SUPREME COURT OF QUEENSLAND

CITATION:	*Electoral Commission of Queensland v Palmer Leisure Australia Pty Ltd* [2022] QSC 169
PARTIES:	**ELECTORAL COMMISSION OF QUEENSLAND** (respondent/plaintiff) **v** **PALMER LEISURE AUSTRALIA PTY LTD** **(ACN 152 386 617)** (applicant/defendant)
FILE NO/S:	BS No 12968 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 August 2022
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2022
JUDGE:	Martin SJA
ORDER:	**1. The application is dismissed.** **2. I will hear the parties on costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – where the applicant/ defendant lodged a development application with respect to land it owned at Robina – where the applicant/defendant made six gifts of money to the United Australia Party – where the respondent/plaintiff has commenced proceedings in which it seeks a declaration that the applicant/defendant was a "property developer" within the meaning of section 273(2) of the *Electoral Act 1992* – where the applicant/defendant has made only one relevant planning application – where the applicant/defendant applies for summary judgment on the basis that the respondent/plaintiff cannot establish that it is a property developer –whether it follows from the filing of a single planning application that the applicant/defendant was "engaged in a business that regularly involves the making of relevant planning applications" as required by s 273(2) – whether the applicant/defendant's construction of s 273(2) was so obviously correct that the respondent/plaintiff had no prospect of establishing that the applicant/defendant was a property developer – whether summary judgment should be granted in favour of the applicant/defendant

Electoral Act 1992, s 273, s 274, s 275, s 276
Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018
Uniform Civil Procedure Rules 1999, r 292, r 293

Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd (1982) 150 CLR 255
Ferguson v Federal Commissioner of Taxation (1979) 37 FLR 310
Forge Group Power Pty Ltd (in liq) v General Electric International Inc (2016) 205 FLR 101
Hungier v Grace (1972) 127 CLR 210
Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2011] 2 Qd R 114
Rabobank New Zealand Ltd v McAnulty [2011] 3 NZLR 192
Spriggs v Federal Commissioner of Taxation (2009) 239 CLR 1

COUNSEL: P Dunning QC and K Byrne for the applicant/defendant
E Longbottom QC and K Blore for the respondent/plaintiff

SOLICITORS: Alexander Law for the applicant/defendant
G R Cooper, Crown Solicitor for the respondent/plaintiff

[1] The *Electoral Act* 1992 makes it unlawful for a "prohibited donor" to make a "political donation". A prohibited donor is, among other things, a "property developer" as defined under that Act.

[2] The Electoral Commission of Queensland (ECQ) commenced proceedings in which it seeks a declaration that Palmer Leisure Australia Pty Ltd (Palmer Leisure) is a "property developer" as defined.

[3] Palmer Leisure returned serve with proceedings in which it seeks various forms of relief but, for the purposes of this hearing, only pursues a declaration that it is not a "property developer".

[4] Palmer Leisure seeks summary judgment in both proceedings on the basis that ECQ cannot establish that Palmer Leisure is a property developer. ECQ resists the application on the basis that the construction of the Act advanced by Palmer Leisure is wrong and that the prospects of success for ECQ are not only real, but they are also strong.

The legislative background

[5] The *Electoral Act* was amended by the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act* 2018. The word "Belcarra" in the title of the amending Act is a reference to a report of the Crime and Corruption Commission – *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*.

[6] So far as is relevant to this application, that amending Act inserted a set of sections which appear under the sub-heading "Political donations from property developers". The relevant sections were inserted, according to the Explanatory Notes to the Amending Bill, because:

> "The Belcarra Report identified there is a risk of corruption when donations are made with the expectation that the recipient will, in return, make decisions that deliver a benefit to the donor. The risk is heightened when donors have business interests that are affected by government decisions. At the local government level, this risk is particularly associated with property developers."

[7] In Part 11, Division 8, Subdivision 4 of the Act, the terms "prohibited donor" and "political donation" are defined.

[8] Section 273 relevantly defines "prohibited donor":

> "(1) For this subdivision, ***prohibited donor*** –
>
> (a) means –
>
> (i) a property developer; or
>
> (ii) an industry representative organisation, a majority of whose members are property developers; but
>
> (b) does not include an entity for whom a determination is in effect under section 277.
>
> Note—
>
> See section 307C(4) in relation to the non-effect of a determination in particular circumstances.
>
> (2) For subsection (1)(a), each of the following persons is a ***property developer***—
>
> (a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation—
>
> (i) in connection with the residential or commercial development of land; and
>
> (ii) with the ultimate purpose of the sale or lease of the land for profit;
>
> (b) a close associate of a corporation mentioned in paragraph (a).
>
> (3) For deciding whether a corporation is a corporation mentioned in subsection (2)(a), any activity engaged in by the corporation for the dominant purpose of providing commercial premises at which the corporation, or a related body corporate of the corporation, will carry on

business is to be disregarded, unless the business involves the sale or leasing of a substantial part of the premises.

