

SUPREME COURT OF QUEENSLAND

CITATION: *Save Surfers Paradise Inc v Gold Coast City Council* [2018] QSC 181

PARTIES: **SAVE SURFERS PARADISE INC**
(Applicant)

v

GOLD COAST CITY COUNCIL
(Respondent)

FILE NO/S: SC No 810 of 2018

DIVISION: Trial Division

PROCEEDING: Application to set aside originating application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 August 2018

DELIVERED AT: Brisbane

HEARING DATE: 16 May 2018

JUDGE: Boddice J

ORDER: **1. I shall hear the parties as to the form of orders and costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT OR ORDER – GENERALLY – where the respondent claims the applicant lacks standing to bring proceedings, and consequently that the proceeding be set aside

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – PROPER OR NECESSARY PARTY AND STANDING – STANDING TO INSTITUTE PROCEEDINGS – PARTICULAR CASES – ASSOCIATIONS AND CLUBS – PROCEDURE IN ACTIONS BY AND AGAINST – PARTIES – WHO MAY BRING PROCEEDINGS – where the applicant is a community organisation incorporated as an association under the *Associations Incorporation Act* 1981 – where the applicant opposes the sale of a carpark by the respondent –

where the respondent claims the applicant lacks standing to bring proceedings – whether the applicant, as an entity, has a sufficient interest to satisfy the standing requirement – where the applicant must demonstrate its private rights are affected or a special interest in the subject matter – where the determination of standing involves an exercise of judgment of fact and degree – where the applicant owns no property affected by the decision – where objects of the applicant, as an organisation, include: opposition to sale of the carpark, maintenance and security of adequate public car parking in Surfers Paradise, and the promotion and support of trade and commerce in the interests of business owners, rate payers and residents in the Surfers Paradise area – where the applicant has actively campaigned for this purpose, including attending government meetings – where the applicant represents hundreds of local business and has the support of many other local business groups, clubs and organisations – where the interests of the members are separate to those of the entity – where some of these members may have a sufficient interest in their own right – where there is insufficient evidence to properly characterise the applicant as a “peak” body recognised by government

COUNSEL: D Savage QC with S Noble for the Applicant
G Gibson QC with A L Wheatley for the Respondent

SOLICITORS: Steindls Lawyers for the Applicant
Clayton Utz for the Respondent

- [1] **BODDICE J:** By Originating Application, filed 23 January 2018, Save Surfers Paradise Inc (‘the applicant’) applied for declaratory relief in respect of decisions made by the Council for the City of Gold Coast (‘the respondent’), in relation to the sale of a property at Surfers Paradise, known as the Surfers Paradise Transit Centre and Bruce Bishop Car Park. An injunction was also sought restraining the respondent from giving effect to those decisions and from permitting the use of the property, other than for its intended purposes.
- [2] By application filed 1 March 2018, the respondent sought an order that the originating application be set aside pursuant to Rule 16 of the *Uniform Civil Procedure Rules 1999* (Qld) or in the Court’s inherent jurisdiction. The basis for that order is that the applicant does not have standing to challenge those decisions.

Background

- [3] The Surfers Paradise Transit Centre and Bruce Bishop Car Park are located in the Surfers Paradise business district. They provide transport hub facilities for members of the public, as well as a large number of car parking spaces available to members of the public upon payment of a fee. Some car parking spaces are also provided to local businesses at concessional rates, pursuant to agreements entered into with the respondent.
- [4] The applicant is a community organisation incorporated under the *Associations Incorporation Act* 1981. The objects of the association, amongst other things, are to oppose the sale of that property, to maintain and secure adequate public car parking in Surfers Paradise, and to promote and support trade and commerce in the interests of business owners, rate payers and residents in the Surfers Paradise area.

Originating Application

- [5] The applicant contends the respondent's decisions were void and of no effect as they were in breach of a public, private or statutory trust, or statutory obligation not to engage in misleading and deceptive conduct, were so unreasonable that no person in the position of the respondent could have made such decisions, or were done for an improper purpose or ulterior motive and not for good government or any other relevant purpose.

