PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

P & E Application No 593 of 2010

MOFO GROUP PTY LTD Applicant

and

BRISBANE CITY COUNCIL & ORS Respondent

BRISBANE

..DATE 24/08/2010

ORDER

CATCHWORDS

Integrated Planning Act 1997, s 3.5.19, s 3.5.24, s 3.5.28, s 3.5.33, s 4.1.21, s 4.1.23

Originating application by maker of a development application which resulted in a development approval - declarations sought that third respondent was not entitled to request and that council was not entitled to agree to a change of the approval (even with the landowner's consent) and an injunction - whether court had jurisdiction considered - application dismissed, as request was properly made and the applicant did not have ownership of the approval, which ran with the land - costs awarded against appellant, in part on the indemnity basis

HIS HONOUR: This is an application by Mofo Group Pty Ltd calculated to achieve recognition of intellectual property rights it might have from work done and financial contributions made by it towards achieving a development approval which took the form of a negotiated decision notice.

The applicant made its original impact assessable development application with the consent of the owners of the property on or about 10 March 2008, which application was made by a company called Conics (Brisbane) Pty Ltd as its consultants, and sought a development permit for material change of use for multi-unit dwellings for 35 units and a development permit for reconfiguring a lot for 35 lots within a community title scheme.

The application, which attracted no submissions, won approval on or about 2 October 2008 but matters were suspended to permit fruitful negotiations which resulted in a negotiated decision notice. This occurred around about 20 January 2009. There was no appeal and the approval came into effect into effect under section 3.5.19 of the Integrated Planning Act 1997 (IPA). Unfortunately for the applicant, it did not complete its intended purchase of the site.

At a later date, the second respondent, Conics (Sunshine Coast) Pty Ltd, made a request to the council for a change to the approval. That was done as disclosed agent of the third respondent, Vantage Holdings Pty Ltd, whose role is not entirely clear.

The owner of the land now is the fourth respondent, Kinabulu Holdings Pty Ltd. It is well advanced in actual construction of dwellings on the site. The extent to which construction has been carried out and to which Kinabulu Holdings has committed resources is relied on as a reason why, in the exercise of its discretion, the court would not grant the relief sought by the applicant, even if the applicant established a case for it.

What the applicant seeks is a declaration that a changed approval incorporated in a decision notice of 1 December 2009 issued by the first respondent council pursuant to the application made by the second respondent on behalf of the third respondent on or about 20 October 2009 is null and void.

Declarations are sought that the second respondent was neither entitled nor authorised to make the application of 20 October 2009, that the third respondent was no more entitled to do that, and that the first respondent was not entitled or empowered to consider that application.

An injunction is sought restraining the third and fourth respondents from proceeding to act in reliance on the relevant permit of 1 December 2009.

This is not the first instance to come before the court of an original developer who conceives a development scheme and applies to a local government for development approval and, in respect of it, has sought to protect its work and investment

in circumstances where, given the way matters have worked out, others are in a position to take advantage of the development application or, in this instance, the resulting development approval.

An early example was Ogle v Pine Rivers Shire Council [2005] QPELR 291. That was followed by Sushames v. Pine Rivers Shire Council [2006] QPELR 188, which was affirmed in the Court of Appeal - [2006] QCA 171. In a different way, Mr Ogle's issues, or some of them, came before the Court of Appeal in Ogle v. Pine Rivers Shire Council [2008] QCA 232.

All of that litigation concerned development applications as opposed to a development approval. Those cases concerned issues as to who could come within the definition of "applicant" for purposes of an applicant appeal under section 4.1.27 of IPA.

Schedule 10 of the Act provides an expansive definition of "applicant" for that purpose as including "the person in whom the benefit of the application vests."

The current application, although it has its genesis in the underlying development application having been the applicant's, is very different, as was emphasised in the Court of Appeal in Sushames.

The owner of land which had given consent to the development application sought to become a party in an appeal arising out

of the way in which the council had dealt with the application.

At paragraphs 20 to 22, the leading judgment states:

> "20 The issue is whether the position is now different by reason of the extended definition in the IPA. Counsel for Cennzeal relies upon this Court's decision in Ogle v Pine Rivers Shire Council in which the purchaser from a mortgagee exercising power of sale was held to be an applicant for the purposes of instituting an appeal. The facts of that case are quite different, but the submissions on behalf of Cennzeal are consistent with the reasoning. At para 20 Robin QC DCJ said:
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> > "Intended or not, the effect of the definition of a Ch.4 applicant is to avoid the outcome in Architects Dewar and Condo Fisheries, and to take things further, by recognising as an applicant for appeal purposes a person assuming ownership of the relevant land only after the making of the development application ..."
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> 21 In coming to that conclusion, his Honour considered that, since a development approval attaches to the land and binds the owner, successors in title and occupants, the owner has an "inchoate, future or contingent" benefit, constituted by the chance of the application leading to an approval, which makes the owner a person with a "real interest" in the outcome of the application. While stating that the extended definition "probably connotes a direct benefit" he observed that the word "benefit", in other parts of the Act, was used in the sense of "any advantage, actual or potential" and concluded that the expression should not be construed in a technical or restricted way. He said that the position comes close to an application running with the land for Ch 4 purposes (although he said that he did not have to decide that question). That would be a significant change to the previous position.
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> 22 The interest of the owner in the outcome of a development application is not productive of any right prior to the council's decision on an application, other than the right to grant or withhold consent to the making of the application. The extended definition does not apply to Ch 3. Prior to council's decision, Cennzeal would have had no right to assume the role of applicant or to prevent Soncom from withdrawing the application, even if contractual relations had already ceased."

