PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Neilsens Concrete Pty Ltd & Anor v Brisbane City Council* [2020] QPEC 3
PARTIES:	**NEILSENS CONCRETE PTY LTD (ACN 055 131 283)** (First Applicant) **and** **ORB HOLDINGS PTY LTD (ACN 010 227 371)** (Second Applicant) **v** **BRISBANE CITY COUNCIL** (Respondent)
FILE NO:	2106/19
DIVISION:	Planning and Environment Court
PROCEEDING:	Hearing of an originating application
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	21 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2019, submissions closed 8 November 2019. Further oral submissions heard 29 January 2020.
JUDGE:	RS Jones DCJ
ORDER:	**1. Pursuant to s 11 of the *Planning and Environment Court Act* 2016 it is declared that the use of the land situated at 58 Clarins Street, Coorparoo being lots 3-5 on RP117090, lots 110-114 on RP12739, lots 51 and 53 on RP868482 and lot 2 on RP96381 as a concrete batching plant has not been abandoned.** **2. Pursuant to s 11 of the *Planning and Environment Court Act* 2016 it is declared that the land may be used for purposes consistent with the development approval issued by this Court on 25 March 1983 (Brisbane City Council File Reference 420/10-RJ125/58).** **3. I will hear further from the parties if necessary as to any consequential orders.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – where a development approval was granted by this court for a

concrete batching plant to be operated on the subject site – where the second applicant is the owner of the subject site – where the second applicant intends to lease the subject site to the first applicant for the intended operation of a concrete batching plant – where the respondent council refused a minor change to the development approval – where the respondent council contends the concrete batching plant use has been abandoned – where the first and second applicant seek declaratory relief pursuant to s 11 *Planning and Environment Court Act* 2016

TOWN PLANNING – ABANDONMENT – where the respondent council contends the use of the subject site for a concrete batching plant has been abandoned – where previous tenant gave declaration of abandonment to respondent council – whether the use has been abandoned – whether the second applicant intended to permanently abandon or terminate the subject site's use as a concrete batching plant

ONUS OF PROOF – whether applicants or respondent council bears the onus to prove abandonment of use – where respondent asserts the applicants bear the onus – where the applicants assert who bears the onus need not be determined

INTENTION – whether the owners or occupiers intention for the use of land to be answered by his subjective intentions – whether subjective intentions of owner or occupier but one of the circumstances to be considered

Legislation

Integrated Planning Act 1997 (Qld)

Planning Act 2016 (Qld)

Planning and Environment Court Act 2016 (Qld)

Cases

Benter Pty Ltd v Brisbane City Council [2006] QPELR 451

Earle Cameron Constructions Pty Ltd v Parramatta City Council (1981) 46 LGRA 130

Hudak v Waverley Municipal Council (1990) 18 NSWLR 709

Hughes v Secretary of State (2000) 80 PCR 397

Jeblon Pty Ltd v North City Municipal Council (1982) 48 LGRA 113

Leeming & Anor v City of Port Adelaide [No 2] (1987) 45 SASR 506

Mac Services Group Ltd v Belyando Shire Council & Ors [2008] QPELR 503

Woollahra Municipal Council v Banool Developments Pty Ltd (1973) 129 CLR 138

Woollahra Municipal Council v T.A.J.J Investments (1982) 49 LGRA 123

COUNSEL: Mr J Horton QC with Mr M Batty for the first applicant
Mr D O'Brien QC with Mr J Hastie for the second applicant
Mr Job QC with Mr J Lyons for the Brisbane City Council

SOLICITORS: Minter Ellison Lawyers for the first applicant
HWL Ebsworth Lawyers for the second applicant
Brisbane City Legal for the Council

[1] This proceeding is concerned with an originating application seeking declaratory relief. In particular:

1. A declaration pursuant to s 11 of the *Planning and Environment Court Act* 2016 (Qld)…that the use of the land situated at 58 Clarins Street, Coorparoo being Lots 3-5 on RP117090, Lots 110-114 on RP12739, Lots 51 and 53 on RP868482 and Lot 2 on RP96381 (**land**) as a concrete batching plant has not been abandoned;
2. A declaration pursuant to s 11 of the *Planning and Environment Court Act* 2016 (Qld) that the land may be lawfully used consistent with the development approval issued by this court on 25 March 1983….

[2] For the reasons given below the orders of the Court are:

1. Pursuant to s 11 of the *Planning and Environment Court Act* 2016 it is declared that the use of the land situated at 58 Clarins Street, Coorparoo being lots 3-5 on RP117090, lots 110-114 on RP12739, lots 51 and 53 on RP868482 and lot 2 on RP96381 as a concrete batching plant has not been abandoned.
2. Pursuant to s 11 of the *Planning and Environment Court Act* 2016 it is declared that the land may be used for purposes consistent with the development approval issued by this Court on 25 March 1983 (Brisbane City Council File Reference 420/10-RJ125/58).
3. I will hear further from the parties if necessary as to any consequential orders.

Background

[3] Orb Holdings Pty Ltd (Orb) purchased the subject land on 7 December 1978. Following what were described as lengthy and complex negotiations, Neilsens Concrete Pty Ltd (Neilsens) entered into a contract to purchase the land on or about

21 December 2018. Neilsens wish to operate, among other things, a concrete batching plant on the land, a use to which that land had been historically put.

[4] It is uncontroversial that the land had been used lawfully to accommodate a concrete batching operation pursuant to orders made by Judge Carter (as he then was) sitting in the then Local Government Court on 25 March 1983 (the development approval). The development approval was issued for the benefit of BMG Resources Ltd and not Orb.[1] BMG and its later corporate manifestation, Boral Constructions Materials (Qld) Ltd (Boral), used the land for concrete batching purposes from 25 March 1983 through to December 2012.

[5] Notwithstanding ceasing its operations, Boral remained in occupation, initially pursuant to a lease and thereafter under a "*holding over tenancy*" that came to an end at or about 28 April 2015. It is common ground that since that date, no concrete batching or similar operations have occurred on the land and it has, to all intents and purposes, since late 2014, been a vacant block of land.[2]

[6] On or about 2 February 2018, a Minor Change Application was lodged with the Brisbane City Council (Council) on behalf of Neilsens. That application was also served on the State Assessment and Referral Agency as an affected entity. Soon after the application was served on the Council it took the position that the use of the land for concrete batching purposes had been abandoned.

