

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Glesk v Chief Executive of the Department of Environment and Science* [2023] QPEC 43

PARTIES: **TIBOR GLESK**
(appellant)

v

CHIEF EXECUTIVE OF THE DEPARTMENT OF ENVIRONMENT AND SCIENCE
(respondent)

FILE NO/S: 3121 of 2023

DIVISION: Planning and Environment

PROCEEDING: Application in pending proceeding

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 6 November 2023 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2023

JUDGE: Williamson KC

ORDER: **Order as per draft**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against giving of enforcement notice – where appellant applied for a stay of an enforcement notice pursuant to r 658 of the *Uniform Civil Procedure Rules 1999* – where enforcement notice is about a matter stated in s 167(5)(a) of the *Planning Act 2016*, namely vegetation clearing - whether s 171 of the *Planning Act 2016* precludes the Court granting a stay of the enforcement notice – whether the stay should be granted.

LEGISLATION: *Planning Act 2016*, ss 163, 167 and 171
Planning and Environment Court Rules 2018, rr 4 and 16
Uniform Civil Procedure Rules 1999, r 658

COUNSEL: Mr A Storie (solicitor) for the appellant
Ms K McAuliffe-Lake for the respondent

SOLICITORS: Connor O’Meara Solicitors for the appellant
Litigation Unit, Department of Environment and Science for

the respondent

- [1] This is an appeal against an enforcement notice given by the respondent for land situated at Tallowood Close, Little Mountain. The enforcement notice states that the respondent held a reasonable belief the appellant committed a development offence, namely, a breach of s 163(1)(b) of the *Planning Act 2016*. The alleged offence involves the clearing of native vegetation on the land within an area mapped as a koala habitat area outside a koala priority area. The clearing is alleged to have been carried out between 21 January 2021 and 3 February 2021.
- [2] A review of the enforcement notice also reveals the appellant is required to carry out various steps to rehabilitate part of the land. This is to occur by way of the reinstatement of vegetation. To comply with the enforcement notice, the first of the steps required for rehabilitation must be completed by 5 p.m. on 10 November 2023.
- [3] The appellant seeks an order that the operation of the enforcement notice be stayed until this appeal is decided, or otherwise ends. That is to be understood as the point in time when the Court makes final orders in the appeal or, if the appeal is discontinued, the cessation of the period prescribed by r 16(2) of the *Planning and Environment Court Rules 2018*.
- [4] The application was not opposed by the respondent. Indeed, it invited the Court to grant a stay for the reasons advanced on behalf of the appellant.
- [5] Why does the appellant seek a stay?
- [6] As the enforcement notice is about a development offence relating to the clearing of vegetation, the commencement of the appeal does not automatically stay the operation of the enforcement notice (see ss 171(2) and 167(5)(a) of the *Planning Act 2016*). The appellant would, as a consequence, commit an offence if it did not comply with the enforcement notice. That there is a genuine prospect of non-compliance with the enforcement notice arises here given it requires the appellant to take steps towards rehabilitation of the land by 5 p.m. this Friday, 10 November 2023. It is unrealistic to think this appeal could be heard and determined prior to 10 November 2023.
- [7] There is no express power conferred on the Planning and Environment Court to grant a stay of an enforcement notice, pending the determination of an appeal. It was submitted by Mr Storie that the power conferred by r 658 of the *Uniform Civil Procedure Rules 1999 (UCPR)* is sufficiently broad to confer such a power. Rule 658 of the UCPR applies to the Planning and Environment Court by virtue of r 4 of the *Planning and Environment Court Rules 2018*.
- [8] Rule 658 of the UCPR is expressed in the following terms:

“658 General

- (1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.

- (2) The Court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document.”

