

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *NuGrow Ipswich Pty Ltd v Chief Executive of the Department of Environment and Science* [2023] QPEC 45

PARTIES: **NUGROW IPSWICH PTY LTD (ACN 124 571 875)**
(Appellant)

v

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

FILE NO/S: 631 of 2023

DIVISION: Planning and Environment

PROCEEDING: Application in Pending Proceeding

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 2 November 2023 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 13 October 2023 and 2 November 2023

JUDGE: Kefford DCJ

ORDER: **The Respondent's application in pending proceeding filed 27 September 2023 is dismissed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION IN PENDING PROCEEDING – where the respondent seeks to strike out the appellant's notice of appeal – whether the appeal should be summarily dismissed or struck out – whether the appeal lacks utility or is an abuse of process – whether the relief should be granted

LEGISLATION: *Planning and Environment Court Act 2016* (Qld), s 10
Uniform Civil Procedure Rules 1999 (Qld), r 292

CASES: *Bolton Property Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] QCA 135; [2009] 2 Qd R 202, applied

Deputy Commissioner of Taxation v Salcedo [2005] QCA 227; [2005] 2 Qd R 232, cited

Dey v Victorian Railways Commissioners [1949] HCA 1; (1949) 78 CLR 62, cited

Fancourt & Anor v Mercantile Credits Limited [1983] HCA

25; (1983) 154 CLR 87, cited

General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 122 CLR 125, cited

Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd [2014] QCA 233; [2015] 1 Qd R 476, cited

Neumann Contractors Pty Ltd v Traspunt No. 5 Pty Ltd [2010] QCA 119; [2011] 2 Qd R 114, cited

Rich v CGU Insurance Ltd [2005] HCA 16; (2005) 79 ALJR 856, cited

Theseus Exploration NL v Foyster [1972] HCA 41; (1972) 126 CLR 507, cited

Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2002] QCA 224; [2003] 1 Qd R 259, applied

COUNSEL: S Holt KC and J Bowness for the Appellant
M Hodge KC, N Loos and S Gibson for the Respondent

SOLICITORS: McCullough Robertson for the Appellant
Department of Environment and Science for the Respondent

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Introduction

- [1] NuGrow Ipswich Pty Ltd operates a waste recycling and compost manufacturing facility at Lot 3 Swanbank Road, Swanbank under an environmental authority that authorises the carrying out of several environmentally relevant activities.
- [2] On 17 December 2021, Chief Executive of the Department of Environment and Science (“the Chief Executive”) approved a transitional environmental program. It authorised a certain site layout and required works to bring the waste recycling and compost manufacturing facility into compliance with the conditions of the environmental authority relating to the reduction of potential odour nuisance.

- [3] The object of the approved transitional environmental program is to transition NuGrow Ipswich Pty Ltd into compliance with conditions of its environmental authority. The conditions relate to potential odour nuisance.
- [4] The approved transitional environmental program had a finish date of 4 September 2023.
- [5] On 1 August 2022, NuGrow Ipswich Pty Ltd made an application to the Chief Executive seeking the approval of amendments to the approved transitional environmental program. The amendments sought were outlined in a proposed amended transitional environmental program. The amendments did not include a different finish date for the approved transitional environmental program.
- [6] On 5 December 2022, the Chief Executive decided to refuse the application to amend the approved transitional environmental program.
- [7] On 19 December 2022, NuGrow Ipswich Pty Ltd made an application for internal review of that original decision.
- [8] On 10 February 2023, the Chief Executive decided to confirm its original decision.
- [9] On 14 March 2023, NuGrow Ipswich Pty Ltd commenced this appeal seeking, inter alia, orders that the Chief Executive’s decision of 10 February 2023 be set aside and substituted with a decision to vary the original decision such that the proposed amended transitional environmental program is approved.
- [10] It is common ground that the appeal is a P&E Court proceeding and is within the jurisdiction of the Court.
- [11] On 4 September 2023, the finish date of the approved transitional environmental program passed.
- [12] On 27 September 2023, the Chief Executive filed an application in pending proceeding seeking orders that:
- (a) the Notice of Appeal filed by NuGrow on 14 March 2023 be struck out; and
 - (b) NuGrow pay the Department’s costs of the application, and the proceeding.
- [13] This is the application currently before me for determination.
- [14] In exercising its jurisdiction, the Court must comply with s 10 of the *Planning and Environment Court Act 2016* (Qld), which states:

“10 Principles for exercising jurisdiction

- (1) In conducting P&E court proceedings and applying the rules, the P&E Court must—
 - (a) facilitate the just and expeditious resolution of the issues; and
 - (b) avoid undue delay, expense and technicality.

