

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Elesanar Constructions Pty Ltd v Department of Main Roads and Transport & others* [2012] QPEC 16

PARTIES: **ELESANAR CONSTRUCTIONS PTY LTD**
ACN 000 804 384
(Appellant)
v

DEPARTMENT OF MAIN ROADS AND TRANSPORT
(Respondent)

and

ALLCONNEX WATER
(Second Respondent)

and

GOLD COAST CITY COUNCIL
(Third Respondent)

FILE NO: 356/11

PROCEEDING: Application

DELIVERED ON: 1 March 2012

DELIVERED AT: Southport

HEARING DATE: 1 March 2012

JUDGE: Judge C F Wall QC

ORDER: Submitters to be re-served with Notice of Appeal

CATCHWORDS: ENVIRONMENT AND PLANNING - procedure – service of notice of appeal on submitters – letter accompanying service misled submitters as to right to elect to become a respondent to the appeal – necessity to re-serve notice of appeal

COUNSEL: Mr A. Abaza (Solicitor) for Elesanar Constructions Pty Ltd

Mr N. Andreatidis for Allconnex Water

Mr E. Morzone for Gold Coast City Council

SOLICITORS: The Appellant was self represented
Corrs Chambers Westgarth for Allconnex Water
King and Company for Gold Coast City Council

HIS HONOUR: One issue for determination today is whether the notice of appeal was given in compliance with section 4.1.41 of IPA, in particular section 4.1.41, (1) (a) (iv), requiring service of a written notice of appeal on submitters.

There were many submitters. The appellant, by letter dated 24th August 2011, forwarded a sealed copy of the notice of appeal to each submitter and in the letter said: "You are a submitter to the application for sand processing application(sic) on Lot 176 and Elesanar has filed in Southport to make it easier for you to attend the Court. A notice of election form PEC6, should be filed and provided to us so that you can be heard in the proceedings if you so wish. An email address would be helpful".

Details were then provided as to where the form was available on the Court's website and the letter continued: "As you can see from the notice of appeal Elesanar is concerned that there should be conditions of development approval that: 16.1 Landscaping to be in accordance with that shown in plan 002Rev1 annexed marked "MRA"; 16.2 For so long as the use continues on the subject site existing trees and bushes including the long-leaved tuckeroo along the site's boundary with the Pacific Highway are to be maintained. Elesanar would like your support in the present Court action for conditions 16.1 and 16.2 noted above. And hence the Notice of Election enclosed refers to that if you so wish and a copy could be

given to us after signature and filing with the Court. Please give these matters your careful consideration".

The enclosed Notice of Election named the appellant as Elesanar Constructions Pty Ltd, the Department of Transport and Main Roads as respondent, Allconnex Water second respondent and Gold Coast City Council third respondent. It is then headed "Notice of election" and included this statement: "I wish to support the conditions proposed by the Appellant Elesanar Constructions Pty Ltd as condition 16.1 and 16.2. I do not agree with the Bermuda Street extension shown on attachment "Z" to the Notice of Appeal". The form then had space for the name and address of the person "electing to correspond to this notice of appeal" and then a place for the Co-Respondent to sign.

The notice on the last page of the Notice of Appeal is in the appropriate form and states: "If you are entitled to elect to be a party to this appeal and you wish to be heard in this appeal you must (a) within 10 business days of receipt of this Notice of Appeal file a Notice of Election in the Registry where this Notice of Appeal was filed or where the Court file is kept; and (b) serve a copy of the Notice of Election on each other party. The Notice of Election should be in form PEC6 for the Planning and Environment Court". If that was all and there was no letter in the terms I have indicated there would be no problem.

The Council submits that submitters would have been misled by the letter dated 24th of August 2011 and the draft Notice of Election.

The submission made by Mr Morzone is that whilst the Notice of Appeal included within it the prescribed notice advising of a right of election on the last page, the effect of such notice was seriously tainted by statements in the accompanying letter and the enclosed Notice of Election. He submitted that the statements were misleading and likely to mislead a reasonable person into believing that the election given to the submitters was one which could be taken up only if the submitters supported the appellant's position. He submitted that submitters were not given an unequivocal notice of their right to elect to become a party and be heard.

I think there is substance in those submissions. I think that the letter which accompanied service of the notice of appeal on the submitters and the proforma Notice of Election sent with it were misleading and misinformed the submitters of their rights, or at least it would have given them the clear impression that they could elect to join the proceeding only if they supported the appellant's case and the particulars referred to in the letter and the proforma Notice of Election.

The letter and the proforma Notice of Election may well have

led to confusion in the mind of the recipient as to their position as potential respondents to the appeal and as to the rights they had or were entitled to in relation to the appeal. The documents which accompanied the Notice of Appeal sent to the submitters potentially, and in my view in fact probably did, adversely affect their awareness of precisely what their rights were as potential respondents, and thereby restricted their opportunity to exercise rights which submitters have in the case of an appeal by an applicant.

Further, by reference only to conditions 16.1 and 16.2 the letter and the proforma Notice of Election may have given the impression that any right to elect to become a respondent to the appeal was a right which was limited to argument about those conditions. The letter and the proforma Notice of Election would I think have detracted from the notice at the end of the notice of appeal. It would have qualified that in a misleading sense.

For those reasons, I do not think that there has been compliance with section 4.1.41(1)(a)(iv) in relation to service of the written notice of appeal on the submitters.

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HIS HONOUR: I give leave to the appellant to file and serve an amended Notice of Appeal specifying that the appellant also

appeals against Condition 37. I order that an amended notice of appeal be served on the submitters. Do you want a time limit?

MR ANDREATIDIS: No, your Honour, not necessarily.

HIS HONOUR: I am satisfied that "Allconnex Water" is a sufficient description of the name of the Second Respondent. The application to remove Allconnex Water as a party is dismissed and no order for costs is made. I adjourn the hearing of the preliminary issue raised by the appellant as to whether conditions 36 and 37 are void for uncertainty or beyond power to a date to be fixed.

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HIS HONOUR: I will reserve the application by Allconnex Water and the Gold Coast City Council for costs of today as a result of non-compliance with section 4.1.41.