…

(5) In this section—

close associate, of a corporation, means any of the following persons—

…

(b) a director or other officer of the corporation;

…

relevant planning application means—

(a) an application for, or to change, a development approval under the Planning Act 2016 or the repealed Sustainable Planning Act 2009; or

…"

[9] Section 274 defines "political donation":

"(1) For this subdivision, each of the following is a ***political donation***—

(a) a gift made to or for the benefit of—

(i) a political party; or

(ii) a candidate in an election;

(b) a gift made to or for the benefit of another entity—

(i) to enable the entity (directly or indirectly) to make a gift mentioned in paragraph (a) or to incur electoral expenditure; or

(ii) to reimburse the entity (directly or indirectly) for making a gift mentioned in paragraph (a) or incurring electoral expenditure;

(c) a loan from an entity that, if the loan were a gift, would be a gift mentioned in paragraph (a) or (b).

(2) Despite section 201(3)(b), a reference in this section to a gift includes a fundraising contribution, to the extent the amount of the contribution forms part of the proceeds of the fundraising venture or function to which the contribution relates.

(3) Despite section 201(3)(c), a reference in this section to a gift includes any of the following amounts paid by a person to a political party, to the

extent the total amount of the person's payments in a calendar year exceeds $1,000—

(a) an amount paid as a subscription for a person's membership of the party;

(b) an amount paid for a person's affiliation with the party."

[10] Section 275 makes political donations from prohibited donors unlawful – both for the donor and for the person who accepts such a donation. It provides:

"(1) It is unlawful for a prohibited donor to make a political donation.

(2) It is unlawful for a person to make a political donation on behalf of a prohibited donor.

(3) It is unlawful for a person to accept a political donation that was made (wholly or in part) by or on behalf of a prohibited donor.

(4) It is unlawful for a prohibited donor to solicit a person to make a political donation.

(5) It is unlawful for a person to solicit, on behalf of a prohibited donor, another person to make a political donation."

[11] In ECQ's statement of claim it is alleged that Palmer Leisure made six gifts of money to Clive Palmer's United Australia Party (UAP) between 21 August 2020 and 9 October 2020. Palmer Leisure admits that the UAP is a political party for the purposes of the Act.

[12] Palmer Leisure also concedes, for the purposes of this application only, that each of the payments made was a "political donation" within the meaning of the Act. That left the focus of the argument on the meaning of the definition of "prohibited donor".

[13] The ECQ contends that Palmer Leisure is a "property developer" within the meaning of s 273(2)(a). It was not argued that the exclusion set out in s 273(3) applied, that is, it was not part of Palmer Leisure's case that any activity it had engaged in was for the dominant purpose of providing commercial premises for itself.

Why the ECQ says that Palmer Leisure is a property developer

[14] Palmer Leisure owns land at Robina. On that land it conducts a golf course – the Palmer Colonial Golf Course.

[15] On 22 May 2015, Palmer Leisure lodged a development application for "preliminary approval" under s 241 and s 242 of the (since repealed) *Sustainable Planning Act* 2009. The purpose of the application was to vary the effect of the Gold Coast Planning Scheme to allow for the development of the land for "business activities, community activities, industrial activities, recreational and environmental activities, residential activities, tourism and entertainment activities and transport

and infrastructure activities, in accordance with the Robina Transit Development Plan."

[16] The application stated that the project would:

(a) yield an anticipated 2,500 dwellings;

(b) include buildings of various heights to a maximum of 30 storeys;

(c) provide for a mixed-use commercial hub; and

(d) downsize the activities of the existing golf course.

[17] Several changes were later made to the proposed development application including reductions in both the number of residential dwellings and the maximum height of the buildings.

[18] On 25 February 2020, the Gold Coast City Council refused the application. Palmer Leisure appealed against the refusal to the Planning and Environment Court. That appeal has not yet been decided.

[19] The ECQ pleads in its Statement of Claim that, if the development application is granted, then it will be necessary for Palmer Leisure to make future relevant planning applications in order to undertake the project. In its defence, Palmer Leisure does not admit that allegation on the basis that it "concerns future hypothetical matters about which the defendant does not have knowledge".