- (2) The parties to a P&E Court proceeding impliedly undertake to the court and each other to proceed in an expeditious way.”

What are relevant considerations with respect to whether the appeal should be summarily dismissed or struck out?

[15] The Court has a broad discretion in determining whether the appeal should be summarily dismissed or struck out.

[16] The discretion to order summary judgment should only be exercised with great care and never in circumstances in which there is a real question to be tried.¹ Proceedings should be determined summarily only in the clearest of cases.²

[17] As was observed by Daubney J in *Bolton Property Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] QCA 135; [2009] 2 Qd R 202, in the context of r 292 of the *Uniform Civil Procedure Rules 1999* (Qld), at 218 [78]:

“... [t]he need to be satisfied in respect of [the] second element and, in any event, the proper judicial exercise of the discretion to grant or deny summary judgment are each matters which invoke the necessity for a judge to exercise great care, and proceed with appropriate caution, having regard to the patent seriousness of a decision to summarily terminate a proceeding by effectively denying a party the opportunity to present its case at a trial “in the ordinary way, and after taking advantage of the usual interlocutory processes”.”

(footnotes omitted)

[18] That statement echoes the caution expressed some years earlier by the Court of Appeal in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2002] QCA 224; [2003] 1 Qd R 259 by Holmes J (with whom Davies JA and Mullins J agreed) at 265 [7]:³

“However, it remains, without doubt, the case that:

“great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case.””

(footnotes omitted)

[19] The court should only determine a proceeding (or part of it) summarily in the clearest of circumstances and only if satisfied to a high degree of certainty as to the definitive outcome of the proceeding were it to proceed in the ordinary way.⁴

¹ *Fancourt & Anor v Mercantile Credits Limited* [1983] HCA 25; (1983) 154 CLR 87, 99.

² *Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227; [2005] 2 Qd R 232, 233 [3].

³ Citing *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 122 CLR 125, 130.

⁴ *Neumann Contractors Pty Ltd v Traspunt No. 5 Pty Ltd* [2010] QCA 119; [2011] 2 Qd R 114, 136 [80]-[81]; *Rich v CGU Insurance Ltd* [2005] HCA 16; (2005) 79 ALJR 856, 859.

- [20] The issues that justify a case proceeding to a final hearing do not need to be factual. Where there are legal issues of some complexity, a court is also justified in refusing to make a summary determination.⁵
- [21] The power to strike out is to be exercised sparingly.⁶ Generally, a strike out is not appropriate in cases of doubt or difficulty or where a pleading raises a debatable question.⁷

What are the grounds on which the Chief Executive seeks summary determination or strike out?

- [22] The grounds relied on by the Chief Executive are set out in paragraphs 10 and 11 of its Application in Pending Proceeding. They are in the following terms:

- “10. The Respondent relies upon the following grounds in relation to the orders sought in this application:
- a. the end date of the TEP has passed, such that there is no approval presently in place;
 - b. the end date of the Proposed Amended TEP relied on by NuGrow in the Amendment Application has also passed;
 - c. there is no provision in the *Environmental Protection Act 1994* (Qld) (EPA) which has the effect of preserving or extending the end date of a proposed amended TEP pending appeal of a decision to refuse to approve it;
 - d. NuGrow has not applied for a stay of the Review Decision on conditions which include an extension or preservation of the end date of the TEP or the Proposed Amended TEP;
 - e. the Court does not have power to approve a TEP with an amended end date pursuant to sections 339 or 539 of the EPA;
 - f. in circumstances where the subject matter of the appeal – the Approved TEP sought to be amended pursuant to the Proposed Amended TEP – has ended and is no longer of effect, the Appeal is nugatory.
11. In the premises of the above, the Notice of Appeal should be struck out in its entirety as it lacks utility and is otherwise an abuse of process.”

⁵ *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2014] QCA 233; [2015] 1 Qd R 476, 510 [72] per Ann Lyons J citing Barwick CJ, Gibbs and Stephen JJ in *Theseus Exploration NL v Foyster* [1972] HCA 41; (1972) 126 CLR 507, 515.

⁶ *General Steel Industries Inc v Commissioner for Railways (NSW) & Ors* [1964] HCA 69; (1964) 112 CLR 125, 129-30; *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62, 91.

