[2010] QPEC 126

PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

P & E Appeal No 2577 of 2010

DOUGLAS WILLIAM MCILWRAITH Appellant

and

SCENIC RIM REGIONAL COUNCIL Respondent

BRISBANE

..DATE 04/11/2010

ORDER

CATCHWORDS

Commonwealth of Australia Constitution Act, s 109 Judiciary Act 1903 (Cth), s 78B Sustainable Planning Act 2009, s 461 Integrated Planning Act 1997, s 4.1.55 Uniform Civil Procedure Rules, r 14 Planning and Environment Court Rules, r 5, r 6, r 19(5)

Appeal by developer against development approval granted two and a half years before on his own application - appellant contends application and approval (with which he is unable or unwilling to comply) void because Commonwealth regulation "covers the field" - on application for directions matters ventilated included what was a reasonable time to allow Attorneys-General to become involved - whether notice to be given to submitters and concurrence agencies for the application - whether court could give directions at all - whether first consideration was extending time for appeal - whether appeal could be treated as an originating application for declarations

HIS HONOUR: The only filed documents are a notice of appeal filed on the 9th of September 2010, the Council's entered appearance filed the 24th of September 2010 and an application in pending proceeding by the appellant seeking directions. That latter application is required by the Rules to be brought to advance the appeal towards hearing.

The court has heard a good deal of the history of the matter from the Bar table which ought to be placed before it in a formal way in affidavits.

The notice of appeal is unusual. It, in form, is an appeal against the Council's decision approving an application by the appellant for development approval, a decision of the 1st of February 2008 made upon a development application dated the 14th of May 2007 and identified in the notice of appeal by its Council file number.

The basis for getting set aside the council's decision is that the appellant's development application was void as the Council's approval was not required. The activity - or use - of the relevant land covered by the application and approval is the operation of a private airstrip.

Mention has been made this morning of jurisprudence concerned with whether or not such a use is ancillary to some principal

use of the site but the challenge indicated in the notice of appeal is not - or is not, principally, of that kind, but is a constitutional challenge based on s 109 of the Constitution of the Commonwealth and the proposition that relevant matters are regulated federally in a way that "covers the field" and excludes any role for the State or under the umbrella of the State's local governments.

You said, Mr Stephens, that it was the development application that was made because the Council threatened prosecution; is that right?

MR STEPHENS: That's correct, your Honour.

HIS HONOUR: Yes. You say, first of all, the Council said you needed development approval for your airstrip and your client applied for that and got it; is that right?

MR STEPHENS: I understand a prosecution was brought. They got to court on a prosecution and it was agreed that they would agree to the prosecution being dismissed if he filed a development application.

HIS HONOUR: Which he did.

MR STEPHENS: Yes.

HIS HONOUR: And he got an approval and now he's threatened with prosecution again?

MR STEPHENS: No. There's no prosecution. He's come along and said, well, look, he can't comply with it and as a result of which he sought legal advice-----

HIS HONOUR: All right.

MR STEPHENS: -----and so he-----

HIS HONOUR: So that the only threat of prosecution was on the basis that he didn't have a development approval from the local Government.

MR STEPHENS: That's right.

HIS HONOUR: All right.

MR STEPHENS: Your Honour, could I just say in relation to that, these are my instructions. I haven't had an opportunity

to talk to my client in relation to that but it's what I believe happened but I wasn't present when that happened so I'm not, you know - there's a risk that what I've said is not entirely accurate but it's pretty close.

HIS HONOUR: Thanks for clearing that up.

MR STEPHENS: Thank you.

HIS HONOUR: Paragraph 1 of the relief sought in the notice of appeal is any necessary extension of time pursuant to s 4.1.55 of the Integrated Planning Act 1997. The appellant is well out of time for purposes of commencing an appeal. Indeed, the legislation under which appeals can be brought to this court is now the Sustainable Planning Act 2009. One of the issues raised by Mr Andreatidis who's represented the Council this morning is whether or not the appeal has been brought under the correct Act.

He has also raised before the court the impact of s 78B of the (Commonwealth) Judiciary Act of 1903 (Cth) which provides that if in any cause "pending" in an Australian court there is involved a matter arising under the Constitution or involving its interpretation, "It is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General of the question of intervention in the proceedings or

removal of
the cause to the High Court."

That provision, it was submitted, precludes the court from doing anything. Mr Andreatidis acknowledged the practicalities of a situation such as the present one and that the court would be able to fix dates for further reviews of the proceeding and the like.

He submitted that it would not be open to the court to give directions requiring the parties to file further material according to a timetable and the like. It hasn't been convenient to argue such issues today. The parts of s 78B following that were quoted make it clear that to a considerable extent the court may proceed, even to "continue to hear evidence and argument concerning matters severable," under sub-s (2) or, indeed, where it's necessary in the court's view, in the interests of justice, to hear and determine proceedings so far as they relate to the granting of urgent relief of an interlocutory nature under sub-s (5).