[20] The ECQ pleads that Palmer Leisure is a "property developer" within the meaning of s 273(2) of the *Electoral Act* because:

(a) the proposed project involves residential and commercial development of the land to be undertaken by Palmer Leisure for the ultimate purpose of the sale or lease of the land for profit; and

(b) Palmer Leisure is engaged in a business that regularly involves the making of relevant planning applications by or on behalf of itself in connection with that residential and commercial development with the ultimate purpose of sale or lease for profit.

[21] At the heart of the argument was the accepted fact that Palmer Leisure has made only one relevant planning application. The argument concerned the proper construction of s 273 and what is necessary to constitute "a business that regularly involves the making of relevant planning applications".

"One swallow does not a summer make, nor one fine day."[1]

[22] Palmer Leisure argues that ECQ has no real prospect of successfully establishing that, by filing a single relevant planning application, Palmer Leisure is engaged in a business that is caught by s 273.

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1 Aristotle – *Nicomachean Ethics.*

[23] The argument centred on the meaning of "engaged in a business that regularly involves the making of relevant planning applications". The ECQ could not, the submission went, rely upon an argument that Palmer Leisure was engaged in such a business when it had lodged only one relevant planning application which had yet to be approved. The ECQ submitted that it could.

[24] Palmer Leisure submitted that there was, implicit in the ECQ's argument, the assumption that the application would be approved, that Palmer Leisure would want to undertake the development, and that in doing so it would be necessary to make relevant planning applications in the future. This was not enough to show that Palmer Leisure was engaged in a relevant business. The application was simply a single swallow.

[25] It was also contended that the word "engaged" was used in the past tense and that that was inconsistent with finding that an entity which had made only one application could be in the relevant business. The word "engaged" is not used in that sense. It takes the form of a past participle functioning as an adjective and is used to describe "business".

What is necessary to show that a corporation is "engaged in a business that regularly involves the making of relevant planning applications"?

[26] The definition in s 273(2) requires that a corporation not only be engaged in a business, but also in a business that regularly involves the making of relevant planning applications. Whether the activities of an individual or a corporation constitute a "business" has occupied much judicial consideration. In *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd*,[2] Mason J referred to the chameleon-like hue that the word "business" can have as it readily adapts itself to its surroundings.[3] In other words, the context can dictate or affect the meaning.

[27] There are many aspects which can fall to be considered. In *Hungier v Grace*,[4] the question was whether someone was a money lender as defined in the *Money Lenders Act* 1958 (Vic), that is, was the applicant a "person whose business … is that of money-lending". Barwick CJ said:

> "The decision whether a person is one 'whose business (whether or not he carries on any other business) is that of money-lending' can only be reached after a close examination of the facts in each particular case. It is not enough merely to show that a person has lent money to another. … **Whilst no doubt system and regularity are involved in the carrying on of a business, it does not necessarily follow that one who has transactions of the same kind systematically or regularly is carrying on a business in those transactions**. One may systematically make regular deposits to a bank account but not be carrying on a business of doing so. In other words, system and regularity of making transactions are not in themselves definitive in this field. Their absence may well deny that a business is being carried on but their presence does not necessarily establish that it is."[5] (emphasis added)

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2 (1982) 150 CLR 355.
3 At 378-379.
4 (1972) 127 CLR 210.
5 At 216-217.

[28] The meaning of "business" has often been considered in the context of whether a taxpayer was carrying on a business and thus liable to particular taxation or able to make particular deductions and so on. In *Ferguson v Federal Commissioner of Taxation*,[6] the Full Court of the Federal Court of Australia had to decide whether a taxpayer was carrying on a business. The taxpayer had, in anticipation of his retirement, leased five Charolais cows and entered into an agreement with a management company to agist, breed from, and otherwise care for and manage the cows. The taxpayer intended to acquire a grazing property upon his retirement. He claimed to be entitled to a deduction under the *Income Tax Assessment Act* 1936 in respect of expenditure on leasing, agistment and other outgoings.

[29] The Full Court found in his favour. On whether he was conducting a business, Bowen CJ and Franki J said:

> "There are many elements to be considered. The nature of the activities, particularly whether they have the purpose of profit-making, may be important. However, an immediate purpose of profit-making in a particular income year does not appear to be essential. Certainly it may be held a person is carrying on business notwithstanding his profit is small or even where he is making a loss. Repetition and regularity of the activities is also important. However, **every business has to begin and even isolated activities may in the circumstances be held to be the commencement of carrying on business**. Again, organization of activities in a business-like manner, the keeping of books, records and the use of system may all serve to indicate that a business is being carried on."[7] (emphasis added)

[30] That the actions of a company at an early stage may constitute a "business" was accepted by Fisher J:

> "The fact that he ultimately intended to carry on the business of cattle raising or primary production on his own property with the stock acquired during the first stage does not necessarily preclude the finding that the taxpayer was also carrying on business during the first stage. **A person may conduct a business, albeit of a limited nature, the activities of which business are preparatory to or in preparation for the conduct of another business on a larger scale. The question is whether the more limited activities at the earlier stage, standing alone, constitute a business.**"[8] (emphasis added)

[31] It follows, then, that the possibility that an entity will be a "property developer" even though it has only made one development application cannot be dismissed. Other matters need to be considered.