The respective cases of the parties

[7] In the written submissions filed on behalf of the Council, it was asserted that particularly relevant matters were as follows:[3]

> "(a) the use of the land as a batching plant ceased in late 2012;
>
> (b) all plant and equipment (and all hardstand) was removed in late 2014 (The change between when the land was used and the state it has remained in since 2014 is illustrated…the land (is) devoid of any hardstand or infrastructure);
>
> (c) the removal of the plant and equipment occurred at or around the same time that Boral gave a '**declaration of abandonment**' to the Council;
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> (d) for the past 5 years the land has remained in a state which is devoid of any indication that it was once used for a batching plant;

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1 Exhibit 1, V1, tab 3-4, pp 117-180 (Exhibit pp 5-9).
2 Exhibit 5, FIG B2-B3 at p 23.
3 Council's written submissions, at para 3.

> (e) neither of the Applicants have ever used the land as a batching plant. Although at all material times the land has been owned by Orb Holdings, it has never operated a batching plant or been involved in the concrete industry; and the plant and equipment necessary for the past use was never owned by Orb Holdings (but by Boral and its related entities)." (Footnotes omitted – emphasis added)

[8] In respect of the declaration of abandonment referred to, on 27 June 2014 Boral wrote to Orb identifying a number of matters. First, it asserted that it considered it necessary to terminate its "*holding over tenancy*" because the rent was so high as to impact on the profitability of the on-site operations. Boral also indicated that it had no intention of recommencing concrete batching while in occupation and that it would not consider the sale of its assets and would remove all equipment, buildings, offices, hard stand and service facilities. That correspondence also asserted that a declaration of abandonment had already been provided to the Council.[4] Whether Boral had the right to declare abandonment of the use was hotly disputed by agents acting on behalf of Orb.[5]

[9] There was no dispute between the parties that since about 2012 concrete batching did not occur on the land and that the site, as it currently stands, is effectively vacant land. Instead, emphasis is placed on the intentions of Orb concerning the future use to which the land would be put. In the written submissions filed on behalf of Neilsens, it was said that the relevant case law showed that:[6]

> "(a) the intention of an owner in respect of the use of the land in question is a relevant consideration in determining whether a use has been abandoned or not;
>
> (b) existing use rights are not lost simply because they are not, at one moment in time, being actually carried out on the land;
>
> (c) the length of time that a parcel of land has not been used for is a relevant consideration."

[10] Thereafter, reference is made to the physical characteristics of land, and it is then asserted:[7]

> "However, in the circumstances of this particular use, neither point should result in the Court not granting the relief sought.
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> That is so given that:
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> (a) the length of time in question must be balanced against considerations relating to **intention** and the lengthy (but necessary)

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4 Exhibit 1, V1, tab 4, p 226 (p54 of the Exhibits).
5 Ibid, at p 228 (p 56 of the Exhibit).
6 Neilsens' written submissions, at para 16.
7 Neilsens' written submissions, at paras 25 and 26.

> negotiations that took place between Neilsens and Orb over a number of years about the occupation and ultimate purchase of the land; and
>
> (b) the removal of improvements from the land in 2014 ought to be considered in light of the fact that the removal occurred to prevent a competitor taking the benefit of the use rights on the land and also in circumstances where the improvements were not removed by Neilsens or Orb, but rather a third party (namely, Boral)."

[11] The submissions filed on behalf of Orb were even more emphatic in respect of the question of intention. In its written submissions, under the bold heading of "*Abandonment is about Intention*", after referring to a number of authorities, it was then said "*in particular, the Council do not engage with the fact that it is binding authority that, unless there is an intention to cease permanently the use, there can be no abandonment*".[8]

[12] In respect to the issue of the intentions of a party, it was submitted on behalf of the Council:[9]

> "As the cases referred to below demonstrate, a determination of whether a use has been abandoned requires an analysis of all the relevant facts and circumstances. The **intentions** of a party such as an owner or occupier are only part of this matrix. This is so regardless of whether those intentions are subjective or objective."

[13] According to Orb, the question of whether the objective approach should be preferred to the subjective approach was unnecessary for the court to resolve because the evidence would enable the court to be comfortably satisfied that, objectively, Orb did not intend to abandon or terminate the use. Or, to put it another way, the evidence was such that Orb could demonstrate that there had been no abandonment irrespective of which approach was taken to determining the question.[10] A similar submission was made on behalf of Neilsens.[11]

[14] By the time this proceeding had commenced, there was evidence highly suggestive of the previous use having been abandoned. Concrete batching operations ceased in December 2012. Boral indicated that it had no intentions of recommencing that use and, consistent with that, somewhere between October and November 2014,[12] had removed all the physical indicia of a concrete batching operation.

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8 Orb's submissions in reply, at para 11.
9 Council's written submissions, at para 14.
10 Orb's written submissions, at paras 35-36.
11 Neilsens' written submissions, at para 17.
12 Exhibit 5, pp 5-6 (Attachments B, Figs B6-B8).

[15] Not surprisingly then, both Orb and Neilsens rejected the suggestion of abandonment based primarily on the intentions of Orb as to what it intended to occur on the land from the date Boral left. On behalf of Orb, it was submitted:[13]

> "The question of whether the Concrete Use has been abandoned turns upon whether the owner of the land, Orb, intended to permanently abandon or terminate the Concrete Use. Unless the Court is satisfied that such an intention existed (sic), there can be no finding of abandonment and, consequently, the Land may continue to be used for the Concrete Use pursuant to the approval."

Intention to abandon

[16] On behalf of Orb it was initially submitted that "*in the absence of a subjective intention to abandon or terminate the use there would be no abandonment.*"[14] However, after recognising there were conflicting views expressed on the topic it was "*fairly accepted*" that the question of determining the intention of the owner/occupier concerning the use of the land involved an objective consideration of all the evidence but, nonetheless the subjective intention of the parties was "*an important and relevant consideration*."[15]

[17] In Orb's submissions in reply, it was again submitted that the subjective intention of the owner/occupier concerning the use of the land was the primary if not determinative consideration.[16] On behalf of the Council it was accepted that the subjective intentions of the owner was a relevant consideration but that the question had to be determined objectively. That is, what would a reasonable person armed with all the relevant facts, matters and circumstances conclude.

