PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Mitchell v Brisbane City Council & Anor* [2006] QPEC 086
PARTIES:	**STEVEN MITCHELL** *Appellant* V **BRISBANE CITY COUNCIL** *Respondent* And **MMF PROPERTIES HOLDINGS PTY LTD (ACN 106 972 936)** *Co-respondent*
FILE NO/S:	BD 369/2006
DIVISION:	Planning and Environment
PROCEEDING:	Applications: (a) by the appellant, for extensions of time to give notice of the appeal; and, (b) by the co-respondent, to strike out the appeal and for relief under the *Integrated Planning Act* 1997, s 4.1.5A
ORIGINATING COURT:	Planning and Environment Court of Queensland`
DELIVERED ON:	10 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2006
JUDGE:	Alan Wilson SC, DCJ
ORDER:	**1 Declare that, although there has not been compliance with the provisions of the *Integrated Planning Act* 1997 with respect to the giving of public notification of the application the subject of this Appeal, the opportunity for a person to exercise the rights conferred by that Act have not been substantially restricted; and** **2 Refuse the appellant's application under s 4.1.55 of that Act, and order that his appeal be dismissed.**

CATCHWORDS: PLANNING - PLANNING LAW – procedural errors

Non-compliance at notification stage – whether substantially restricted the opportunity for a person to exercise rights under Act or whether non-compliance should be excused – s 4.1.5A

Failure to serve Notice of Appeal – application to extend time – s 4.1.55 – whether resulting prejudice in extension

Integrated Planning Act 1997

Uniform Civil Procedure Rules 1999

Advance Property Planners Pty Ltd v Brisbane [2004] QPEC 047
Bradshaw v Beaudesert [2006] QPEC 071
Butler v Kingaroy [2005] QPEC 049
Gregory v Brisbane [1999] QPELR 138
Hunter Valley Developments Pty Ltd v Cohen [1984] 3 FCR 344
Kangaroo Point Residents Association v Brisbane [2006] QPEC 011
King v Charters Towers [2004] QPELR 51
Lindsay v Rose, *Registrar of the Immigration Review Tribunal* 44 ALD 570
Rathera Pty Ltd v Gold Coast (2000) 115 LGERA 348
Robertson v Brisbane [2003] QPEC 077
Soyka v Hervey [2002] QPEC 30
Telstra Corp v Pine Rivers [2000] QPELR 241

COUNSEL: Mrs L M King, Solicitor, for Mr Mitchell

Mr B Job for Brisbane City Council

Mr D O'Brien for MMF Property Holdings

SOLICITORS: Hemming and Hart

Brisbane City Council Solicitor

Stephen Goodfellow

[1] Procedural errors have occurred in the course of the development application which lead to this appeal, and the proceeding itself. The appellant Mr Mitchell asks, in essence, to be excused his failure to serve the respondents with his Notice of Appeal. The developer MMF wants Mr Mitchell's appeal struck out, primarily for that failure; and, to be excused a mistake it made during the public notification stage of its development application.

[2] The appeal springs from MMF's plans to demolish a building containing three dwelling units (in a community title scheme) at 19 Park St Hawthorne, subdivide the land into three parcels, and construct three new single-unit dwellings. On 12 January 2006 Council issued a Negotiated Decision Notice granting preliminary approval for building work, and development permits for a Material Change of Use, and Reconfiguration. On 9 February 2006 MMF obtained permission to demolish

the existing units and, the evidence shows, that work began on 22 February and was completed on or about 27 February.

[3] Mr Mitchell has an interest in an adjoining house at 17 Park Street and in 2005 he lodged a submission against MMF's proposal. On 16 January 2006 he learned of the decision in a letter in which Council provided information about his rights of appeal and enclosed a copy of some parts of the *Integrated Planning Act* 1997(IPA). From the attachments, Mr Mitchell apparently saw that he had 20 business days to lodge an appeal (s 4.1.28) and he did that on 13 February, one day inside the appeal period. He failed, however, to notice that MMF should be made a co-respondent to his appeal (s 4.1.43) and its name did not appear on the document he filed; nor did he see that he was required to give notice of his appeal to the Council and MMF (s 4.1.41(1)(b) and (2)(b)).

