HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B64 of 2020

BETWEEN:

SUNLAND GROUP LIMITED ACN 063 429 532
First Appellant

AND

SUNLAND DEVELOPMENTS NO 22 ACN 164 903 011
Second Appellant

AND

GOLD COAST CITY COUNCIL
Respondent

RESPONDENT'S AMENDED SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES

2. On their proper construction, do conditions C13-16 (the **Conditions**) of a preliminary approval (the **Preliminary Approval**) for development on land at Mermaid Beach, Queensland (the **Land**) impose a legal obligation to pay infrastructure contributions in respect of future development on the Land?

3. Does the *contra proferentem* rule assist the construction of the Conditions?

4. (By the Notice of Contention) if, on their proper construction, the Conditions do impose an obligation to pay infrastructure contributions in respect of future development on the Land, is the Respondent (the **Council**) nevertheless obliged, by the later commencement of the *Sustainable Planning Act 2009* (Qld) (the **SPA**) and the *Planning Act 2016* (Qld) (the **Planning Act**), to issue infrastructure charges notices (**ICNs**) when approving development permits for development on the Land?

Part III: SECTION 78B NOTICE

5. No notice is required to be given under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: MATERIAL FACTS

6. Further to the matters stated at AS[9], by order of the Planning and Environment Court dated 16 June 2017[1] the Preliminary Approval was changed, as permitted by ss 367-377 of the SPA. The area of the Land was approximately 37 hectares.[2]

7. The Council agrees with the facts stated ~~in~~at AS[12] but, for the reasons addressed at paragraph 26 below, does not accept that the publication of up-to-date rates for the planning scheme policies enables the amount of the infrastructure contributions to be calculated at any time before a development permit is given.

8. Although the documents referred to at AS[15] speak for themselves, they are not relevant to the disposition of the issues in this appeal. They are letters from the Council post-dating the Preliminary Approval (by many years).

9. Further to the facts stated at AS[16a], although the ICNs issued by the Council under the SPA did not allow credits in accordance with the Conditions, Sunland accepts that credits were given,- although not as provided by the Conditions.[3]

10. The fourth and final sentences of AS[17] (commencing *"Despite this..."*) are controversial submissions as to the operation or effect of particular provisions of the SPA and the Planning Act. They are not accepted by the Council and are further addressed at Part VI below.

11. The Council does not accept the correctness of the statements at AS[19]. As to the first sentence, it is correct that the Council intends to levy further infrastructure charges, in respect of future development permits, without reference to the Conditions, but otherwise denies that the first sentence accurately states its position. As to the second sentence, the Council's primary position is that it intends to levy infrastructure charges on development permits without reference to the Conditions, because the Conditions did not impose infrastructure

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1 Respondent's Book of Further Materials [**RBFM**] pp. 6-69.
2 "The Lakes" Development Plan and Place Code. RBFM p. 43.4.
3 RBFM pp. 73-74 (Transcript of Proceedings, Planning and Environment Court 18 March 2019 T1-15 L40-T1-16 L4).

contributions on development on the Land.[4] Alternatively, if the Conditions do levy infrastructure contributions on development on the Land, the relevant provisions of the SPA and the Planning Act oblige the Council to issue ICNs in respect of development permits granted for development on the Land.[5]

Part V: ARGUMENT

Development Approvals

12. When the Preliminary Approval was given, the legislation in force was the *Integrated Planning Act 1997* (Qld) (the **IPA**).

13. The IPA distinguished between a *"preliminary approval"* and a *"development permit"*.[6] Although both types of approval were a *"development approval"*, the difference was that although a preliminary approval approved development, it did not authorise assessable development to occur. Only a development permit authorised assessable development to occur.[7] Later legislation has maintained the distinction.[8]

14. In consequence:

(a) notwithstanding a preliminary approval, assessable development cannot take place in the absence of a further application (or applications) for, and approval of, a development permit or permits;

(b) the utility of a preliminary approval is to override, to the extent permitted by the legislation, and to that extent modify, the operation of a local planning instrument (relevantly, a planning scheme) for a proposed development (typically, large scale or long-term developments);[9]

(c) by its operation, a preliminary approval affects the consideration of any subsequent application for a development permit that might be made;

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4 The issue identified at paragraph 2 above.
5 The issue identified at paragraph 4 above.
6 IPA s 3.1.5.
7 IPA s 3.1.5(1) and (3).
8 SPA s 241(1) and 243; Planning Act s 49.
9 IPA s 3.1.6, 3.5.14A; SPA s 242; Planning Act 350(3) and Schedule 1.

(d) by that means, a preliminary approval establishes the framework under which subsequent applications for development permits are to be assessed.