[18] In support of what appeared to be its primary position on this topic, Orb placed reliance on the decision of the New South Wales Court of Appeal in *Hudak v Waverley Municipal Council*.[17] The passage of Mahoney JA relied on for that proposition was:[18]

> "It is not necessary to attempt an exhausted definition of 'abandonment' in this provision, but it will ordinarily involve that **the owner intends that use of the land** for the existing purpose use, or the right to use it, **be given up** or that he have the intention to do something which is inconsistent with its continuance. The proof, at a later date, of what was **the intention of the**

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13 Orb's written submissions, at para 4.
14 Ibid at para 19.
15 Ibid para 20.
16 Orb's reply at paras [12]-[14]: Final oral submissions T1-14 ll 28-38.
17 (1990) 18 NSWLR 709 at 713. Orb's written submissions, at para 23.
18 At p 713.

> **owner**, when, in fact, the use for that purpose ceased is, as experience has shown, often difficult."

[19] In the same case Hope AJA made the following observations:[19]

> "**It was put initially by counsel for the appellant that there could be no abandonment so long as the owner continued to have a subjective intention to carry on the existing use. In due course he resiled a little from this absolute approach, but still submitted that subjected intention was the primary consideration for determining the question where actual use had ceased.**
>
> **It is difficult to imagine that an existing use will continue indefinitely despite absence of actual use merely because an owner has an intention to carry on the existing use or to resume it at some time in the future….**
>
> It seems to me, it is necessary to have regard to the whole of the circumstances, including the subjective intention of the relevant person, and to determine whether in the light of all those matters the cessation of actual use proved by the facts is outweighed by an asserted subjective intention to continue the use. Where there continues to be activity designed to continue non-conforming use as was the case in….and the length of cessation of actual use is not very long, it may be easy enough to conclude that there has been no abandonment. **If however years go by without actual use particularly where the factor said to be delaying a resumption of the existing use is something of an indefinite character, such as winning the lottery, there would be little difficulty in concluding that the cessation of use for a similar period of time involved an abandonment**." (Emphasis added)

[20] In my respectful opinion, the passage from the judgment of Mahoney JA relied on does not support the view that an express intention on the part of the owner to cease the use permanently was required to find abandonment of a use. As Hope AJA observed, in certain instances the subjective intention of the user may be determinative but, in other circumstances, need not be.

[21] The written submissions on behalf of Neilsens make it tolerably clear that the issue of abandonment was to be determined objectively by reference to all relevant considerations including the subjective intentions of the owner.[20]

[22] In *Mac Services Group Ltd v Belyando Shire Council & Ors,*[21] Wilson SC DCJ (as he then was) after considering a number of authorities said:

> "…Those decisions show that the question as to whether or not an abandonment has occurred is one of fact to be determined having regard to all the circumstances of the case, considered from the stance of **a reasonable person with knowledge of all of those circumstances; and**

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19 At p 716.
20 At paras 15-19.
21 [2008] QPELR 503, 506 at [20]-[21].

> **also that, importantly, those circumstances will include the subjective intention of the relevant person** (and that subjective intention must involve an intention not to abandon the use, and not merely to preserve existing rights if that is possible).
>
> Also importantly, the mere physical cessation of a use does not necessarily connote its abandonment (and neither does a failure to use to capacity); and, the fact that a use is recurring but only happens when the actual use is required or necessary does not mean that during intervening periods, including periods of lapse, it has necessarily or automatically been abandoned." (Footnotes omitted)

[23] A similar approach was adopted by Rackemann DCJ in *Benter*.[22] On balance I have concluded that the question of whether or not a use has been abandoned is a question of fact to be determined objectively but where the subjective intentions of the owner/occupier is a relevant and important consideration. In this context I also respectfully agree with the observation of Rackemann DCJ that "*a conclusion of abandonment cannot be avoided simply by the assertion of an ongoing intention to preserve existing rights*."[23] As was observed by Kennedy LJ in *Hughes v Secretary of State*[24] such an approach could lead to absurd outcomes. For the reasons discussed below I do not consider this conclusion to be at odds with the reasoning of Mason J (as he then was) in *Woollahra Municipal Council v Banool Developments Pty Ltd*.[25]

The onus question

[24] Following the conclusion of the evidence, the matter was adjourned to allow the parties to prepare written submissions. Thereafter, I raised the issue of which party bore the onus of proof. This led to a flurry of emails that commenced on 29 October and concluded 30 October 2019. Those emails became an Exhibit in the proceedings.[26] A chronology handed up by Mr O'Brien QC, senior counsel for the Orb Holdings Pty Ltd (Orb), also became an Exhibit.[27]

[25] It was submitted by Mr Job QC, senior counsel for the Council that, consistent with the approach adopted in *Benter Pty Ltd v Brisbane City Council*,[28] it was the applicants who bore the onus. On behalf of Orb it was submitted that, while it may

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22 At paras 15-19.
23 At para 5.
24 (2000) 80 PCR 397 at 402.
25 (1973) 129 CLR 138.
26 Exhibit 7.
27 Exhibit 6.
28 [2006] QPELR 451, 453 at [18].

generally be accepted that an applicant has an onus in declaratory proceedings such as this, there is authority to "*suggest*" that, while the onus is on the applicant to show it has a lawful use the onus is on the Council to prove that there has been abandonment. It was then said:

> "We will contend that, ultimately, the question of who, in proceedings of this type, bears the onus need not be determined because, even if the onus is on the Applicants to disprove abandonment, that onus has comfortably been discharged."

[26] On 4 November 2019, submissions on the onus point were made by Neilsens in which it was asserted:

> "1. On the question of who bears the onus of proving that the batching plant use had not been abandoned, the First Applicant agrees with the substance of the outline of submissions filed on behalf of the Second Applicant dated 31 October 2019.
>
> 2. As to whether the onus needs to be determined (see paras 8 and 10 of the Second Applicant's outline), the First Applicant says this is something which can only be known once the evidence is weighed by the court.
>
> 3. To the extent the question of onus falls to be determined, the First Applicant submits it is the Respondent who has the onus of proof in showing the use for a lawful purpose has been abandoned, as the party making that assertion."