The decisions

- [6] The decisions, the subject of this application, were made on 2 and 17 May 2017.
- [7] Relevantly, the first decision, made in a special budget committee meeting, was:

“That council approves the sale of the Surfers Paradise Transit Centre and Bruce Bishop Car Park by public tender, subject to the satisfactory resolution of matters detailed in the report. Such matters include, but are not limited to, the following:

- (a) Acknowledgement of current leases/tenancies in place, including provision of twelve-month lease options for those tenants currently on month to month arrangements.
- (b) Current operational arrangements.
- (c) Provision of 640 public parking spaces with such to be retained by the purchaser.
- (d) Any future redevelopment providing for a suitable transit centre and civic space, etc.
- (e) That an additional 100 car park spaces be preserved for community use as determined by the Council. ”

[8] Relevantly, the second decision, made at the Council meeting on 17 May 2017, was:

“That Council approves the sale of the Surfers Paradise Transit Centre and Bruce Bishop Car Park by public tender, subject to the satisfactory resolution of matters detailed in the report. Such matters include, but are not limited to the following:

- (a) Acknowledgement of current leases/tenancies in place including provision of twelve-month lease options for those tenants currently on month to month arrangements.
- (b) Current operational arrangements.
- (c) Provision of 640 public parking spaces with such to be retained by the purchaser.
- (d) Provision of 100 additional parking spaces with such to be retained by the purchaser, and made available at no cost to the council, for community use.
- (e) That a report be brought back to the relevant standing committee in regards to how a public car parking management plan would be developed to ensure that during any future redevelopment of the site a minimum of 740 car spaces were able to be maintained.
- (f) Provision of other commercial, residential and visitor parking for any future development will need to be in strict accordance with the requirements of the City Plan (and will be calculated without consideration to the public and community use parking spaces requirements already identified).
- (g) Any future redevelopment of the site will be required to provide for transit centre operations that will be designed, in consultation with bus/coach operators, to include suitable sized set down areas.

- (h) Any future redevelopment will need to provide for a civic space that incorporates elements of lawn, trees, and natural shade structures to create a place for visitors, friends and family to gather and to play.”

Evidence

- [9] The Bruce Bishop Car Park was developed by the respondent after a policy decision in 1974 to provide car parking for the central Surfers Paradise district, so as to support and encourage its growth. Its construction was funded through developer contributions, required under the respondent’s planning scheme, as well as loan funds obtained by the respondent and repaid through revenue generated from rate payers. Since its construction, the respondent has consistently affirmed and maintained the importance of the provision of safe, accessible, reasonably priced off-street parking facilities for the benefit of users of the Surfers Paradise district.
- [10] The applicant was incorporated following those decisions. The founding members of the applicant come from an array of professional or business backgrounds. The organisation represents hundreds of local businesses in Surfers Paradise. It has the support of many other local business groups, clubs and organisations. Since its incorporation it has campaigned against the decision to sell the car park, on the basis it is a breach of trust and contrary to the interests of the Surfers Paradise district.
- [11] The applicant has made complaints to the Crime and Misconduct Commission and the Ombudsman. It has made representations to various government bodies and the respondent itself. The respondent has sent invitations on behalf of its Heart of the City Advisory Committee, for the applicant to attend consultation workshops as a relevant and representative stakeholder community group, with the requisite interest in participating in future community master planning consultations and decision making processes within Surfers Paradise. There is no other community organisation with the specific focus of opposing the sale of the properties.
- [12] The availability of inexpensive and conveniently located public parking is important to the businesses of members of the applicant, and to the amenity of Surfers Paradise in general. The sale of the Bruce Bishop Car Park would significantly reduce the amount

of available, convenient parking, which would be disastrous for local businesses and residents in Surfers Paradise. Some businesses would suffer financial loss.

- [13] For example, the Surfers Paradise RSL Sub-branch had made significant monetary contributions to the respondent in 1989 and 1990, in exchange for which the RSL received the use of 87 parking spaces in the Bruce Bishop Car Park for use by volunteers, members and guests at a concessional annual charge. The club had consistently used a minimum of 80 parking spaces every year since 1990. The club's viability was dependent upon the availability of those cheap, secure and conveniently located parking spaces.
- [14] The sale of the Bruce Bishop Car Park would materially affect the economic viability of the club. The proposed re-development of that carpark only provided for 640 publicly available spaces and 100 spaces for clubs, community groups and volunteers. That allocation was manifestly inadequate for the Club's needs, and in the Club's view, unconscionable in light of the Club's significant monetary contribution to the development of that carpark.
- [15] The Chair of the Surfers Paradise Heart and City Advisory Committee, established under the respondent's economic development and major projects directorate, endorsed the efforts of the applicant to save the Bruce Bishop Car Park. The sale of the car park will have an economic impact on property values and local businesses.
- [16] The applicant had been invited to attend a meeting of this organisation to discuss that sale. It had also been invited to participate in master planning workshops to convey the importance of car parking to the economy of the Surfers Paradise area.
- [17] The applicant had participated in three lengthy interviews on a Gold Coast based community radio station, in respect of the proposed sale. Those interviews were undertaken having regard to the public interest in the respondent's proposed sale. The interviews resulted in significant support for the applicant's aims and actions, indicating deep community interest in the issue.

