act. The statutory procedure further is indicative that there is a discretion imposed on the Council as to whether or not it will proceed after a consideration of the assessor's report to enter a place in the Register. There is no limitation imposed in relation to relevant considerations which determine whether the Council will proceed with the application to register a place permanently in the Register. This procedure is to be contrasted with the provisions of s.30(6) whereby the appeal is limited to the matters as therein stated.

The Council does not hear evidence in relation to the application nor does it permit any cross-examination by the appellant of the assessor or in any other way has the appellant a right to place before the Council any material relevant to the application other than by way of an objection. As the appeal under s.30(6) is limited to specific matters therein referred to, not all the considerations that are or may be before the Council can come before the Court on the hearing of the appeal. In those circumstances the Court is not in the same position as the Council in dealing with the application.

The various provisions of the Act are indicative that the power of the Council to act is generally expressed in a discretionary manner. In addition the right of objection is limited to two aspects of the process as prescribed by s.26(3). Those two aspects similarly are the matters under s.30(6) whereby an appeal against the decision to enter a place in the Register on a permanent basis may be made. On the appeal, I am satisfied the appellant cannot go outside of the matters set out in s.30(6) of the Act. Other matters which may have been material in the consideration by the Council of the application, for example, private or public economics are not matters which are justiciable before the Court. The extent of the discretionary power of the Council

which permeates the whole Act is further reflected in s.24(4) whereby the Council, if it is of opinion that the place is of cultural heritage significance and satisfies one or more of the criteria, may provisionally enter a place in the Register. At that point I am satisfied there is no obligation or compulsion on the Council to so enter a place provisionally although it has satisfied the two considerations.

It is further to be noted that under s.30(5) of the Act, the right of appeal is not given to an objector but to the owner. Under s.26(1), not only the owner but any other person may object to the proposal to enter a place in the Register on a permanent basis. Whilst the right of appeal is given only to an owner, there is no restriction on the evidence that may be adduced on behalf of the owner provided that evidence relates to the issues relevant under s.30(6).

On a consideration of the various statutory provisions, I am satisfied that the jurisdiction of the Court is different from the jurisdiction of the Council, and that the procedures which are available differ in material aspects.

The absence of many judicial indicia in relation to the proceedings before the Council are indicative that, in the circumstances, the hearing before the Court is in the nature of a rehearing, but because of the variations, there cannot be a rehearing de novo, as that term is usually understood. Similarly, the rehearing is not limited to the matters which were before the Council when it considered the application and made its decision that a place be entered in the Register on a permanent basis. The appeal is in the nature of a rehearing of a special kind which is created by the Statute. The legislative intent envisages the taking of evidence on those issues of the appeal which may be raised under s.30(6) of the Act.

The legislature by the limitation of the grounds of appeal under s.30(6) of the Act has indicated an intention that the matters before the Court are not the

same as those matters which may be properly considered by the Council upon the application.

In my opinion, the appeal is in the nature of a rehearing with the Court being at liberty to hear evidence relative only to the issues which may lawfully be raised in an appeal under s.30(6) of the Act. The parties are at liberty to adduce such evidence as is relevant to the issues raised in the Notice of Appeal and are not restricted to matters which were before the Council, e.g. the objection lodged under s.26(1) of the Act.

The Act specifically limits the issues which may be raised on the appeal. Whilst the placing of an onus on the appellant in those circumstances is to establish the negative, nevertheless I am satisfied that the onus to establish the matters raised in the appeal rests on it in accordance with the legislative intent as set out in s.30(6) of the Act. Whilst the placing of an onus on the appellant to prove a negative may, in some circumstances, be undesirable, I do not see that as a practical matter the issues arising in the appeal are matters which are capable of being proved in a positive sense. The fact that upon an appeal, the Court may confirm, vary or reverse the decision under appeal, does not extend the power of the Court beyond determining those issues which may properly be raised under s.30(6).

In all the circumstances I am satisfied that the appellant bears an onus to establish the matters raised in its Notice of Appeal. Accordingly, the appellant is to present the evidence it proposes to adduce on the hearing of the appeal first.