[27] In the supplementary written submissions filed on behalf of Orb, with which Neilsens seemed to agree, provided:

> "8. Ultimately, the question of onus is not one which the Court needs to determine. Even if the Applicant's do have the onus of establishing that the Concrete Use has not been abandoned, that onus has been discharged. The only evidence before the Court is that which has been led by the Applicants. Such evidence comfortably establishes that there was never any intention to abandon the Concrete Use.
>
> 9. In assessing that evidence, it is important to appreciate that a finding of abandonment is one which is not lightly made…
>
> 10. Having regard to the strength of the evidence before the Court and the caution which must be shown in approaching the question before the Court, irrespective of the onus question, there can be no finding of abandonment."

[28] During final oral submissions on 29 January 2020 both Orb and the Council maintained their original positions. That is, the other side bore the onus but it did not matter in the circumstances of this case because of the weight of the evidence.

Each of course contending that the evidence clearly supported their own respective cases.[29]

[29] The relevant passage relied on by the Council in *Benter Pty Ltd* was the observation made by Rackemann DCJ:[30]

> "It has been said, in different contexts, that the onus lies on the person who asserts abandonment, but I was not referred to any provision of the IPA which would provide a basis for concluding that an applicant for a declaration that a use has not been abandoned, does not bear the onus. An applicant would, at the very least, bear the onus of adducing evidence to establish intention where, as here, it seeks to establish or rely upon subjective intention to avoid the conclusion which would otherwise be drawn from an examination of the site activities." (Footnote deleted)

[30] The reference to "IPA" is of course a reference to the *Integrated Planning Act* 1997 which has long since been superseded. That said, I am not aware of any provision of either the *Planning Act* 2016 or the *Planning and Environment Court Act* 2016 which would have any material impact on the observations made by his Honour. The "*different contexts*" to which his Honour referred would appear to be those in *Jeblon Pty Ltd v North Sydney M.C.*[31] where Gipps J stated to the effect that the party who asserts abandonment bears the onus of proving it. Mr O'Brien submitted, at least as I understand it, that some care was needed in considering Judge Rackemann's observations in *Benter* as his Honour was "*not saying unequivocally that the onus will always lie on the applicant*" in cases such as this.[32]

[31] If my understanding of Mr O'Brien's submission is correct then I agree. However, in circumstances where the subjective intention of the owner concerning its use played such a very important part of the case advanced by both applicants, I consider the reasoning of Judge Rackemann to be quite persuasive.

[32] Accordingly, I have concluded that Orb and Neilsens bear the onus. However, I also agree with Mr O'Brien that such conclusion is of little importance in the circumstances of this proceeding.

[33] By way of conclusion on this topic I would point out that my conclusions concerning onus turn on the particular circumstances of this proceeding. In many, if

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29 T1-7 ll 42-45 and T1-9 ll 42-45 per Mr O'Brien QC: T1-25 ll 23-27 per Mr Job QC.
30 At 453-454 at [18].
31 48 LGRA 113 at 118.
32 29/1/20 T1-5 ll 17-32.

not most cases where it is asserted that there has been abandonment of a use of land, the onus will lie with the party asserting it.

Discussion and consideration

[34] Under the heading "*Evidence Establishes No Intention To Abandon*", six specific matters are identified and relied on. First, from "*at least*" 1986 until December 2012, the land had been used for the purpose of concrete production. Second, since Boral vacated the site, Orb has been active in attempting to ensure that the existing use of the land ought not to be seen as having been abandoned. Third, on 29 April 2014 Orb engaged a real estate agent with experience in marketing concrete sites to undertake a marketing program to secure a new tenant. That is one day immediately after Boral gave its 12 months' notice of intention to vacate on 28 April of 2014. It is then submitted:[33]

> "The only tenants which were targeted were those in the concrete industry. The Land was marketed specifically on the basis that it could be used for Concrete Use **and for no other use**. The evidence of Mr Hyland reveals the extensive marketing campaign undertaken over the years that followed. Any person who bothered to inquire as to the Land, and its intended use, would have readily learnt that the Land was being marketed as having a pre-existing use right for a concrete plant and that prospective tenants seeking to exploit that use were being sought. That is apparent not just from the marketing material generated by Mr Hyland but also the advertising undertaken by Orb to the same effect from 2016 onwards on the internet at sites such as 'realcommercial.com.au' and 'propertyprojects.net'."[34] (Emphasis added, footnotes omitted)

[35] The fourth matter relied on is that Orb, no doubt to assist in securing the leasing or sale of the land to another concrete producer, sought to have Boral leave some of its improvements on the site. This occurred during negotiations with Neilsens who had expressed a genuine interest in leasing the land for the purposes of concrete production.[35] Those attempts were unsuccessful. The fifth and sixth matters relied on were concerned with the lengthy negotiations between Orb and Neilsens which concluded in December 2017, and, that soon thereafter, Neilsens made the application for a minor change to the approval. It is then said when these matters

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33 Orb's written submissions, at para 41.

34 As is discussed below, in fact other uses were contemplated by Orb in its marketing strategy for the land.

35 Exhibit 1, V1, tab 4 at p 253 (p 81 of Exhibit).

are considered as a whole "*it ought to be objectively apparent that, at no stage, has Orb intended to abandon the Concrete Use*".[36]

[36] Neilsens adopted a similar strategy in that it also relied on six specific matters in support of its position. The first of those takes up a number of the historical matters raised by Orb focusing on its attempt to sell or lease the land after the departure of Boral.[37] Thereafter, while accepting that at first blush a considerable length of time had elapsed since the use of the land ceased in 2012 that, for the reasons explained, would not be determinative. That lapse of time had to be "*balanced against considerations relating to intention and the lengthy (but necessary) negotiations that took place between Neilsens and Orb over a number of years…*"[38] It was then pointed out that, notwithstanding the land being vacant for a considerable period of time, no alternate use has occurred on the site and, consistent with the submissions made on behalf of Orb, it was Boral who insisted on removing all of the plant and equipment from the site. Presumably to deter the entry of a competitor.