Section 245 of the Sustainable Planning Act 2009 (SPA) corresponds with s 3.5.28.

Mr Favell represented the applicant here. He inherited his brief from other counsel who is no loner practising at the bar.

The history of the application, so far as I am personally aware of it from conducting reviews, shows the respondents from the outset challenging the validity of it - indeed, whether the court even has jurisdiction; they have been expressly challenging the applicant's contentions as entirely unsustainable; at earlier or later stages, all have placed the appellant on notice that costs will be sought against it.

While accepting that the decisions referred to above, which tend to acknowledge the entitlements of the applicant for a development approval, are not directly in point, Mr Favell seeks to use the approach to indicate that the original development applicant has a part to play and, more importantly, rights that can be protected in the development approval if one has been granted by the local government.

The section referred to in the extract quoted from Keane JA's reasons commences: "The development approval attaches to the land". That has, in my view, always been taken as ensuring that a development approval runs with the land for the benefit of the owner of the land for the time being.

Mr Favell's contention is that what that section is all about, as indicated by the following words in subsection (1) and perhaps subsection (2) as well, is ensuring that subsequent owners are bound by the conditions of a development approval.

He cites as an instance of that occurring Hawkins v. Izzard [2001] QPELR 423 (at D), especially at page 429 where there is support for the proposition that IPA section 3.5.28 is there to ensure that conditions have to be complied with. That the section may impose burdens that come with a development approval on owners does not exclude its apparent purpose of confirming that the benefits run with the land. That the benefits pass to a new owner has never, to my knowledge, been challenged, until now.

The recent High Court decision of Hillpalm Pty Ltd v. Heaven's Door Pty Ltd [2004] 220 CLR 472 has revealed some potential difficulties where other principles intrude, in particular, the indefeasibility provisions of the Torrens legislation. There, a subsequent owner escaped liability to provide a right of way because what Cullinane J criticised as inefficient administration led to there being no notation of the proposed right of way in current searchable records of the Registrar-General in New South Wales.

The applicant's proposition today is that section 3.5.28 has really nothing to do with ownership of a development approval from the standpoint of being entitled to implement it or, in the present context, make a request to have it changed.

Both section 3.5.24 and section 3.5.33 of the IPA are potentially available if a person wants a minor change to be made to a development approval, in the first instance, or if a person wishes to change or cancel a condition in the other.

In the applicant's submission, "a person" has to be read down. It was observed that the expression is not "any person", with the suggestion that "any" might let in a wider class entitled to make requests.

The notion is that there has to be some qualification on "a person". Vantage, the third respondent, which made the application in this regard, was, as Mr Favell correctly points out, never an applicant for purposes of the underlying development application, nor an owner. It could not point to any specific assignment to it of any application or approval. Contrary to the submissions of the other parties, the applicant submits that the IPA does not confer ownership of approvals.

Both section 3.5.24 in subsection (3) and section 3.5.33 in subsection (3) provide that if the "person" is not the owner, the request must be accompanied by the owner's consent. That was the case in respect of the request made by Vantage with the assistance of the second respondent.

The applicant's submission is that the owner's consent cannot have the effect of conferring on an entity such as Vantage any relevant right. There is some support for a proposition along

those lines in Sushames at first instance at [17] in particular. The currency of a submitter appeal meant that the development approval under appeal had not taken effect: IPA s 3.5.19. Judge Rackemann had to determine whether an owner with nothing to rely on but having consented to a development application made by someone else; it was held not entitled to participate in the appeal as "applicant".

My view is clear that section 3.5.28 does confer ownership in the sense of the right to take advantage of a development approval on the owner of land for the time being.

Mr Favell did not shrink from submitting that such an approval could not be implemented without the consent of the original applicant for the approval to the use of its intellectual property.

If that is the case, in my view it has nothing to do with rights that can be enforced in this court. There may be other courts or tribunals where relief by way of protection of rights that Mofo might have could be obtained, even to the extent of preventing construction of development.

Some of the respondents were highly critical of the applicant for failing to take steps unspecified to protect any intellectual property rights it might have.

In my opinion, a development approval not only runs with the land, it forms part of the whole planning regime for the local

government area - conferring development rights which may well differ from those that the general planning arrangements confer.