[4] In fact the copy of the IPA sections Council sent to Mr Mitchell was outdated, and wrongly told him he had ten days to notify those respondents[1]; as it transpires that error is irrelevant because, as he and his wife (who was helping him in the matter, and filed the Notice of Appeal) believed, the Council or the Court would be attending to those things. Council learned of the appeal as a result of its regular searches in the Court, and told one of MMF's officers late on 27 February.

[5] MMF's error occurred earlier: its notices to adjoining owners and notice on a sign posted up on the land and in a newspaper failed to mention the application for reconfiguration into three allotments, although they did plainly show that three 'single unit dwellings' were contemplated[2] and Council's planning scheme defines that term in a way showing each unit has its own allotment[3]. Mr Mitchell was the only person to lodge a submission with Council; his wife inspected the plans through the auspices of the local Councillor; and his appeal, on its face, manifests a clear understanding of the nature of the three proposed dwellings.

[6] It is convenient to deal with this application first. IPA s 4.1.5A gives the Court a wide discretion to excuse non-compliance with its statutory requirements if the mistake has not '*…substantially restricted the opportunity for a person to exercise the rights conferred by this ... Act*'. There is no evidence to suggest any other person might have made a submission had the application for reconfiguration been properly notified and, in the context of the actual application, that seems improbable. On the other hand, it is likely that a person whose interest was pricked would have inspected the application documents (like Mrs Mitchell) and framed their objection by reference to them (as Mr Mitchell has)[4]. Those documents make it tolerably clear that the creation of three separate allotments was envisaged.

[7] A perceived shortfall in description confronted Quirk DCJ in *Telstra Corp v Pine Rivers* [2000] QPELR 241, where public notice of construction of a telephone tower was in quite terse terms: '*public utilities – material change of use*'. His Honour noted the prescribed form contains no instruction about the level of detail required

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[1] And not two, as amendments introduced on 4 October 2004 now provide: *Integrated Planning and Other Legislation Amendment Act* 2003, s 80

[2] The documents contained the words 'MATERIAL CHANGE OF USE (3 Single Unit Dwellings)' and 'Preliminary Building Approval'

[3] Brisbane *City Plan 2000*, Vol 1, Ch 3, p 73

[4] As the Court of Appeal recognized in *Rathera Pty Ltd v Gold Coast* (2000) 115 LGERA 348, per Jones J at 353, and 354-5

but, where the applicant was a very well known public corporation and the application was for a public utility:

> A sensible understanding of that information (and the relevant town planning scheme definition) would have conveyed to the reader that the proposal involved a major facility relating to the provision of telephone services. That would, in my view of the matter, be sufficiently informative to excite the interest of any potential submitter in gaining further information about the proposal by resorting to the material available at the Council chambers[5].

[8] I was reminded, too, of the discussion of the nature of this provision appearing in *Advance Property Planners Pty Ltd v Brisbane* [2004] QPEC 047, at [16]: that it is an integral part of the IPA legislation and contains a wide discretion which should not be exercised adversely where the principal criterion – the unlikelihood of substantial restriction to the rights of interested persons – is satisfied. Occasion for that kind of prejudice or disadvantage seems most unlikely in the circumstances just described, and the non-compliance should be excused.

[9] Mr Mitchell's application to extend time is bound up with MMF's application to strike out his appeal. He seeks an extension of time for the giving of the notice of appeal to the Council and MMF until 27 February 2006 relying, as I understood the submissions made on his behalf, upon both s 4.1.5 A, and s 4.1.55 which provides:

> **4.1.55 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.