[37] It was submitted on behalf of Orb, that the starting point for the modern Australian position on the issue of abandonment, was the decision of the High Court in *Woollahra Municipal Council v Banool Developments Pty Ltd*. The passage relied on in the judgment of Mason J (as he then was) was as follows:[39]

> "There is, however, an issue as to nos. 34 and 34A for the appellant submitted that if the view which I have expressed as to the law should be taken, then it should be held that the existing use of the premises was abandoned by the respondent. I do not agree with this submission. **It is plain enough that the respondent has at all times intended that the premises should be used as a service station and for car parking and that the only reason why that intention has not been executed is that the Council refused to grant the application and that litigation has ensued. In the circumstances the lapse of time, since the premises were last used as a motor garage, although considerable, is not enough to warrant the conclusion that the existing use was abandoned or terminated**."
>
> It is clear that car parking does not fall within the scope of the 'existing use' of the premises, but there remains the question whether use for the purpose of car sales and panel beating which formed part of the 'existing use' has been abandoned, as his Honour found. **In coming to this conclusion the primary judge considered that it was not enough for the respondent to have a subjective intention to continue these activities and that it was incumbent upon the respondent to indicate its intention**

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36 Orb's written submissions, at para 46.
37 Neilsens' written submissions, at paras 21-23.
38 Ibid, at para 26.
39 Ibid, 149 at [37]-[38]; Orb's written submissions, at para 14.

> **in the applications or accompanying documents. I do not agree. ….** Once the significance which his Honour attributed to the applications is put to one side, **I am unable to conclude that the evidence established an intention to abandon or terminate 'the existing use', for it seems to have been acknowledged that the respondent may have had a subjective intention to continue the sale of cars and panel beating in the premises**." (Emphasis added)

[38] Once the facts involved in that case are appreciated, his Honour's observations are, with respect, unsurprising. The land comprising 34-34A Ocean Street, were a part of four adjacent parcels of land purchased by Banool for the purposes of redevelopment. Historically, the land had been used for a number of uses including a combination of shops and dwellings and, in respect of 34-34A, for a motor garage and associated uses. It was Banool's intention to redevelop all of the lots as one site, and on 16 April 1969, it lodged with the local authority four separate applications for building approvals. The proposed new buildings consisted for the most part, of shops and storage areas. However, in one instance, the development proposed was for a service station and parking area.

[39] As Mason J observed in respect to 34-34A, there was a single building erected on that site which had been "*for many years used as a motor garage and for related purposes*". Additionally, up until February 1967, there was a petrol pump constructed beside the curb in front of the building. That pump had been removed prior to purchase by Banool.

[40] In circumstances where one of the uses of the land was intended to be for a service station and car parking and where the land had been used for that or a similar use from 1943 up until February 1967 when the petrol pump was removed, it is, as I have said, unsurprising that the use was found not to have been abandoned. Insofar as the subjective intention of Banool was concerned, it seems to have been acknowledged that the respondent may have had a subjective intention to continue the sale of cars and panel beating in the premises and, the lodging of the building application was not necessarily inconsistent with the existence of an intention to put the premises to their existing use.

[41] The facts in that case can be contrasted with those that exist here. While Orb has at all material times been the owner of the land, at no time has it carried out or sought to have approval for it to carry out concrete production on the land. That use had been applied for and carried out by Boral. Also, unlike the situation in *Banool*,

there are no existing premises from which the use could be carried out. For Neilsens to carry out that use, considerable works would have to be undertaken. Another significant distinguishing feature is that in *Banool*, the delay in the use was as a consequence of the Council's refusal to grant the building application sought which then led to the ensuing litigation. In this case, the delay has been the result of Orb not being able to secure another lessee or purchaser prepared to meet its terms and conditions.

[42] In *Leeming v City of Port Adelaide [No 2]* (1987) 45 SASR 506, King CJ observed:[40]

> "A use may be discontinued by means of cessation of activity pursuant to that use accompanied by words or conduct on the part of the owner or occupier indicating unequivocally an intention to abandon or to terminate the use. **It may also be discontinued by cessation of activity pursuant to the use in such circumstances, or for such duration, or both, as to indicate from a practical point of view that such cessation is no mere interruption of activity pursuant to the use, but amounts to abandonment or termination of the use, irrespective of the subjective intentions of the owner or occupier as to the future.**" (Emphasis added)

[43] After referring to those observations and to the judgment of the Court in *Hudak,* the Council then placed emphasis on the decision of Rackemann DCJ in *Benter.* The thrust of the Council's submissions were twofold. First, that where there had been no use of the land for concrete batching since late 2012 and that all the associated plant and equipment had been removed by late 2014 and, where Boral had signalled its intention to "*abandon*" its use of the land, the only basis upon which Orb and/or Neilsens could succeed, required an acceptance of the asserted intentions of Orb concerning the use of the land.[41] I agree.

[44] After observing that at no time had Orb used the land for concrete production nor had it ever sought approval for that use, the Council then focussed on the broad marketing strategy adopted by Orb to lease or sell the land to, in effect, the highest bidder regardless of the intended end use of the land. It was then submitted:[42]

> "Cases such as *Benter* and *Mirandraft Pty Ltd v Rockdale Municipal Council* (1980) 46 LGRA 163 demonstrate the significance of the removal of all of the things necessary to carry out the use.
>
> This is a case where, to use the language of *Leeming*, the "*circumstances*" surrounding the "*cessation of activity*" not only involve the removal of all

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40 At p 515.
41 Council's written submissions, at paras 24-28.
42 Ibid, at paras 29-31.

> of the things necessary to carry out the use, but the "*duration*" of cessation is a lengthy period (approximately 7 years since the cessation of use, and 5 years since any infrastructure existed on the land). Again, using the language of *Leeming*, it cannot seriously be suggested that this is merely an "*interruption of activity*".
>
> It is submitted that the "reasonable person with knowledge of all of the relevant circumstances" referred to in the authorities would be in no doubt at all that the use has been abandoned." (Footnotes omitted)

[45] As to the future use of the land, the intention of Orb was to maximise its profits by obtaining the highest price achievable in the case of a sale and the highest rent achievable in the case of a lease. Its objective was not necessarily the continuation of the previous use. That was but one option, albeit clearly the most favoured option.