It's my view - and I think it was accepted at the Bar table that it would be open to the parties cooperatively to take steps by way of preparation of affidavit and other material and exchanging it with the other side.

It may well be that the court could give directions in that regard as well, although such directions might prove of little value if intervention by any Attorney-General meant that issues in the proceeding changed.

The Judiciary Act point has not taken the appellant and his advisers by surprise; indeed, they have already advised the Commonwealth and six State Attorneys-General of the proceeding. The court is going on information provided from the Bar table by Mr Stephens, who has warned that, in some respects, his understanding may be imperfect.

At the beginning of today's hearing, the 4th of September 2010 was said to be the date of notice to the Attorneys at which time, in my view, there would have been no cause "pending". I think that refers to a matter the subject of an existing file in a court.

I would have thought it necessary to advise the Attorneys formally once a cause was, indeed, pending in the relevant sense - which would tend to confirm the seriousness of the situation.

The appellant has received from the Commonwealth Attorney and all State Attorneys, except for Queensland and Western Australia, written indication of a lack of interest in taking

any step in this appeal.

As Mr Andreatidis said, it's unsatisfactory not to have proper evidence of these matters. It's inappropriate to be critical of the appellant or his advisers in this regard because they had not anticipated anything happening today other than the giving of directions for the filing of further material and the fixing of a further date.

There's no definition of what is a reasonable time in s 78B but I think it's reasonable to assume that the time that the non-responding Attorneys have had to date is a factor in the court's determination of what may be a reasonable time to wait from today.

Mr Stephens corrected what he'd earlier said to notify the court that the date when the letters were sent to the Attorneys was, in fact, the 4th of October 2010, after the commencement of the appeal. I understood him to say that the appeal document had not been sent. In the absence of proper evidence, the court can't assess the adequacy of the steps taken vis-a-vis the respective Attorneys. If they've had only one month to consider the matter, I venture to suggest that that may not be a reasonable time.

The notice of appeal has no return date endorsed on it. The

interlocutory application for directions does nominate today as a return date, but I'd infer that the Attorneys know nothing about that.

The Council, through Mr Andreatidis, tendered what seems to be a pro forma of the Council's decision notice. The document bears no signature or reproduction of any signature and is complicated because, among other things, instructions for completion of what's obviously a standard form used by the Council have been left in place.

The document is useful in identifying the names and addresses of 29 or 30 submitters who made submissions to the Council when the impact-assessable development application was made. It also identifies the two concurrence agencies, being State Government departments. Whether or not the concurrence agencies and submitters ought to be notified of this appeal as well as the Chief Executive, notice to whom has not been established, is a matter of contention.

Mr Stephens argued that his client's approach was to have the constitutional issue dealt with as a preliminary point pursuant to r 19(5) of the Planning and Environment Court Rules. His approach was that the submitters need not be involved in that exercise. They may, however, have or wish to argue that they have an entitlement to be heard on the

constitutional issue. The cautious approach would be to notify them and, in particular, of the date when the matter will be mentioned again in the court, which is the 9th of December 2010.

It proceeded today on the basis that notification of them at the addresses revealed in Exhibit 1 would be sufficient notice. Concurrence agencies, taking a cautious approach, might be advised of what's happening in the same way.

It's not clear to me, at this stage, that the extension of time point under whatever is the appropriate Act ought not to be dealt with first. Unless the appeal can be entertained by the court at all, a problem, given that it's apparently well out of time, there may be little point in attempts to ventilate constitutional issues.

There's been discussion to the effect that it may be appropriate, if the delay embarrassing the appeal cannot be overcome, for the appellant to proceed in another way, namely, by originating application seeking a declaration to the effect that everything that happened in 2007 and 2008 is void.

Mr Stephens submitted that the court could direct that the appeal be treated as an originating application. The UCPR, by r 14, to the extent that it might apply in this court,

authorises orders to assist litigants who adopt the incorrect procedure. The procedures mentioned in the rule are application and claim.

I doubt that that rule is of assistance in this court. There doesn't seem to be any lacuna of the kind that invites recourse to the UCPR for an answer. Indeed, the PEC Rules acknowledge the difference between originating applications, which are the required way for commencing a proceeding other than an appeal under r 6, and appeals - which are not a creature of the Rules at all but a creature of the legislation. Applicant appeals are brought under s 461 of the Sustainable Planning Act 2009.

I am inclined to think it would be impossible for an originating application made under the Rules to be treated as an appeal. The considerations in respect of an appeal being treated as an originating application maybe less difficult.

I would not be about to make any final decision about this interesting issue in the absence of argument about it which the parties haven't had any opportunity to prepare. However, I think it would be unlikely that r 5, which entitles the court to waive compliance with provisions of the Rules, would authorise the treating of the appeal as an originating application for declarations. That is a matter for further

argument.

The appeal has been adjourned for a mention on a date next month acceptable to the parties and the order recognises the entitlement of the appellant to have returnable, together with the appeal, any originating application he may file for the purposes of regularising procedural matters if so advised.