- [9] The power conferred by r 658 of the UCPR is expressed in broad terms. It confers a power on the Court to make any order that the nature of the case requires. The broad expression of the rule extends, in my view, to granting a stay such as that sought here. This is plain enough from the words of the rule itself. It is a proposition also supported by authority. It is well established that, as a matter of statutory construction, a power granted to a court is not to be construed subject to a limitation not contained in the grant itself. To construe r 658 as subject to a limitation would require words to be read into the rule. There is no immediate context to suggest it is intended that words of limitation should be read into the rule, which confers a power to be exercised judicially.
- [10] The question arises whether s 171 of the *Planning Act 2016* operates to limit the Court’s power to stay the enforcement notice under r 658. For the reasons set out below, s 171 does not, in my view, have such an effect.
- [11] Section 171 of the *Planning Act 2016* is in the following terms:

“171 Stay of enforcement notice

- (1) An appeal against an enforcement notice stays the operation of the notice until –
- (a) the tribunal or court hearing the appeal decides otherwise; or
- (b) the appeal ends.
- (2) However, the notice is not stayed to the extent the notice is about a matter stated in section 167(5)(a).”

- [12] It was uncontroversial the enforcement notice here is about a matter stated in s 167(5)(a) of the *Planning Act 2016*, being the clearing of vegetation. Section 171(2) is therefore engaged.
- [13] Section 171(2) of the *Planning Act 2016* does not, in terms, express a prohibition upon the grant of a stay by order of the Court. A limitation of this kind, if intended, needs to be read into the provision as a matter of implication. There is no such implication open on the plain words of the section. Nor is it supported by surrounding context in the Act.
- [14] I accept Mr Storie’s submission that subsections (1) and (2) of s 171, when read together, have the effect of identifying a subset of enforcement notice appeals having the benefit of a stay; this benefit arises by the act of commencing the appeal without the need for any order from the Court to that effect. I also accept Mr Storie’s submission that s 171(2) of the *Planning Act 2016* identifies a subset of enforcement notice appeals that do not have the benefit of an ‘automatic’ stay. As was pointed out, subsection (2) is notable for what it does not say. The provision does not say an enforcement notice ‘*must not be stayed*’. This leaves room for a stay to be granted if the nature of the case requires it.

- [15] To adopt a different construction would, in my view, not be without consequence.
- [16] A construction that precludes the Court from granting a stay of an enforcement notice about one of the matters in s 167(5)(a) of the *Planning Act 2016* may have the effect of rendering an appeal nugatory and deprive, in a practical sense, an appellant of the appeal rights granted under the *Planning Act 2016*. In simple terms, the absence of a stay may mean an appellant is required to take a step required by an enforcement notice that is the subject of challenge and may be found not to be validly imposed. A construction of the Act having this effect should not, in my view, be preferred in the absence of clear words. Clear words would be required to accept the legislature intended to preclude the Court from making an order intended to secure the effectiveness of an appeal right exercised under the *Planning Act 2016*. Those words are not present in the Act.
- [17] Turning then to the grant of stay, I am satisfied it would be appropriate in the present case to make such an order. This is so having regard to the enforcement notice, the notice of appeal and the following matters.
- [18] First, if the stay is not granted, the appellant would be required to carry out steps under the enforcement notice that the appeal seeks to impugn. This could have the result that a judgment ultimately obtained in the appellant's favour may not be fully effective, and the appellant, on one view, could be prejudiced by having to carry out actions under an enforcement notice that is ultimately found not to have been validly imposed.
- [19] Second, the enforcement notice relates to vegetation clearing alleged to have occurred nearly three years ago. There is no suggestion there is some pressing need for the rehabilitation required by the enforcement notice to be carried out immediately, such as to avoid adverse ongoing environmental impacts. The stay would do no more than preserve the status quo, pending the determination of the appeal in that context.
- [20] Third, it is not said the appeal is frivolous or unarguable.
- [21] Finally, it can be observed that the respondent, being the enforcement authority that gave the notice, does not oppose the stay and does not suggest it would suffer any prejudice if the stay was granted.
- [22] In the circumstances, as I have already said, I am satisfied it is appropriate for a stay to be granted. I will make orders in accordance with the draft provided to me this morning by Mr Storie.