[18] Members of the applicant had also, prior to its incorporation, worked together on community issues affecting Surfers Paradise businesses, clubs and residents, including lobbying council, state government and other organisations for the betterment of the Surfers Paradise area.

Set aside application

[19] The respondent submits the applicant does not have a requisite interest sufficient to found standing to challenge the relevant decisions. Standing to challenge the decisions could only arise if the applicant's private rights were affected or it had special interest in the subject matter. As no private right of the applicant is said to be affected, standing can only exist if the applicant had a special interest in the decisions.

[20] Such an interest is not established by some of the members of the applicant having a special interest. Special interest is also not established by the applicant's members being affected by the relevant decisions. Further, none of the conduct complained of as misleading and deceptive was conduct in trade or commerce.

[21] The applicant submits it does have the requisite special interest, sufficient to found standing in respect of the decisions. The respondent is a public authority. It owes public duties. The decisions adversely impact upon the applicant and the interests and concerns of its members. The challenge specifically relates to the lawfulness of the respondent's decisions. The applicant is recognised by governments and the respondent as the relevant organisation to protect the commercial interests of businesses in the Surfers Paradise area.

Relevant principles

[22] Rule 16 of the UCPR, provides that a court may set aside an originating process. A court may also do so pursuant to its inherent jurisdiction. Such an order may be made where a party "lacks an interest which would entitle that party to maintain" the proceeding.¹

¹ *Custodial Limited v Cardinal Financial Services & Ors* [2005] 2 Qd R 115 at [1].

- [23] Where the party has no standing to bring the proceeding and would not succeed, an order may be made on a summary basis. Such an order should only be made when there is a clear case of a lack of standing to bring the claim and of a lack of likelihood of success.²

Discussion

Standing

- [24] Members of the public or private organisations may only seek declaratory or injunctive relief in respect of alleged public rights and duties, if able to establish, either an interference with their private rights or that they have a special interest in the subject matter of the action.³
- [25] A special interest requires more than a mere intellectual or emotional concern. In *Australian Conservation Foundation Inc v Commonwealth*,⁴ Gibb J (as His Honour then was), said:

“A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.”

- [26] Similar considerations apply in respect of incorporated entities. To have standing, it must be shown that that entity will have its private rights interfered with, or, that that entity has a special interest in the subject matter. The fact that some members of that entity have a special interest does not mean that the body corporate will have standing.⁵ The special interest test is also not met merely by that organisation having objects or purposes related to the subject matter of the dispute.⁶

² *General Steel Industries Inc. v Commissioner for Railways* (1964) 112 CLR 127.

³ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 37 per Gibbs CJ at 35-36. See also Brennan J at 74-76.

⁴ (1980) 146 CLR 413 at 530-531.

⁵ *Australian Conservation Foundation* per Gibbs J at 531, Steven J at 539 and Mason J at 547-548.

⁶ *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 330 [48].

- [27] The relevant authorities were comprehensively considered by Bowskill J in *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines*,⁷ when considering an application for a statement of reasons under the *Judicial Review Act*, in relation to a decision made by a delegate of the Minister, under the *Mineral Resources Act 1989* (Qld). Unsurprisingly, that consideration contains instances where standing was established and instances where there was a finding of no standing.
- [28] Significantly, a review of those authorities establishes that a party cannot acquire standing merely by proclaiming an interest in obtaining the relief. That party must show it will be specifically affected, to a substantially greater degree or in a significantly different manner, to a member of the public. As Brennan J (as His Honour then was), observed in *Onus*:⁸

“Whether a plaintiff has shown a sufficient interest in a particular case must be a question of degree, but not a question of discretion.... it is material to consider whether the plaintiff’s interest in the action is sufficient to assure that “concrete adverseness which sharpens the presentation of issues”, falling for determination.... it is also material to consider whether the plaintiff has shown so distinctive an interest that his action to enforce the defendant’s public duty is likely to avoid a multiplicity of actions.... at least the plaintiff must be able to show that success in the action would confer on him – albeit as a member of a class – a benefit or advantage greater than the benefit or advantage thereby conferred upon the ordinary member of the community; or alternatively that success in the action would relieve him of a detriment or disadvantage to which he would otherwise have been subject – albeit as a member of a class – to an extent greater than the ordinary member of the community.” [Citations omitted]

- [29] An assessment of whether there exists the requisite closeness of connection often requires a judgment of fact and degree.⁹ In reaching those judgments of fact and degree, evidence of the involvement of the plaintiff in the specific subject matter of the litigation can be relevant, although it is not determinative.¹⁰
- [30] Although the applicant was only incorporated after the decisions, and its objects and activities reflect the interests of its members, it does not follow that the applicant itself cannot have the requisite special interest, sufficient to establish a standing in the present

⁷ [2018] QSC 21.

