IN THE HIGH COURT OF AUSTRALIA No. B33 of 2017
BRISBANE REGISTRY

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

BETWEEN: **JOSHUA JAMES PIKE & NATALIE PATRICIA PIKE**
Appellants

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AND: **KYM LOUISE TIGHE & MICHAEL JAMES TIGHE**
First Respondents

AND: **TOWNSVILLE CITY COUNCIL**
Second Respondent

FIRST RESPONDENT'S ~~SUMMARY OF ARGUMENT~~ SUBMISSIONS

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Three issues arise in this appeal. First can the appellant now contend in support of the orders made at first instance that someone other than the First Respondent contravened the operative provisions of the SPA (as the Appellant uses that term) when there was no finding to that effect in either Court below. Second if yes to the first issue then was the construction of the development approval favoured by the Court of Appeal correct namely did the development approval cease to have effect
30 once the plan of subdivision registered in the Queensland Land Title Registry. Third – if issue 1 and 2 are resolved in the negative can it be said that the First Respondents contravened the development approval having offered an easement that satisfied the condition albeit on terms.

Part III: Notice Under section 78B of the *Judiciary Act 1903*

Respondent's Summary of Argument
Filed on behalf of the Respondent
Form 19

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3. The First Respondents certify that consideration has been given to the question whether notice pursuant to s. 78B of the *Judiciary Act 1903 (*Cth*)* should be given, with the conclusion that that is not necessary.

Part IV: Statement of Material Facts in contest

4. The First Respondents accept the facts stated by the Appellant save to add the following-:

Contrary to paragraph 7 of the Appellants outline the First Respondent has offered an easement providing for a further easement in terms of condition 2 of the development approval which the Appellant does not accept. Whether or not the Second Respondent would have accepted same instead of approving the subdivision other than in accordance with Condition 2 of the development approval is unknown.

Part V: Statement of applicable statutes

5. The appellants statement of applicable constitutional provisions, statutes and regulations is accepted. The respondent refers additionally to:

(a) Section 50 *Land Title Act 1994* (Q);

(b) Section 3.7.2 of the *Integrated Planning Act 1997* (Q)*;*

(c) Section 73 *Planning Act 2016* (Q).

Part VI: Respondent's Argument

6. Section 245(1) of the *Sustainable Planning Act* 2009 (Q) ("SPA") provided at relevant times:-

> *"(1) A development approval –*
>
> *(a) attaches to the land the subject of the application to which the approval relates; and*
>
> *(b) binds the owner, the owner's successor in title and any occupier of the land."*

7. Section 580(2) of the SPA provided:-

> *"(1) A person must not contravene a development approval, including any condition in the approval.*
>
> *Maximum penalty – 1665 units."*

8. Section 601(1) of the SPA provided that a person may bring a proceeding in the Land and Environment Court of Queensland (a Court of limited jurisdiction):-

> *"(1)(a) for an order to remedy or restrain the commission of a development offence."*

9. The relevant "development approval conditions" delimit the way a "person" contravenes "a development approval" so as to commit "an offence" and demonstrates how the commission of that offence may be remedied or restrained.

10. The development approval in the instant case for subdivision of a lot into new lots 1 and 2 (granted by the Townsville City Council (Council) in May 2009) was subject to conditions stated in a schedule including that "unless explicitly stated elsewhere ... all requirements of the conditions of this approval must be satisfied prior to Council signing the survey plan". All the conditions were required to be satisfied before subdivision. The approved contemplated subdivision not development, building or other work.

11. There was no explicit statement to the contrary as the Court of Appeal found: Ct of App R 2. The Court of Appeal found the Council endorsed the survey plan with a certification that the Council approved the plan in accordance with the *Integrated Planning Act 1997* notwithstanding the easement did not comply with Condition 2:

12. The First Respondents contend:

(a) Part 7 IPA (the operative predecessor to the SPA) regulated approvals of plans of subdivision. Section 3.7.2(3) provided that the Council must approve plans (of subdivision) if the conditions of the development permit authorising the reconfiguration (subdivision) have been complied with or where a plan was non-complaint section 3.7.2(5) required the Council to give written notice to the applicant stating the actions to be taken to allow the plan to be approved;

(b) condition 2 (the subject of this appeal) required and only required the creation and registration of an easement benefiting the Appellant's land, as a condition of the subdivision approved by the Council. Section 50 of the *Land Title Act* 1994 (Qld) provided at material times relevantly that a plan of subdivision must (here) "have been approved by the relevant planning body". The Council approved the plan without notification under section 3.7.2(5) notwithstanding the easement did not comply and the land was subdivided.

13. Subsequent to subdivision the Appellants and Respondents became each the owner of one of the lots and subsequent to becoming owners fell into a dispute as to the use of the easement. The First Respondent offered a further easement, the Appellant declined it .

14. The appellant's application below seeking resolution of that dispute sought a declaration that condition 2 of the development permit "for land described as Lot 1 ..... has been contravened" and for an enforcement order directing the present respondent to comply with condition 2 ...." Ct of App R 4. It contended at trial that the First Respondents had contravened the development approval.

15. After a contested trial the primary judge declared that the first respondents had committed a development offence – the particulars of which was "not complying with the conditions of the development approval". The reasons given by the primary judge for that conclusion at para 110 (quoted at para 5 of the Court of

Appeal judgment) concern an unregistered easement and are not relied upon by the appellant here. Same were made absent any contention to that effect by either party.

16. The appellants depart from the contentions at trial by suggesting some other party not a party to the proceedings but a predecessor in title committed a development offence and it is the commission of that offence by others that empowered the primary Court to make the order made at first instance against the First Respondents. The appellant should not be allowed to raise that issue since as the Court of Appeal observed there was no finding about other contraventions made see Court of Appeal para 21 the evidence about it remains controversial.

