

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ATKINSON J

No BS2422 of 2005

UNITED COMMUNICATIONS NETWORK PTY LTD Applicant
ACN 073 283 083

and

BRISBANE CITY COUNCIL Respondent

BRISBANE

..DATE 12/08/2005

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: This is an application for statutory order of review. The application seeks to quash a decision of the council. The operative decision being a decision made on 15 February 2005 that the council would make an application to the Minister for Natural Resources for resumption of the applicant's land.

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The grounds of the application are that the decision took into account irrelevant considerations, it failed to take into account relevant considerations, that it was an exercise of a discretionary power of the council in accordance with a rule or policy without regard to the merits of the case, that it was an exercise of a power by the council that it is so unreasonable, that no reasonable person could so exercise the power, that it involved an error of law contrary to section 29(2)(i) of the Judicial Review Act (1991) and that contrary to section 20(2)(h) of the Judicial Review Act (1991), there was no evidence or other material to justify making the decision. The matter was the subject of directions in this Court where a number of directions were given by another Judge of this Court on the 14th of April 2005. Those directions determined the way in which the matter would be prepared for trial and, in accordance with those directions, affidavits were filed and a bundle of documents was prepared.

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In addition, there were statements of facts, issues and contentions filed by the applicant, a response to that by the defendant and a response to that from the applicant.

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The bundle of documents, as is usual, contained many more documents than were referred to on the hearing of this matter and I have not had regard to any of the documents in the bundle that were not referred to in the hearing of this matter.

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The matter proceeded for a three day hearing on Wednesday of this week. The applicant was represented by Mr Lyons of Queen's Counsel and Mr Nevison and by Quinn and Scattini Lawyers. The Brisbane City Council was represented by Mr Bain of Queen's Counsel, Mr O'Brien and the Brisbane City Legal Practice.

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Mr Bain took objection to some of the material filed on behalf of the applicant, including a number of paragraphs from the affidavit of Mr Purcell. Those objections were well taken and were accepted by the applicant's counsel and I have not had regard to the objectionable paragraphs.

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Mr Huang, who is the director and, he has told me, sole shareholder of the applicant also filed an affidavit. No objection was taken to that and he was not required for cross-examination. I should say that some of it is argumentative but nothing turned on that. It refers to the number of steps that Mr Huang took to try to persuade the council that they should not resume his property.

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On behalf of the respondent there were four affidavits filed. Mr Lyons indicated that one and possibly two of the deponents

would be required for cross-examination and they were made available for cross-examination. Mr McLean, who is an ecologist who works for the Brisbane City Council was cross-examined by Mr Lyons at some length.

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In addition Mr Phegan was cross-examined, first by Mr Lyons, and then by Mr Huang. The reason why Mr Phegan was cross-examined by those two people was that this morning, on the third morning, Mr Lyons and his junior counsel together with his instructing solicitors sought leave to withdraw as their instructions had been terminated. I gave them that leave and Mr Huang conducted the case on behalf of the applicant thereafter.

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Mr Huang is clearly a very intelligent man and very passionate about his case. English is not his first language but he was able to present his arguments clearly, although he struggled at times with the question of what was relevant to the decision which I was required to make.

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It was of some great advantage to me to hear and see Mr McLean give evidence. As a result of hearing Mr McLean and seeing him and listening carefully to his evidence I formed a firm impression that he was a man who went about his task carefully, professionally and entirely honourably and took into account all the submissions made by the applicant in making the recommendations that he made that the land should be resumed.

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Indeed, the respondent presented an overwhelming argument that not only was the decision made lawfully but that it was almost inevitably the only correct decision that it could have made. I hasten to say that it was not necessary for it to show the latter. All that is necessary in this case is to show that the decision was made in accordance with law.

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I am making this decision ex tempore, not really through choice but because there are strict time limits under the Acquisition of Land Act which mean that were I to reserve this decision to give careful written reasons the time that that would take would mean that the decision would be otiose and the delay would have meant that the council recommendation could not be acted upon, therefore it is necessary for me to give ex tempore reasons.