[10] As previously noted, Mr Mitchell should have given written notice of the appeal to the Council and MMF within two business days[6]. The appeal was filed on Monday 13 February 2006. It is unclear when Council discovered the appeal, but MMF learned of it when Council sent a copy of the appeal document by facsimile on 27 February 2006. Even if this process is assumed to constitute compliance with s 4.1.41, the giving of notice was about 12 days late; and, assuming that Mr and Mrs Mitchell had read and understood the earlier version of that section attached to Council's letter to them, it was still outside the 10 days mentioned there.

[11] The Mitchell's various errors were explained by reference to a want of familiarity with the process, difficulty in understanding the IPA sections annexed to Council's letter, and things told to them by Council, and court registry staff which led them to believe that bringing an appeal against Council was sufficient and all subsequent steps would be managed by other parties – the Council, or the Court. I think, with respect, that a careful reading of the IPA sections would have been sufficient to inform them of the correct position but, sensibly, Mr O'Brien of Counsel (for MMF) accepted that the process is complicated and daunting for lay persons, and submitted that the critical issue in both Mr Mitchell's and MMF's applications was the question of prejudice[7].

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[5] *Telstra Corp v Pine Rivers, supra* at 242
[6] Section 4.1.41
[7] T17.4-18

[12] MMF says it has suffered prejudice because, after the appeal period expired, it moved to demolish the units (at a cost of over $15,000) and has lost the rental income it might have earned had it left the building standing while Mr Mitchell's appeal was determined. Mr Watson, a director of MMF, swears that if he had known an appeal had been lodged he would not have proceeded with the demolition. While I accept that, during the appeal period, he was conducting searches and enquiries to determine if an appeal had been filed (which were fruitless, because Mr Mitchell failed to name MMF as a co-respondent in the appeal), this claim of prejudice is rendered, I think, less compelling by other evidence that he had relocated two of the three tenants in the old building by 9 February and accepted a quotation for demolition on 13 February.

[13] There was also, by the time demolition commenced on 22 February, at least the whiff of an appeal: as Mr Watson said in his affidavit filed by leave on 4 August, he had a conversation with a Miss Taylor on 18 February when she told him that she thought Mr Mitchell was going to lodge an appeal. It is also clear that Mrs Mitchell spoke to one of the demolition workers on about 24 February and told him an appeal had been lodged and that man passed this information on to Mr Watson[8] who did not, however, attempt to contact Mr Mitchell before demolition commenced.

[14] Mrs King, who appeared for Mrs Mitchell, also relied upon the history of the matter since February this year for the proposition that any prejudice to MMF was not of the most serious kind. MMF filed an entry of appearance in the appeal on 2 March and applied for directions on 9 March and a Directions Order was made on 15 March, setting out steps to be taken in the appeal proceedings leading to a hearing during the August 2006 sittings of this Court. Under that order MMF was entitled to deliver a request for particulars on or before 22 March but did not do so until 7 April. Some steps relevant to disclosure were then undertaken. On 24 April MMF's solicitors advised the appellant they would be bringing an application to strike out the appeal which would be filed "shortly". Later, there were 'without prejudice' discussions between the parties and MMF's application was eventually filed on 21 July. Some of the delay has, I accept, been occasioned by MMF's change of solicitors.

[15] MMF has also made a further application to Council for reconfiguration of the land into two lots, something which was publicly notified (for comment only) in July. Mrs King says this is inconsistent with the application the subject of the appeal and that demolition would be required for its purposes, in any event.

[16] In *Soyka v Hervey* [2002] QPEC 30 the appeal itself was, arguably, late but that occurred in circumstances where the appellant, who had been a submitter, had not received a decision notice. In the course of his judgment, Quirk DCJ considered s 4.1.55 and identified three considerations relevant to the exercise of the discretion arising under it: whether there is an acceptable explanation for the delay; whether it is fair and equitable in the circumstances to extend time; and, whether other parties would suffer any and if so what prejudice, militating against an extension being granted.