15. The Preliminary Approval illustrates the application of those principles.[10] Relevantly:

(a) Condition B1 recorded the Council's approval of variations to the planning scheme then in force. It stated that *"... pursuant to section 3.5.14A(1)(a) of the Integrated Planning Act 1997, approves all of the variations sought by the applicant, being those variations listed below..."*;[11]

(b) Condition C4 provided that *"the conditions of this Preliminary Approval shall establish the planning framework for future development on the site"* and that *"Future application for Development Permits pursuant to this Preliminary Approval shall be subject to the level of assessment set out in the Table of Development within the approved 'Lakeview at Mermaid Plan'"*;[12]

(c) Condition C5 stated that the Preliminary Approval *"... is not for the detailed design or layout of the development"* which *"... shall be determined following the submission of additional information with the future development applications"*;[13]

(d) Condition C7 provided that "*For any assessable development listed in the Table of Development for the* (plan of development) *the following applicable Development Permits will be required: Material Change of Use, Carrying Out Building Work, Carrying Out Operational Work, Reconfiguring a Lot*";[14]

(e) Condition C8 provided that "*Submission of metes and bounds to the satisfaction of the City of Gold Coast for each precinct prior to the issue of a Development Permit for Material Change of Use*".[15]

16. A development approval attaches to the land, and binds the owner, the owners' successors in title and any occupier.[16] A development approval has been described as operating in rem[17]

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10 For example, conditions B1, C3-9; Appellant's Book of Further Materials [**ABFM**] pp. 8-15.
11 ABFM p. 8.
12 ABFM p. 8.
13 ABFM p. 8.
14 ABFM p. 9.
15 ABFM p. 9.
16 IPA s 3.5.28; SPA s 245; Planning Act s 73

and as *"a consent to the world at large in relation to the land which is its subject"*.[18] A planning consent has even been described as *"... in some respects... equivalent to a document of title"*.[19]

17. A development approval is not a contract. It is an approval given by a local government in the discharge of its statutory functions. That has consequences relevant to construction. In *Westfield Management Ltd v Perpetual Trustee Company Ltd*[20] Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ held that the principles explained by Dixon J in *King Gee Clothing Co Pty Ltd v The Commonwealth*[21] and *Cann's Pty Ltd v The Commonwealth,*[22] not principles of the law of contract, apply to the construction of development approvals.[23]

10 18. Conditions of a development approval, including a preliminary approval, are legally enforceable. It is a development offence to contravene a condition of an approval.[24] Proceedings may be brought not only by a local government, but by any person, by way of prosecution for the imposition of a penalty for a development offence[25] and for enforcement orders.[26]

19. In consequence, the imposition of a condition *"... that is uncertain in the result that its application produces"* or that *"... involves some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment"*[27] is properly characterised as a failure to exercise the power, and the condition will not be effective to
20 impose any obligation.

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17 *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 504 [23] per Mason P (Stein JA and Giles JA agreeing).

18 *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 293.7; *Pike v Tighe* (2018) 262 CLR 648 at 659 [39].

19 *Ryde Municipal Council v Royal Ryde Homes & Anor* (1970) 19 LGRA 321 at 324.4 per Else-Mitchell J.

20 [2007] HCA Trans 367 T126 L5520 - T127 L5532.

21 (1945) 71 CLR 184 at 194-195.

22 (1945) 71 CLR 210.

23 Although the decision concerned the refusal of an application for special leave to appeal (from the decision of the New South Wales Court of Appeal in *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245), it has been referred to and applied since: by the New South Wales Court of Appeal in *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* (2009) 167 LGERA 395 at 423 [97]-[99] per Tobias JA (Young JA and Bergin CJ in Eq~~Q~~ agreeing); and *Cheetham v Goulburn Motorcycle Club Inc.* [2017] NSWCA83 at [18] per Basten JA (McColl JA and Sackville AJA agreeing).

24 IPA s 4.3.3;~~.~~ SPA s 345;~~.~~ Planning Act s 65(1).

25 IPA Part 3 Div 4; SPA s 601; Planning Act s 180(1).

26 IPA Part 3 Div 5; SPA s 604; Planning Act s 180(2).

27 *Cann's Pty Ltd v The Commonwealth* (1945) 71 CLR 210 at 228.1 per Dixon J; *King Gee Clothing Co. Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 197.5-7 per Dixon J.

Sunland's submissions

20. First, Sunland's criticism of the alleged failure of the Court of Appeal to have regard to its submission as to the operation of the Conditions[28] should be rejected. The criticism requires an explanation, which is revealed by a review of the course of the submissions in the Planning and Environment Court and the Court of Appeal.