⁸ (1981) 149 CLR 37 at 75-76.

⁹ *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at [37]-[39].

¹⁰ *Alliance to Save Hinchinbrook Inc v Cook* [2007] 1 Qd R 102 at [16].

proceeding.¹¹ However, merely incorporating an organisation with relevant objects will not provide that organisation with standing it otherwise would not have.¹²

- [31] There is evidence of the applicant's involvement in articulating the interests of the Surfers Paradise business community in the retention of public assets constructed through the use of public contributions or funding. Those activities are in accord with its objects. Those objects have been actively pursued through submissions and representations, including complaints to the Crime & Corruption Commission and the Ombudsman.
- [32] Further, the circumstances of the applicant, in the context of the surrounding material, supports a conclusion that the applicant, through its public activities, is actively pursuing the interests of its members and supporting organisations. Some of those members have commercial interests affected by the decisions in a material way, greater than an ordinary member of the public. Such an impact would be sufficient to constitute a special interest for that individual member. However, a special interest of its individual members is insufficient to constitute the requisite special interest of the applicant. A party's special interest may nevertheless be established by evidence that each of its members have a requisite interest in the subject matter.¹³
- [33] A consideration of all of the evidence and of the particular circumstances of the applicant does not support a conclusion that this applicant itself has the requisite special interest. The applicant owns no property which is affected by the decisions. The applicant has no interests of its own, which might be affected, other than indirectly through an affect upon the interests of some of its members.¹⁴ There is no evidence all of the applicant's members have the requisite special interest. Some of those members may have no more than an intellectual or emotional interest in the retention of public car parking in the Surfers Paradise district.¹⁵

¹¹ *Alliance to Save Hinchinbrook Inc v Cook* [2007] 1 Qd R 102 at [18], [21]; *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* [2018] QSC 21.

¹² *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1994) 52 FCR 209 at 69.

¹³ *Manuka Business Association Inc v ACT Executive* (1998) 146 FLR 464.

¹⁴ *cf One Steel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc* (2006) 94 SASR 357 at [30].

¹⁵ *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 333 [61] citing *One Steel* at [30].

- [34] There is also no evidence sufficient to properly characterise the applicant as the “peak” organisation recognised by governments. The material indicates the applicant has conscientiously pursued overturning of the decisions and in that respect has a public profile. However, that profile is different to recognition as a peak organisation, sufficient to qualify it for a finding that as a peak body recognised by government, it has itself the requisite special interests sufficient to support standing. Similarly, invitations to attend workshops do not of themselves indicate any recognition that the body is a “peak” organisation.
- [35] Whilst determination of standing involves an exercise of judgment, of fact and degree, the evidence simply establishes that whilst the decisions have a real impact on the availability of public car parking spaces in the Surfers Paradise district, which materially affect the commercial interests of some of the members of the applicant, the applicant itself does not have a special interest sufficient to found an entitlement to enforce public duties or rights. Success in the action will not confer upon the applicant a benefit or advantage greater than the benefit or advantage conferred upon an ordinary member of the community, nor would that success relieve the applicant of a detriment or disadvantage to an extent greater than the ordinary member of the community.¹⁶
- [36] The applicant accepted that such a determination would similarly affect all aspects of its claimed relief.
- [37] In coming to that conclusion I have had regard to the principle that summary determination of a proceeding is a power to be exercised with great caution. However, a determination of whether a party has established the requisite special interest, whilst a question of degree, is not a question of discretion. Accordingly, where standing is not established, it is appropriate to exercise the summary dismissal power.
- [38] The respondent also contended that the claim for relief based on misleading and deceptive conduct could not succeed, as that conduct had not occurred in trade or commerce. However, at this preliminary stage, it could not be said that it is clear that the conduct was not in trade and commerce. Accordingly, summary dismissal of the applicant’s proceeding on that basis would not be appropriate.

¹⁶ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 37 at [75].

Orders

[39] The respondent's application to set aside the proceeding is allowed on the basis the applicant lacks standing.

[40] I shall hear the parties as to the form of orders and costs.