[17] More recently, in *Robertson v Brisbane* [2003] QPEC 077 and *Butler v Kingaroy* [2005] QPEC 049 Judges of this Court considered more expansive criteria which

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[8] Mr Watson's affidavit filed 18 July 2006 par 16

may attach to the phrase "sufficient grounds" in s 4.1.55, extracted from the judgment of Branson J (as her Honour then was) in the Federal Court of Australia in *Lindsay v Rose*, *Registrar of the Immigration Review Tribunal*[9] where guiding principles distilled by Wilcox J from earlier decisions in the Federal Court[10] were considered:

> (a) The *prima facie* rule is that proceedings commenced outside the "prescribed period" will not be entertained … it is a pre-condition to the exercise of discretion … that application for extension show an "acceptable explanation of the delay" and that it is "fair and equitable in the circumstances" to extend time.
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> (b) Action taken by the applicant other than by lodging an appeal is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished. A distinction is to be made between the case of a person who, by non-curial means, has continued to make the other parties aware that he contests the finality of the decision, and a case where the other parties were allowed to believe that the matter has finally concluded.
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> (c) Any prejudice to a respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension.
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> (d) However, the mere absence of prejudice is not enough to justify the grant of an extension. In this context, public considerations often intrude. A delay which may result, if the application is successful, in the unsettling of other people or of established practices is likely to prove fatal to the application.
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> (e) The merits of the substantive appeal are properly to be taken into account in considering whether an extension of time should be granted.
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> (f) Considerations of fairness as between the applicant and other persons otherwise in a like position are relevant to the manner of exercise at the Court's discretion.

[18] In *Robertson* the appeal was lodged in time, but served more than six weeks after the period then allowed under s 4.1.41. Like Mr Mitchell, the appellant blamed the oversight on a failure to fully comprehend relevant statutory provisions, and the requirements of the Court process; and, there was some evidence of prejudice to the co-respondent. Ultimately, Newton DCJ held that the combination of financial prejudice (albeit unquantified), cost and delay, and the lengthy period which elapsed after the expiration of the appeal period weighed against exercising the discretion in the appellant's favour.

[19] In *Butler* the delay was much longer (six months) but the appeal was brought on behalf of an applicant for a development permit which had been refused. His explanation was that he relied upon his planning consultant and solicitors and in the intervening period there had been regular correspondence between the parties; and, relevantly, there had been no submitters in respect of the application. Rackemann

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[9] 44 ALD 570, at 578

[10] *Hunter Valley Developments Pty Ltd v Cohen* [1984] 3 FCR 344 at 348-50

DCJ thought those circumstances were sufficient to warrant the exercise of the discretion in the appellant's favour.

[20] *Bradshaw v Beaudesert* [2006] QPEC 071 is another case in which delay by the submitter/appellant's solicitors was a material factor. After she saw the decision notice the appellant thought it sensible to meet with Council officers, and further time elapsed while she made enquiries to identify lawyers who could assist her in the matter. The solicitors she chose did lodge an appeal, only a day or two late, but failed to name the co-respondent or give notice to him under s 4.1.41. Later, the appellant engaged new solicitors. There was no evidence of prejudice to the co-respondent and Rackemann DCJ held it would be fair and equitable, in those circumstances, to extend time.

[21] I was also referred to the decision of His Honour Judge Wall QC in *King v Charters Towers* [2004] QPELR 51 in which the applicant, who had been a submitter, was a little under a month late in electing to become co-respondent in an appeal and sought an extension when, he said, he discovered that the respondent council might compromise the appeal with the appellant developer. The fact negotiations between the developer and the local authority were considerably advanced and, indeed, a compromise was in the wind was held to carry a risk of significant prejudice to the appellant, and the submitter's application was refused.