[46] On 30 April 2014, Mr Matthews prepared an email which was clearly focused on the ideal purchaser/lessee being involved in concrete production. Nonetheless, he identified as an alternative, other purchasers or lessees who may be seeking a larger inner city site.[43] When being taken to that document by Mr Job, the following exchange took place.[44]

> "**Q.** And in item 3, strong alternative industrial connections with other entities who may be seeking a larger industrial inner-city site?
>
> **A.** Yes.
>
> **Q.** And in the fourth item, be able to advise on the highest and best use for the site and alternative uses?
>
> **A.** Yes.
>
> **Q.** So what was being sought from JLL was a submission or a proposal from it or them for the leasing of the site. Correct?
>
> **A.** Yes.
>
> **Q.** And there was the indication in this email from you on page 19 that the owners are intending to hold the land long term but may be prepared to develop a generic building for a quality long-term lessee. See that?
>
> **A.** Yes.
>
> **Q.** It's clear therefore that whilst the prospective agents were being informed of the opportunity for advantage to be taken of what were considered to be existing use rights, other industrial uses would have been considered by Orb?
>
> **A.** **At an appropriate figure**.
>
> **Q.** Yes. That is, industrial uses other than a concrete batching plant?

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43 Exhibit 1, V1, p 191 (p 19 of Exhibits). Exhibit 1, V1, pp 190-191 (pp 18-19 of Exhibits). Also at p 197 (p 25 of Exhibits).

44 T1-32 ll 1-22.

A. But not in preference to.

Q. Not in preference, but open to persuasion if the price was right?

A. **If the price was right**."

[47] Mr Hyland also confirmed that while the primary target might have been to secure someone in the concrete production industry, other options were always open for consideration.[45]

[48] However, that the option of securing a non-concrete producing purchaser or lessee was kept open is not necessarily inconsistent with having an intention to resume and not abandon an historical use to which the land had been put. It would make good business sense not to rule out the prospect of an unexpected end user that might be prepared to make an offer too good to be refused. As was observed in *Woollahra Municipal Council v T.A.J.J Investments Pty Ltd,*[46] the keeping of an alternate land use as an option will not necessarily result in a finding of abandonment of the prior existing use. Orb's actions in this regard have to be considered in the light of its dealing with Neilsens. This matter is discussed further below.

[49] It was accepted by Neilsens and subsequently by Orb, that after Boral vacated the site, the marketing of the land addressed both the potential to lease and to sell and did not solely target entities involved in the concrete production industry. However, it was submitted that when looked at objectively, clearly any other user, was very much a secondary target. Both Mr Matthews, a director of Orb, and Mr Hyland, a director of the real estate firm Jones Lang LaSalle, were cross-examined about this matter.[47] The evidence of those two witnesses together with the relevant documentation contained in their respective exhibits, have led me to conclude that, while leaving the option for the sale and/or lease to other users was kept open, the primary target was very much those associated with the concrete production industry.

[50] Returning then to the decision of Rackemann DCJ in *Benter*, the Council emphasised a number of paragraphs of that judgment. In paragraph 5, his Honour observed that the relevant circumstances include the subjective intention of the relevant person but a conclusion of abandonment cannot be avoided simply by the

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45 T1-42 ll 22-32.

46 49 LGRA 123 at 128 per Glass JA.

47 Transcript (T) 1-32-33 per Mr Matthews. T1-42 per Mr Highland.

assertion of an ongoing intention to preserve existing rights. Subsequently, after referring in particular to the decision of *Leeming*, his Honour overserved that relevant subjective intentions are those which relate to the intention to continue the existing use, rather than merely those relating to an intention to preserve a right. His Honour cited as authority for that proposition two cases in particular, *Earle Cameron Constructions Pty Ltd v Parramatta City Council*[48] and *Jeblon Pty Ltd v North City Municipal Council.*[49]

[51] In *Benter*, it was found there had been an abandonment of the use. It is, however, necessary to have regard to the facts surrounding that case. The applicant had purchased premises from Mobil Oil Australia to operate it as a service station in circumstances where Mobil had made a commercial decision to cease operating the site for that use. His Honour described what had occurred prior to the sale of the land in the following terms:[50]

> "Following the cessation of trade the site was vacated, fenced off, and the building on the site was boarded up. On 27 April 2004 Mobil obtained a development approval for demolition. Photographs taken at that time depict the then state of premises and reveal that the bowsers had been removed: an absence of any signage, other than one on the canopy (relating to car servicing); graffiti on the building; and weeds growing through the concrete apron. Some time after obtaining demolition approval the driveway canopy was removed. Mobil did not subsequently operate the site as a service station or redevelop it to a state whereby it was ready to be operated for that purpose, by Mobil or anyone else.
>
> There was some reference to Mobil's failure to demolish the building on site. The evidence does not establish that the building was only suitable for use as part of a service station. **As a matter of common experience, such buildings on disused service station sites are sometimes put to alternate uses**." (Emphasis added)

[52] Given that background as to what occurred on the land, as is the case here, his Honour considered that it strongly suggested that the service station use had been abandoned. It was argued that Mobil's actions should be characterised as steps towards the preservation and remediation of the site and that nothing was done to amount to abandonment. His Honour then went on to consider the subjective intentions of Mobil. In reaching the conclusion that the use had been abandoned, his Honour observed:[51]

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48 (1981) 46 LGRA 130, 137.
49 (1982) 48 LGRA 113, 119.
50 At p 453, [11]-[12]
51 At p 457, [34].

> "While Mobil might not have done anything to prevent the possibility of subsequent redevelopment of the site for service station purposes and while the ultimate purchaser wishes to use it for that purpose, I am not satisfied that the steps taken by Mobil were simply towards the continued use of the site for service station purposes. **Further, the evidence falls short of giving a full explanation of the period for which the site was held in its disused state**, given Mr Burge's inability to say for how long the site had been closed before steps were taken with respect to the site assessment, how long those steps took or specifics in relation to the instructions to market the site." (Emphasis added)

[53] Before proceeding to deal with the cases cited by Rackemann DCJ, *Jeblon* and *Earle Carmeron*, I would make the following observations. First, in *Benter*, it was the owner of the land that made the conscious decision to cease the operation as a service station and to return the land to a state capable of being ready for "*alternate*" uses. That is not the situation in this case. Here, it was the tenant, Boral, not Orb who made the conscious and overt decision to abandon the use and to remove all the plant and other structures despite interest being shown by Orb in retaining at least some of those assets.

[54] The second observation I would make at this stage is that, unlike the situation in *Benter*, in this case considerable effort has gone into providing an explanation for the lack of any actual use of the land over the past eight or so years.