⁷ *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62, 91.

Should I grant the relief sought?

- [23] The Chief Executive's grounds for its application are limited. The Chief Executive says that the Court's broad powers on appeal to decide whether to approve the application to amend the approved transitional environmental program do not extend to approving a transitional environmental program with an amended end date. It says that, as a result, the Notice of Appeal should be struck out in its entirety because it lacks utility and is otherwise an abuse of process.
- [24] As I have already mentioned, it is common ground that the appeal was legitimately commenced and is a P&E Court proceeding. It is not contended that the Court does not have jurisdiction to deal with the appeal.
- [25] The Chief Executive's application does not clearly identify why the institution of the appeal, or its continuation, would amount to an abuse of the Court's processes. Its submissions provided no elucidation on that point. They did not address the case law with respect to abuse of process.
- [26] The lack of clarity with respect to the allegation of an abuse of process is a matter that was clearly raised by NuGrow Ipswich Pty Ltd in the written submissions prepared by its Counsel, Mr Holt KC and Ms Bowness. The written submissions were filed on 27 October 2023. They are dated 12 October 2023 and had been provided to the Chief Executive before its application first came on for hearing on 13 October 2023.
- [27] Even though the Chief Executive had the benefit of the written submissions of NuGrow Ipswich Pty Ltd for several weeks prior to the resumption of the hearing of its application on 2 November 2023, and it had provided additional written submissions in the intervening period, those further written submissions did not address the matters raised at paragraphs 63 to 78 of NuGrow Ipswich Pty Ltd's written submissions. Those written submissions have considerable force. For that reason, at the resumed hearing I asked Mr Hodge KC, Counsel for the Chief Executive, to start by addressing those submissions. Having taken Mr Hodge KC directly to paragraphs 63 to 78 of NuGrow Ipswich Pty Ltd's written submissions and requested assistance with respect to the matters raised therein, Mr Hodge KC did not assist me with the alleged abuse of process.
- [28] In those circumstances, the Chief Executive has not persuaded me that the appeal should be struck out on the basis that it is an abuse of process.
- [29] The other basis on which the Chief Executive seeks to have the appeal struck out is that it lacks utility.
- [30] Ultimately, it is unnecessary for the question of utility and associated construction issues to be determined summarily to decide the Chief Executive's application for strike out of the appeal.
- [31] At the outset, the fact that the parties relied on extensive written submissions canvassing multiple issues indicated to me that the appeal may not be one that, in the exercise of my discretion, should be determined summarily. My concerns in that regard were further heightened when Nugrow Ipswich Pty Ltd indicated that, if the Court formed the view that the appeal should be struck out, it intended to pursue

related applications to amend its Notice of Appeal and to seek relief under s 37 of the *Planning and Environment Court Act 2016*.

- [32] It is apparent from the parties' extensive written submissions and the Chief Executive's oral submissions that there are several issues of statutory construction that inform the respective positions of the parties on the issue of the Court's power, which is central to the Chief Executive's case that the appeal lacks utility. Any savings for the parties (and for the Court) associated with summary determination of those legal issues are contingent on complete success by the Chief Executive with respect to each of the legal questions. If some of the matters of statutory construction or other legal issues that inform the Court's power, and the utility of the appeal, are not determined in the Chief Executive's favour, they may well be ventilated again. In those circumstances, any observations made by me about issues of statutory construction and other legal issues in reasons for judgment about this interlocutory application would be open for further determination by the trial judge. As such, to embark on the course urged by the Chief Executive would consume an extensive amount of the Court's time now and might ultimately be a waste of the Court's limited resources if, having considered those issues, the appeal is not struck out.
- [33] In any event, the issue is of such complexity that I am not persuaded that it is an appropriate use of this Court's limited resources to dismiss the appeal summarily. In reaching that view, I am cognisant that:
- (a) there are public interest issues at play as the appeal relates to an existing waste recycling and compost manufacturing facility and the conditions on which it is operated; and
 - (b) the workload of the Court is such that, to properly consider and address the underlying issues of statutory construction and reach a state of satisfaction on them such that it could be determined that the appeal has no utility would likely occasion greater delay to the ultimate hearing than might otherwise be occasioned were the appeal to proceed and the issues be addressed in the final determination of the appeal.

Order

- [34] The Chief Executive's application in pending proceeding filed 27 September 2003 is dismissed.