[22] Most recently, in *Kangaroo Point Residents Association v Brisbane* [2006] QPEC 011 the competing factors were complex: the submitter's notice of appeal was out of time but it had relied upon mistaken advice from the local authority; in the interim the applicant for development had, however, committed itself to purchase contracts in the mistaken belief there would be no appeals. Rackemann DCJ said[11]:

> The circumstances of this case are regrettable. Neither a decision to allow or to refuse an extension will deliver an entirely satisfactory outcome. There are countervailing factors to be considered. Ultimately, having regard to all the circumstances, I am not persuaded that an extension ought be granted, particularly in light of the significant potential for detriment to (the co-respondent) …[12]

[23] Prejudice arising from the creation of intervening contractual obligations was also determinative in *Gregory v Brisbane* [1999] QPELR 138, in which Brabazon QC, DCJ said it put the matter 'beyond doubt'[13].

[24] Mr Mitchell's grounds of appeal are drawn in the manner one might expect from a litigant acting in person, but they are reasonably clear, and identify the Performance Criteria and Acceptable Solutions relevant to the application and raise what appear to be material issues concerning those criteria, with respect to setbacks; privacy considerations; matters to do with noise and light; and, flooding and storm water management.

[25] Although, as I accept, there has been prejudice to the co-respondent, the force to be attached to that element is reduced, I think, by the circumstances mentioned earlier: the arrangements put in place for demolition during the appeal period, and the

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[11] At page 12
[12] and see *Gregory v Brisbane* [1999] QPELR 138
[13] *supra*, at 139

considerable delay before this application was brought; and, the co-respondent's new, unexplained application for reconfiguration into a smaller number of lots. While prejudice of a serious kind has plainly been compelling in a number of the cases and, in particular, *Kangaroo Point v Brisbane*, *Robertson v Brisbane* and *Gregory v Brisbane* those were decisions in which other factors also told against the applicant: matters such as lengthy delay, a failure to adequately explain that delay, or a want of material about the prospects in the appeal itself.

[26] This case is more finely balanced. The existence of prejudice is obviously important, but tempered by some other factors. The appellant's mistakes, while not excusable, are understandable. He appears to have at least an arguable case and his appeal concerns a property immediately adjoining that in which he has an interest.

[27] It is plainly important that parties who wish to institute proceedings of this kind take reasonable steps to ensure they comply with procedural requirements. The appellant has offended that principle and done so in circumstances where the result involves disadvantage, both financial and practical, to the co-respondent. The particular question which has troubled me in this matter is whether the factors which reduce the force of the co-respondent's complaints of prejudice (it's haste to evict tenants, and demolish the premises; the delay in bringing this application and the history of the proceedings to date; and, the new application for reconfiguration) mean that the actual prejudice does not, in the final analysis, outweigh the prejudice to the appellant if he loses his appeal rights altogether.

[28] I have come to the view the prejudice to the co-respondent does outweigh the prejudice to the appellant. The factors which tell in favour of that conclusion are, by reference to the applicable elements set out in para [17], that the appellant simply failed to take any steps to bring the appeal to the co-respondent's notice and he had not, previously, alerted the developer to that prospect, or his intentions; there is actual prejudice to the developer, who might have had the chance to stop the demolition and earn rent over the past six months; and the co-respondent is, notwithstanding delay on its part and some inconsistency in its actions since February, essentially an innocent party.

[29] The co-respondent brought its application to strike out the appeal under *UCPR* r 171 but it is arguable r 371 is more appropriate (and, see rr 5 and 16). In any event, no argument was directed to this procedural aspect of the matter by the appellant and this Court's power to strike out an appeal has not been extensively considered in the decisions I have mentioned, many of which have simply featured an order 'dismissing' the appeal. On one view, a refusal of the appellant's application to extend time has the effect of rendering his appeal a nullity, and declaratory relief and consequential orders (under IPA ss 4.1.21, and 4.1.22) would be likely follow. It has not been doubted, however, that this Court has all necessary powers and jurisdiction incidental to proceedings brought under IPA and, when the appeal falls at an early but important procedural hurdle, an order dismissing it has the attraction of being clear and unequivocal.