21. In the Planning and Environment Court Everson DCJ concluded, as to the proper construction of the Conditions, that:[29]

> "[11] … the infrastructure conditions were in mandatory terms. Each contribution was obliged to be paid at a clear point in time (at the time application is made for a development permit). Each contribution is to be calculated in accordance with identified Planning Scheme Policies at the rates current at the due date of payment. …" (emphasis added)

22. In the Court of Appeal the Council submitted that the Conditions should not be construed as levying infrastructure contributions and submitted, with respect to the conclusions at first instance noted above, that:

> "[15]…
>
> (d) There was no rational reason to fix the date of calculation, or the date of payment, as '… the time application is made for a Development Permit'. That construction, which was adopted by his Honour, potentially worked considerable unfairness to each of the Council and Sunland, for the obvious reason that there could be no assurance that any future application for a development permit would be approved in terms identical to the application."[30] (emphasis added)

23. In response, Sunland defended the primary judge's conclusion, submitting:

> "[16]…
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> (c) as to paragraph 15(d), there is no irrationality in the Infrastructure Conditions providing for the calculation or payment of infrastructure contributions at the time at which application is made for a Development Permit. The fact that another time could have been identified does not mean the conditions are not operative. …"[31] (emphasis added)

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28 AS[45].
29 [2019] QPEC 14 at [11]; CAB p. 11.
30 Council's Amended Outline of Argument in Court of Appeal. RBFM at p. 77.
31 Sunland's Response Submissions. RBFM at pp.77-78.

24. In its oral submissions, Sunland confirmed its position that *"... the obligation to make the payment is one which applies when you apply for a development permit"*.[32] Although alternative possibilities as to the meaning of *"due date of payment"* were canvassed[33] Sunland did not depart from its primary submission. Implicit in its oral submission to the Court of Appeal, and explicit in its written submission, is its position that the infrastructure contributions it submits are imposed by the Conditions are, at the least, required to be *calculated* at the time at which application is made for a development permit.

25. Plainly, it was that submission that McMurdo JA had in mind at COA RJ [25].[34] Even if his Honour's specific reference to *"paid"* and *"payment"* are ignored, the substance of the point remains: to construe the Conditions as imposing a legally enforceable obligation on Sunland to pay infrastructure contributions calculated before the outcome of its application for a development permit was known is (at least) *"remarkable"* for the reasons given at COA RJ [25]-[26][35] and as ~~discussed above~~ pointed out in these submissions.

26. There was no rational reason to fix either the date of calculation, or the date of payment, of the infrastructure contributions, as *"... the time application is made for a Development Permit"*. McMurdo JA was correct to reject it. That is because:

(a) the amount of the infrastructure contributions payable was not capable of quantification as at the date of application for a development permit. The amount of the contributions could be determined only if and when a development permit was given;

(b) there is no apparent reason for prescribing the date of making an application for a development permit (as distinct from the date of approval of an application for a development permit) as the date at which to calculate the amount of the contribution payable;

(c) that is consistent with condition C4 of the preliminary approval which confirmed that its utility was to *"establish the planning framework for future development on the site"* and with condition C5, confirming that it was not for the detailed design or

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32 ABFM p. 44 (T1-25, L16-17).
33 ABFM p. 44 (T1-24, L19-26)
34 Core Appeal Book [**CAB**] pp. 37-38.
35 CAB pp. 37-38.

layout of the development, which was to be determined following provision of further information and future development applications;

(d) those conditions confirm what is otherwise apparent, namely, that the Preliminary Approval did not (and could not) include the specific level of factual detail (for example, with respect to residential density and height, the mix of residential and commercial uses, and the like) required to calculate the infrastructure contributions generated by the approval of an application for assessable development;

(e) the purpose of the Conditions was to notify the developer of its future obligations in respect of infrastructure contributions (in consequence of the giving of development permits in the future).

27. Secondly, and moreover, part of the relevant statutory context is s 6.1.20(4) of the IPA. Aas at the date of the Preliminary Approval, s 6.1.20(4) provided that planning scheme policies would cease to have effect as of 30 June 2008 (or a later date nominated by the Minister). The Preliminary Approval applied to a large area of land (approximately 37 hectares) and had a currency period of four years. There was no reason to expect that the planning scheme policies identified in the Conditions would still be in force at such future dates as development permits were approved, and there is no reason to attribute to the Council an intention to *"entrench"* the planning scheme policies referred to in the Conditions, regardless of the number of years over which development might take place on the Land and regardless of the changes to be introduced to the statutory regime for the levying of infrastructure contributions in the future.[36]

The contra proferentem rule

28. Thirdly, Sunland's new reliance on the *contra proferentem* rule so as to place *"the least burden"* on it[37] should be rejected both in principle and in its practical application, as should its submission that the Conditions should be construed *"against the approving authority as the drafter of the condition"*.[38]

29. Sunland's submissions do not establish why the rule should be taken to apply to the construction of planning consents. Its application would be contrary to the statements of

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36 City Plan for the City of Gold Coast (2016).
37 AS[42].
38 AS[31].