17. The Court of Appeal addressed the live issue in the appeal before it namely at para 14 R whether there was any basis for finding that the First Respondents had committed the development offence - which the Court of Appeal took to be the First Respondents "failing to grant an additional easement (the terms of which are still unidentified) to be registered which burdened the Respondent's land and benefitted the appellant's land – Lot 2".

The Respondent's First Argument

18. The Court of Appeal was right to hold that the language of s.601(1) SPA which empowers the Land and Environment Court to make the orders sought empowers only the making of orders against persons who commit or propose to commit development offences: see para 21 Court of Appeal Reasons.

19. The language of s.123 of the Environmental Planning and Assessment Act 1979 (NSW) is, as the Court of Appeal observed, indistinguishable. The decision of this Court in Hillpalm Pty Ltd v Heaven's Door Pty Ltd is applicable. No ground for reconsideration of that decision is suggested. A reference to the dissenting judgments of Kirby J and Callinan J (at para 27 of the Appellant's outline) is not to the point.

20. The Applicant accepts or must accept that:

    (a) the Respondent did not commit a development offence; and

    (b) they cannot point to a finding that a development offence was committed by others.

21. The appeal in the First Respondent's submissions therefore fails.

The Respondent's response to the Appellant on the above issue

22. At paragraph 25 of the appellant's outline the appellant contends that the Court of Appeal was in error in holding that the power to make an enforcement order (as against the First Respondents) only arose upon the Court being satisfied that the First Respondents had committed a development offence.

23. The Court of Appeal found that there was no finding sought or made to that factual effect at first instance. No factual finding to that effect was sought in the Court of

Appeal. The only finding made at first instance was that the First Respondents had committed the offence – which the Appellants apparently do not now contend. Whether or not someone else had committed an offence was controversial and that controversy cannot be resolved in this appeal.

24. In any event for the reasons given in the Court of Appeal see para 21 namely that section 601(1)(a), 604(1), 605(1) SPA contemplate only orders the effect of which is to restrain a remedy the commission of an offence to against the person committing the offence, that is the proper construction of the provisions.

The First Respondent's second argument

25. Section 245 of the SPA provides that the terms of a development approval run with the land. That provision says nothing about the terms of particular approval. The Court of Appeal correctly found that s.245 SPA would have application here where the reconfiguration had yet to be completed and perhaps in other circumstances.

26. In the instant case the Court of Appeal reasoned at para 24 and the First Respondents' submit that the language of the development permit (as construed at para 1-2 of the Court of Appeal Judgement) made plain "that the only obligation to create an easement which was imposed by condition 2 was an obligation to register the easement described in condition 2 in conjunction with the survey plan and only as a condition of the simultaneous reconfiguration of the land into Lots 1 and 2". The language was not of a continuing obligation see para 24 Court of Appeal. That construction of the development approval was correct.

The Respondent's response to the Appellants contrary argument

27. The Appellants argument does not focus on the words of the development approval in issue. It assumes the effect of s 245 is to make every approval operate for an infinite period. That cannot be right of all approvals (as the re-enactment of the section 245 in the different terms of section 73 *Planning Act 2016* makes plain). It is not right of this approval.

28. The appellants argue that s.580(1) SPA must be read in combination with s.245(1) – they refer to in *Hillpalm* in the New South Wales Court of Appeal and *Wirkus v Wilson Lawyers* – an interlocutory decision of Lyons J at first instance.

29. Whether or not the terms of a particular development approval may result in a person other than an original proprietor contravening that approval, in this part of the Appellant's argument it is not the First Respondents who committed the development offence. There is no finding any other person committed an offence. Those observations thus do not support this appeal whatever the proper construction of the development approval.

30. The reference to Peat Flagstone in the Queensland Court of Appeal falls in the same category as above for the reasons given in the Court of Appeal recited at para 30(c) of the Appellant's outline. The approval in Peat Flagstone Limited was for

clearing of land. The land was cleared to the extent permitted. The contention was that a new registered proprietor could clear the land more intensively despite the permit not so providing and despite it having no other lawful authority to do so. Again this was a matter of the proper construction of the words of the approval in a context manifestly dissimilar to the present. The respondent has unlike Peat Flagstone no needs of further approval to own or occupy its land.

Para 31-32 Appellant's outline

31. It is not correct to say as per Para 31 of the appellant's outline that the approval here required or contemplated work. On the proper construction of this approval it required creation of an easement – prior to and in connection with the subdivision of land – the approval ran with the land since no matter whether the original proprietor or a successor in title sought to register a plan of subdivision (which it could only do with the approval of the Townsville City Council in any event), it could do so only in terms of the approval as modified by the Council which the Council did by approving the subdivision without compliance.

Para 33

32. The odd results the appellant points to as arising from the Judgment of the Court of Appeal are all examples of an original proprietor committing a development offence or of a condition having continuing effect ie. one not as found by the Court of Appeal in the instant case. The oddest result, adopting the Appellants case, is to accept creation of permanent unregistered provisions affecting land binding each proprietor of the land into the future that are all but undiscoverable upon searching and which might result in serious diminution in value of the land and open ended criminal responsibility. On the Appellants case that is achieved at best by a process of implication to reverse the plain terms of the development approval.

Part VII:

33. Not applicable

Part VIII: Estimate of Time for oral argument

34. The Respondents estimate that 1 hour will be required for the presentation of their oral argument.

DATED: 17 August 2017

D A Savage QC
Counsel for the Respondents