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It could not be thought that an applicant by making an application to this Court for statutory review could defeat a decision because of the delay involved. It must be said, therefore, that these reasons will not be as careful or as comprehensive as they would have been had I had the opportunity to reserve the decision, but I should say implacably that it would have made absolutely no difference to the result that would be reached.

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I have been assisted by a very detailed outline of submissions from the respondent's counsel, Mr Bain, and I am tempted to say that I adopt them in full because there is really nothing in them with which I disagree but what I should say is that

the land in question has been the subject of careful examination by the Brisbane City Council, community groups and other people interested in ecology, wildlife, fauna and flora over many years and has been identified for some significant period of time as land worthy of protection.

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There are three reasons which have been given for that. Essentially they are that the subject property owned by the applicant makes a significant and irreplaceable contribution to the conservation of the city's and the region's biodiversity by: firstly, protecting regional ecosystems that are threatened regionally; secondly, by providing significant habitat for native flora and fauna species that are threatened at a city wide and regional level; and thirdly, playing a critical role in wildlife movement along the regionally significant Karawartha/Greenbank wildlife corridor.

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There is in evidence before me almost an embarrassing plethora of evidence to support each one of those views. The range of fauna in the area is quite extraordinary, from dozens of bird species to short-beaked echidnas, sugar and squirrel gliders, many types of snake and other reptiles, bats, turtles, froglets. The fauna is similarly diverse and important.

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Essentially what Mr Huang has said to me in his oral submissions is that he would rather that the Council allowed him to develop for industrial purposes, the southern one-third of his land, and that may well be his wish. He is entitled to express his wish, but that goes nowhere near showing that the

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Council failed to take into account all the relevant considerations in making its decision that the whole of his land should be subject to a resumption order.

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The applicant made many submissions to the Council, including submissions by experts in the area, but the evidence overwhelmingly shows that all of those submissions were reviewed and considered carefully by Council officers. In other words, that they took into account all relevant considerations, and certainly, everything that was put to them by the applicant as well as many other relevant considerations.

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I can find no evidence that they took into account irrelevant considerations, or that they failed to take into account any relevant considerations. There is no evidence that they exercised their discretionary power in accordance with a rule or policy without regard to the merits of the case. Quite the contrary, the merits of the case were keenly considered. This is an area, as I said, that has been subjected to intensive study over many years. On no view, could the Court come to the conclusion that this was an exercise of a power by the Council that was so unreasonable that no reasonable person could so exercise the power. Indeed, as I said, were it necessary, I would find to the contrary.

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The final ground was that there was no evidence or other material to justify the making of the decision. As I have already said, the evidence in favour of the decision is almost

overwhelming, and this is certainly not a case where there was
no evidence to justify the making of the decision. There is
also the ground that their decision involved in error of law.
I can find no error of law at all in the manner in which the
Council considered its onus duties. This is not a case of the
arbitrary exercise of power or the exercise of powers given
under statute without good reason.

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The Council officers carefully considered everything that was
relevant and using their own expertise as well as all the
relevant material, came to the decision which they considered
appropriate, entirely in accordance with the law. There is
more material to which I could refer, but none of it is
entirely necessary for my decision. Perhaps I should just
add, lest it not be entirely clear, that I am completely
satisfied that there was no bad faith on part of any Council
officer. That is a very serious accusation to make, and one
can hardly think of a case in which it was less warranted.

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None of the grounds of review have been made out and the
application should be dismissed.

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HER HONOUR: Mr Bain has made an application for costs to be
on an indemnity basis on the ground that these proceedings
were conducted by the applicant for an ulterior commercial
motive. While there does appear to be some basis for making
that allegation, Mr Huang was exercising a right to have the

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decision judicially reviewed and his motives are a matter for
himself. I am not inclined in the circumstances, to award
costs on an indemnity basis, however, I do award them on the
ordinary basis, so the application will be dismissed with
costs.

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