[55] In *Jeblon Pty Ltd,* Crips J, during the course of dealing with the matter before the court, referred to the earlier decision of *Earle Cameron Construction Group* in the following terms:[52]

> "In the *Earle Cameron* case the court made a finding, on the evidence before it, that the existing use rights had been abandoned. In that case, the owner, a company, closed down the business, sold the stock and resolved to sell the land, for the express reason that is wished to discontinue the business. The company did not sell the land but, to give effect to the resolution of the directors, the shares were sold. The court rejected a submission on behalf of the company that it was not necessary to show an intention to continue the existing use but merely an intention to preserve existing use rights. In the course of rejecting this submission, the court made the positive finding above…."

[56] In circumstances where the owner of the land was carrying out the use and, pursuant to a clear resolution, closed down the premises and sold all its stock, it is again hardly surprising that it was found that there had been an abandonment of that use.

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52 At p 119.

[57] As has been identified above, Boral ceased concrete production at or about December 2012. Thereafter, it nonetheless remained in occupation until sometime around April 2015, having demolished and/or removed all of its plant and equipment sometime between October and November 2014. However, well prior to that, on 3 June 2014 Orb, through its agents, advised Boral that it intended to seek another tenant who would use the land for the same use or "*similar operation*".[53] On a without prejudice basis, Orb asked Boral whether it would consider selling the plant in situ to another operator.[54]

[58] Consistent with that, on 21 July 2014, Orb wrote to the Council advising that it intended offering the land for lease as a concrete batching plant and, by 30 July 2014, agents had contacted Orb enclosing an offer from Neilsens to lease the land.[55] It was unsurprisingly a condition of that offer that the lessor was to confirm that the then current use could continue "*as of right*" and, that there was no need for a new development application to be lodged with the Council.[56] Negotiations continued with Neilsens, and by 25 September 2014, Neilsens were looking for a memorandum of understanding in respect of the issue of rent reviews.[57]

[59] Boral's response to the proposition that it sell its assets was unequivocal. After alluding to the fact that its interest in continuing to lease or purchase the land had been rebuffed by Orb, it was said that "*Boral will not consider selling its assets*". In the same correspondence Boral also made it clear that it was still interested in remaining in occupation or even purchasing the land on suitable terms.[58] That of course did not occur.

[60] Boral not only made it clear that it had no intention of selling or leaving any of its assets but went further. It notified the Council of its abandonment of its use of the land and notified Orb of its "*declaration of abandonment*" on 27 June 2014.[59] This, not surprisingly, caused a letter of reproach from Orb together with an expression of interest to sell the land to Boral at market value. This occurred on 16 July 2014.[60]

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53 Exhibit 1, V1, p 225 (p 53 of Exhibit).
54 Affidavit of Mr Matthews, at para 13 (see Exhibit 1, V1, p 165)
55 Ibid, at paras 16 and 17.
56 Exhibit 1, Vol 1, p 232 (p 60 of Exhibit).
57 Ibid, pp 82-98 (pp 52-68 of Exhibit).
58 Ibid, p 226 (p 54 of Exhibit).
59 Ibid.
60 Ibid, at p 56.

[61] In response to Neilsens requirement that the use rights could be relied on, Orb wrote to the Council on 4 September 2014 seeking confirmation. On 23 October 2014, the Council responded:

> "After investigations were carried out, I can confirm that the usage of the site as a concrete batching plant is not considered to have been abandoned. As such, the usage rights attached to the land will therefore remain and continue with the land…"

[62] Given the date of that correspondence, it would seem likely that at the time the inspection had been carried out, much if not all of Boral's plant and equipment remained onsite.

[63] By its actions in removing all the physical indicia of a batching plant and advising the Council of its so called, declaration of abandonment, there is no room for doubt that Boral had abandoned that use of the land. That of course is a relevant circumstance to be brought into account, but is by no means determinative.

[64] Notwithstanding Boral's response, Orb, as at 24 September 2014, was still considering a number of marketing strategies. One of which was trying to convince Boral to leave at least some of its assets (hardstand and ramps) on site.[61]

[65] While keeping its options open, it is tolerably clear that from 24 February 2015, Orb was vigorously trying to seal a deal with Neilsens. Following Neilsens offer to lease, on 24 February 2015, negotiations continued including a draft heads of agreement being forwarded to Neilsens on 27 May 2015.

[66] Negotiations continued to wax and wane, and on 10 October 2016, agents for Neilsens sent an email to Orb stating:[62]

> "As foreshadowed I now attach an Agreement for Lease for your Coorparoo property.
>
> I confirm that Johnson, Winter and Slattery are holding the originals and a cheque for the first month's rent. I am happy to have this sent directly to you or your solicitors.
>
> Neilsens have signed the documentation as an act of good faith to demonstrate there (sic) are genuinely interested in leasing the property…"

[67] Notwithstanding that communication, on 24 October 2016, Neilsens through its agents, advised Orb that "*in our opinion the October 2015 negotiations reached an end as we did not see any signs of being able to reach an acceptable outcome. If*

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61 Ibid, p 253 (p 81 of Exhibit).
62 Exhibit 1, V1, p 341 (p 168 of Exhibit).

you feel there is merit I am happy to meet this Wednesday or early next week with or without our respective solicitors."[63]

[68] Neilsens' somewhat reluctance to lease the land might have been because of an underlying interest in purchasing it. On 1 December 2016, through its agents, Neilsens advised as follows:[64]

> "I confirm that Neilsens have decided to withdraw from negotiations to lease the property but do have an interest in purchasing the land on the following terms.
>
> Purchaser, Neilsen Group Investments Pty Ltd.
>
> Purchase Price $6m subject to due diligence and obtaining a satisfactory development approval.
>
> Deposit $600,000 with an initial $100,000 non-refundable on signing the contract and the balance when contract becomes unconditional…."

[69] On 13 January 2017, a draft contract had been prepared and was being considered by Orb's solicitors. Thereafter, negotiations continued culminating in a contract (subject to a number of conditions) being entered into between Orb and Neilsens on 21 December 2018.[65]

Conclusions

[70] While there has been no actual use made of the land since mid-2012, the physical indicia of a concrete batching plant remained until October or November 2014. Indeed, well into 2014, as referred to above, Boral was still expressing interest in leasing or purchasing the land. Any reasonable person armed with that knowledge would not have considered the use as having been abandoned at that stage notwithstanding that the actual use had ceased some two years earlier.