[32] A more recent summary of what might be taken into account can be found in *Spriggs v Federal Commissioner of Taxation*,[9] where the High Court said:

> "[59] The existence of a business is a matter of fact and degree. It will depend on a number of indicia, which must be considered in combination and as a

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6 (1979) 37 FLR 310.
7 At 314.
8 At 321-322.
9 (2009) 239 CLR 1.

> whole. No one factor is necessarily determinative. Relevant factors include, but are not limited to, the existence of a profit-making purpose, the scale of activities, the commercial character of the transactions, and whether the activities are systematic and organised, often described as whether the activities are carried out in a business-like manner." (citations omitted)

[33] The matters referred to in the preceding paragraph are all subject to consideration at a trial – there is nothing in the material in this application which would support a conclusion that those, or some of those, indicia could not be demonstrated.

[34] Apart from the meaning of "business", it is also necessary to consider what will establish that the business "regularly involves the making of relevant planning applications".

[35] A similar expression was considered by Hammerschlag J in *Forge Group Power Pty Ltd (in liq) v General Electric International Inc*.[10] The *Personal Property Securities Act* 2009 concerns, among other things, "PPS leases". Relevantly, a lease will be a PPS lease unless the lessor was "not regularly engaged in the business of leasing goods".

[36] In *Forge*, Hammerschlag J considered Canadian and New Zealand decisions on similar legislative provisions. He did not find them persuasive. His Honour referred to the decision of *Rabobank New Zealand Ltd v McAnulty*,[11] in which the New Zealand Court of Appeal held that:

> "…a single transaction in circumstances where it can be established that the transaction was a one-off would not be 'regular'. Where a transaction was the first but has been followed by others, a good case can be made for the proposition that even the first was 'regular' because it was the start of the regular engagement in the business."[12]

[37] That approach did not, in his Honour's view, sufficiently recognise that the exclusion was directed to activity which constituted engaging in the business of leasing, not to engaging in the activity of entering into leases. He disagreed with the New Zealand approach because, he said, it would not permit a conclusion of regularity where an initial transaction was intended to be followed by others, but no more transactions of the type concerned actually eventuated, despite the best intentions, advertised willingness over a significant period of time and ability of the lessor to enter into more. He said that, in considering frequency or repetitiveness as an element of regularity of business, account may be taken of more than just the actual transactions entered into.

[38] I find the reasoning in *Forge* persuasive. Applying it to these circumstances, the fact that only one planning application had been made would not, of itself, prevent a finding that Palmer Leisure came within the definition in s 273(2). It is a question of fact dependent upon other matters. And those are matters to be determined at a trial.

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10 (2016) 305 FLR 101; [2016] NSWSC 52.
11 [2011] 3 NZLR 192.
12 At [47].

[39] It was argued on Palmer Leisure's behalf that this construction was unlikely because it would catch landowners who only wished to develop a single parcel of land and no more. It may well do so. But that is no reason to reject that construction. A business can engage in regularly making planning applications with respect to one parcel of land and then cease. It will still be caught. Section 273(2) does not require that the business last for any particular time or involve planning applications for different parcels of land. It will, if the facts support it, apply to a landowner seeking to redevelop its own land and nothing more.

When is the test applied?

[40] To determine whether an unlawful donation has been made, the status of the donor and donee is assessed at the time of the donation.

[41] This application is not the vehicle for an exhaustive examination of all the factors which would support a finding that a business comes within s 273(2).

Should summary judgment be given?

[42] No.

[43] Summary judgment is given only in the clearest of cases and when a high degree of certainty is achieved about the ultimate outcome of the proceeding, if it were allowed to go to trial in the ordinary way.[13]

[44] In order to grant summary judgment I would have to conclude that Palmer Leisure's construction of s 273(2) was so obviously correct that ECQ had no prospect of establishing that Palmer Leisure was a "property developer" and, thus, a "prohibited donor". For the reasons set out above, I have not come to that conclusion.

Orders

[45] The application is dismissed.

[46] I will hear the parties on costs.

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13 *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114.