The council has today placed before the court an affidavit which shows that in respect of this very development approval there has recently been another application involving the fourth respondent, the outcome of which is yet another change to the original development approval in the negotiated decision notice.

For what it is worth, my view is that "a person" in the sections which authorise requests to change a development approval or the conditions of it is perfectly general. The control that exists lies in the recognition of the owner's role in subsection (3) in each case.

The respondents, or some of them, contended that the court lacks jurisdiction to entertain the application in any event, the assertion being that it does not qualify as a proceeding for a declaration about "a matter done, to be done or that should have been done for this Act" for purposes of section 4.1.21(1)(a) of IPA. The equivalent SPA section is 456.

I am not persuaded that the court lacks jurisdiction.

The council's challenged decision was either done or purported to be done for the IPA, if not the Sustainable Planning Act 2009 which has replaced it.

A proceeding seeking a declaration that that was not properly or effectively done, in my view, on its face, comes within the court's jurisdiction.

It is only by scrutiny of the grounds which are relied upon that one encounters potential issues about the appropriateness of this court as a forum. That may lead to an outcome of a kind frequently encountered, that the grounds relied on in a proceeding are inadequate to support the relief sought.

In my view, the court does have jurisdiction.

The application, however, ought to be refused, and it is.

There are issues about costs. All of the respondents are, I think, seeking indemnity costs. Mr Favell has not had an opportunity to address the court in that regard. I will provide him with one.

...

HIS HONOUR: In my opinion, the stage was reached in respect of each of the respondents, perhaps at a different time, when the proceeding became frivolous and vexatious within section 4.1.23(2)(c) of the IPA.

The filing of the application on 19 February 2010 could not be so characterised, in my view. However, by 17 March when the proceeding came before me on a mentions day, the contentions

of the respondents that the application was untenable, which have been vindicated today, and unsurprisingly, had been made abundantly clear to the applicant and its then counsel. Given that this is essentially a no costs jurisdiction, I would be reluctant to visit a costs order against the applicant in favour of a respondent who had not clearly intimated an intention to seek costs and, if that is relevant, as it is here for all respondents, costs on the indemnity basis.

It is clear from the authorities that Mr MacNaughton (for the second respondent) has collected that costs can be and have been ordered on that basis in this court. See Kalglen Pty Ltd v. Brisbane City Council [2009] QPELR 643; Collier v. Brisbane City Council [2009] QPELR 679; Gold Coast City Council v. Metrostar [2005] QPELR 17; Sinnathamby v. Purcell [2003] QPELR 237. The Court of Appeal decision in Mudie v. Gainriver Pty Ltd No 2 [2003] 2 Qd R 271 has been found of considerable assistance by judges of this court.

One particular feature I will mention concerns Mr MacNaughton's client which has from the outset contended that it played a role as agent only and ought not to have been joined in a proceeding and, certainly, ought to have been released once it made that point. On 29 April 2010, within the time allowed to the respondents by the orders of 17 March 2010 for the purpose, the fourth respondent filed an application to strike out under rule 171 of the UCPR, which sought indemnity costs for all respondents.

In my opinion, on a theory that the application made for Vantage ought never to have been made, it was defensible for the applicant to join its agent or consultant as well as Vantage. I do not accede to Mr MacNaughton's approach in that regard.

On the major issue, however, as indicated, I think the application did become frivolous and vexatious and ought to have been acknowledged as such once there was some ventilation of the considerations around the time of the mention on 17 March this year. At page 5 of the transcript one reads:

> "HIS HONOUR: You say all of this has got into the public realm now as a result of the development approval. The law in relation to this parcel of land has changed and certain development rights attached to it-----
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> MR MacNAUGHTON: True.
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> HIS HONOUR: -----and they are in a different sphere such that Mr Cochrane's people can't come along and say "Because we got the original idea we remain in charge of any changes being made to that idea."
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> MR MacNAUGHTON: That's right. Your Honour, as it happens under 3.5.28 of IPA the approval once it takes effect runs with the land. Mr Cochrane's client is then as of that moment no longer entitled to run those

Ogle/Sushames arguments that you were alluding to earlier."

The determination of some of the respondents to seek costs was clear. The order made reserved costs. Distinctions are made among the respondents in today's order on the basis of when they specifically put the applicant on notice of the costs that they would be seeking in the event, predictable, in my view, that it failed. The order effectively deals with the costs reserved in the orders of 17 March 2010 and 23 April 2010.

...

The application is dismissed and the applicant is ordered to pay costs as follows:

of the first respondent council from 15 July 2010, indemnity costs to apply after 20 August 2010;

in the case of the second respondent, costs from 15 March 2010 and indemnity costs after 16 July 2010;

in respect of the third respondent, indemnity costs from 17 July 2010; and

in respect of the fourth respondent, costs after 13 April 2010, and indemnity costs from 29 April 2010.