[71] Also, any prudent prospective purchaser/lessee making enquiries of the Council would have been advised to that effect, as evidenced by its correspondence to Orb dated 23 October 2014. The evidence suggests that the abandonment issue came about as a consequence of the minor change application being brought to the Council's attention at or about February 2018.[66] This proceeding was then commenced by way of an originating application filed on 14 June 2019.

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63 Ibid, p 342 (p 169 of Exhibit).
64 Ibid, p 344 (p 171 of Exhibit).
65 Affidavit of Mr Matthews, at para 64 (see Exhibit 1, V1, p 171).
66 Exhibit 6, p 12.

[72] A period of inactivity on a vacant site for so many years could not be reasonably said to have been a mere "*interruption*" of the use of the land. That said, even a lengthy period of inactivity need not necessarily be indicative of an intention of abandonment. Such was the situation in *Leeming*, where it was said that the period of inactivity was "*unquestionably protracted*" but that the delay had to be considered in the light of all the surrounding "*unusual*" circumstances which were described in the following terms:[67]

> "The circumstances, however, were unusual. The premises remained equipped as a meatworks and all concerned appeared to have intended that there would be a resumption of operations as a meatworks **unless perchance there appeared a satisfactory purchaser who wished to use the premises for some other purpose**. **In the unusual circumstance, I do not think that the duration of inactivity is insufficient of itself to constitute discontinuance of the existing use**. I think that the proper conclusion from all the material before the court is that the existing use was never discontinued but that it has continued, albeit in a state of suspended activity." (Emphasis added)

[73] Of course, in this case, no improvements remained on the site, but that would appear to have been a deliberate business decision made on the part of Boral in circumstances where it knew that Orb was interested in securing the retention of at least some of those assets for the potential use by one of Boral's competitors. I also consider that, notwithstanding the protracted nature of the negotiations between Orb and Neilsens, they satisfactorily explain the lengthy period for which the land remained vacant and unused. On balance, I am sufficiently satisfied that when the totality of the relevant facts and circumstances are concerned, it could not be reasonably said that the use of the site had been abandoned.

[74] The emphasised the words set out in that passage from *Leeming* also tends to support, in my respectful opinion, my earlier observation that not ruling out other potential purchasers/lessees that may be interested in using the land for another purpose need not of itself, be indicative of an intention to abandon the prior use.[68]

[75] Before proceeding further, I should address two matters. First, it was submitted on behalf of the Council that the evidence did not establish that the negotiations

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67 In late 1981 the meat works premises were vacated by the then occupant. Thereafter the premises remained vacant despite attempts to market the property until December 1983 when the use was sought to be recommenced. In the meantime, under a new planning regime the use became a prohibited use.

68 Refer also to the observations of the Court below in *Leeming* at p 515 clearly accepted without criticism by the appellate court.

between Orb and Neilsens were "*complicated*" but instead that the dealings between them were sporadic.[69]

[76] I can readily accept that the relationship between Orb and Neilsens was a bit of an off and on affair. I can also accept that in a legal sense, the negotiations could not be described as complicated. However, the evidence is sufficient to show that both parties, while interested in reaching an agreement of some sort, were both experienced and hard-nosed business entities prepared to take an almost uncompromising approach to negotiations.

[77] The second matter is Mr Job's implied rhetorical question to the effect that, if a site has been inactive for nearly eight years and vacant for nearly six years, if that is not enough to establish abandonment, what is?[70]

[78] The short answer is that there is no answer. Each case will turn on its own facts. As a general observation however, it would be reasonable to expect that the longer the period of inactivity, the more difficult will it be for the Court to be satisfied that the use has not been abandoned.

[79] It follows that for the reasons given, relief of the type sought ought to be granted. However, in the Council's written submissions it was said:[71]

> "If contrary to the Council's submissions, the Court was to find that the use had not been abandoned, **the court would make the second declaration**. That would not, however, involve any identification of the nature and extent of the rights associated with that approval. No declaration is sought about that." (Emphasis added)

[80] Thereafter, reference was made to that part of the written submissions made on behalf of Orb under the heading "*Approval to be taken to be a development permit under the (Planning Act* 2016*)*".[72] After referring to that matter the Council contended:[73]

> "There is considerable complexity associated with that issue. Council submits that it is sufficient for the court to determine whether the use has been abandoned. If so, it is unnecessary to deal with the complexity of the transitional provisions relied upon by the Applicants. For completeness though, the following submissions are made in relation to those matters…."

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69 Written submissions at para 57(c).
70 T1-28 LL 1-24: T1-31 L 1.
71 Council's written submissions, at para 36.
72 Orb's reply submissions, at paras 9-12.
73 Council's written submissions, at para 46.

[81] In the supplementary submissions filed on behalf of Orb, the observation made by the Council was noted and it was then said "*in light of that proper concession by the Council, Orb agrees that this is not an issue which the Court needs to resolve. Nevertheless, Orb does not accept that the issue is unclear as the Council submits*".[74] As to whether that matter is as complex as the Council submits or otherwise, can be left for another day. As the parties recognised, it is unnecessary to consider the matter any further.

[82] During the final oral submissions the issue of the utility of the second declaration sought was also raised. Given the concession made by the Council emphasised above, notwithstanding that some concerns about the utility of that declaration remain, I intend to adopt the approach advanced by Mr Job to the effect that the second declaration could be made without expressing any final view on the *transitional issues* identified by the Council. Accordingly, I will grant the relief sought but will refrain from expressing any opinion about those other matters. Accordingly, the orders of the court are:

1. Pursuant to s 11 of the *Planning and Environment Court Act* 2016 it is declared that the use of the land situated at 58 Clarins Street, Coorparoo being lots 3-5 on RP117090, lots 110-114 on RP12739, lots 51 and 53 on RP868482 and lot 2 on RP96381 as a concrete batching plant has not been abandoned.
2. Pursuant to s 11 of the *Planning and Environment Court Act* 2016 it is declared that the land may be used for purposes consistent with the development approval issued by this Court on 25 March 1983 (Brisbane City Council File Reference 420/10-RJ125/58).
3. I will hear further from the parties if necessary as to any consequential orders.

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74 Orb's reply at para 33.