IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B33 of 2017

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

JOSHUA JAMES PIKE &
NATALIE PATRICIA PIKE
Appellants

and

KYM LOUISE TIGHE &
MICHAEL JAMES TIGHE
First Respondents

and

TOWNSVILLE CITY COUNCIL
Second Respondent

APPELLANTS' REPLY

Part I: Certification

1. This Reply is in a form suitable for publication on the internet.

Part II: Appellants' Reply

2. In the document described as the First Respondents' Summary of Argument ("FRS"), the First Respondents make submissions to the effect that the Appellants have departed from the way in which the case was put at first instance and on appeal, on the basis that it has not previously been suggested that someone other than the First Respondents had contravened the development approval and therefore committed a development offence (FRS paras 2, 16). The submission is incorrect:

   (a) [21] of the Reasons for Judgment of the Court of Appeal record that the Appellants did argue that s.604(1) of the *SPA* justified the enforcement order

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upon the basis that the proprietors of the original lot committed a development offence;

(b) the Appellants commenced their oral argument before the Court of Appeal by dealing with this point (T1-27/36 to T1-28/7; see also T1-32/28-47);

(c) the matter had also been argued before the Planning and Environment Court, as is indicated by [50] of the Reasons for Judgment of the Planning and Environment Court.

3. The First Respondents then submit that the Appellants either accept or must accept that the First Respondents did not commit a development offence (FRS paras 20, 23). That submission is also incorrect:

(a) the Planning and Environment Court found that the First Respondents had committed a development offence ([111]; see also order no. 2);

(b) for the reasons developed in the Appellants' Submissions ("AS"), that finding was correct in principle (see eg AS paras 23, 28, 29(a), 30, 31).

4. The First Respondents refer to an offer made by them on 6 December 2012 to provide a further easement (FRS paras 4, 13; see also First Respondents' Additional Events to Chronology para 2). The offer:

(a) did not comply with the development approval, or the registered plan of survey, each of which involved an easement width of 10m, whereas the offer contemplated a reduction to 5m;

(b) confirms that the registered easement does not satisfy the terms of condition 2 of the development approval;

(c) was, prior to the proceeding in the Planning and Environment Court, overtaken by a letter dated 6 November 2014 from the First Respondents' solicitors, in which the First Respondents declined to grant an easement in accordance with condition 2 of the development approval.

5. In paras 10-12 of the FRS, and in the context of applicable legislative provisions, the First Respondents rely upon the contention that condition 2 was required to be

complied with prior to the endorsement by the Second Respondent of the survey plan. In addition to the submissions made in the AS, the Appellants note that there are single judge decisions in Queensland and New South Wales which support the proposition that these considerations are not an impediment to subsequently obtaining an enforcement order if a condition of a development approval has in truth not been complied with[1].

6. As regards para 27 of the FRS:

(a) the Appellants' argument does not assume that the effect of s.245 of *SPA* is to make every approval (or every condition of an approval) operate for an infinite period[2];

(b) the Appellants dispute the implied contention of the First Respondents that s.73 of the *Planning Act 2016* supports the First Respondents' position; quite apart from the difficulties raised by reliance upon a later statute to determine whether it throws any light upon the interpretation of an earlier statute[3], the reference to *"while a development approval is in effect"* in s.73 is simply a reference back to the terms of s.71 as to when *"a development approval starts to have effect"*.

7. The First Respondents' contentions about *"the oddest result"* in para 32 of the FRS overlook that they have not challenged the conclusion of the Court of Appeal that no question of indefeasibility arose in this case (at [13]), and that previous judgments have recognised that ignorance on the part of a purchaser of land of a breach of planning law that gives rise to a claim for an enforcement order is a matter relevant to the decision of the relevant Court as to whether to exercise its discretion[4].

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1 *Ainsworth v Yarrowee Pty Ltd 2010 NSWLEC 118 at [6][37]; Sunshine Coast Regional Council v Recora Pty Ltd 2012 QPELR 419, 420-421[6]-[13]*

2 cf the discussion in *Peet Flagstone City Pty Ltd v Logan City Council 2014 QCA 210 at [31]*

3 cf *Allina Pty Ltd v Federal Commissioner of Taxation 1991 28 FCR 203, 212*

4 see eg *Hillpalm Pty Ltd v Heaven's Door Pty Ltd 2002 55 NSWLR 446, 450[22]; Hillpalm Pty Ltd v Heaven's Door Pty Ltd 2004 220 CLR 472, 506[103], 514[128]*

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