principle in the cases referred to and noted at paragraph 17 above.[39] That characterisation is sufficient to exclude the operation of the rule.[40] But even if the rule is applicable in principle, it does not assist Sunland in its application:

(a) the *"confused nature"* of the rule has been well recognised.[41] If the application of the rule causes the Conditions to be construed *"against the interests"* of the Council, it must surely produce the result that the Conditions are not effective to impose any obligation on Sunland;

(b) unsurprisingly it is often described as *"the last resort in construction"* or by words to similar effect;[42]

(c) further, if the rule favours a construction against the interests of the person for whose benefit the conditions are inserted, the same result as for subparagraph (a) follows. That is because it is Sunland who is claiming the *"benefit"* of the Conditions – it is Sunland, not the Council, that asserts the Conditions create binding obligations;

(d) finally, the inference is readily available that the reason Sunland contends that the Conditions should be construed *"against"* the Council is because subsequent legislative changes ~~had~~ have been disadvantageous to it. But the construction of the Conditions, and the application of the rule, cannot depend on the incidence of subsequent events including, relevantly, legislative changes. Were it otherwise, different outcomes could result, depending on the occurrence, timing and effect of subsequent events.

Other principles of construction relied on by Sunland

30. Fourthly, Sunland otherwise states the principles of construction in the event of ambiguity too widely.[43] Although it is correct that in *Matijesevic v Logan City Council*[44] Connolly J

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39 On balance, the features of a development approval referenced at paragraphs 14, 16 and 17 above satisfy the requirements of the definition of *"statutory instrument"* in the *Statutory Instruments Act 1992* (Qld), s 7.

40 *Insurance Commission (WA) v Container Handlers Pty Ltd* (2004) 218 CLR 89 at 122 [98]-[99] per Kirby J; *Lange v Queensland Building Services Authority* [2012] 2 Qd.R. 457 at 466 [53]; *Brown v Petranker* (1991) 22 NSWLR 717 at 722 B-G.

41 *North v Marina* [2003] NSWSC 64 at [56]-[72] per Campbell J; *Ferella v Otvosi* (2005) 65 NSWLR 101 at 108 [21] per Hamilton J.

42 For example, *Western Australian Bank v Royal Insurance Co.* (1908) 5 CLR 533 at 554; *Johnson v American Home Assurance Co.* (1998) 192 CLR 266 at 274-275; *Insurance Commission (WA) v Container Handlers Pty Ltd* (2004) 218 CLR 89 at 122 [97]-[98]; *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* (2013) QCA 183 at [38]; *Brighton v Australia and New Zealand Banking Group* [2011] NSWCA 152 at [99].

observed, obiter, that *"... it would accord with principle, where planning approvals are ambiguous, to construe them in the way which places the least burden on the landowner"*, the more accurate statement of principle is that of Else-Mitchell J in *Ryde Municipal Council v Royal Ryde Homes*[45] that:

> "Any lack of clarity or certainty is the responsibility of the council and it must take the consequences of any failure to specify accurately or in detail what is consented to as well as any conditions to which a consent is subject."

31. It is that statement of principle that has received predominant judicial endorsement.[46]

32. Once again, regardless how the guiding principle is formulated, it is of no assistance to Sunland. That is because, applying the words of Connolly J in *Matijesevic,* the construction of the Conditions *"in the way which places the least burden on [Sunland]"* must surely be that they are not effective to impose any legally enforceable obligation on it to pay infrastructure contributions. So, too, if the principle as formulated by Else-Mitchell J applies.

33. In the result, none of the principles called in aid by Sunland supports the constructions of the Conditions for which it contends. The Conditions are to be construed, informed by the considerations referred to at paragraphs 14-19 and 26-27 above.

34. Fifthly, it is evident that Sunland's classification of the wording of the Conditions as being in *"mandatory language"*[47] begs the question. The words *"shall"* and *"will"* are as apt to refer to future intention as they are to immediate obligation. The classification of words of that nature is the end of the enquiry, not the beginning.[48] The correct meaning to be given to the words will depend on the wording of the provisions; the context, including the statutory context, in which they appear;[49] and the *"objective circumstances"*.[50] For the reasons already given, the words are not to be construed as being in *"mandatory language"*.

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43 At AS[31] and [42].

44 [1984] 1 Qd.R. 599 at 605.

45 (1970) 19 LGRA 321 at 324.4.

46 For example, *Mossman Municipal Council v Denning* (2002) NSWLEC 227 at [8] per Lloyd J; *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* (2009) 167 LGERA 395 at 422 [95]. Cf. *Mariner Construction Pty Ltd v Maroochy Shire Council* [2000] QPELR 334 at 336 [16]; *Hawkins & Izzard v Permarig Pty Ltd & Brisbane City Council* [2001] QPELR 414 at 416 E-G.

47 AS[23], [44]-[45].

48 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93] per McHugh, Gummow, Kirby and Hayne JJ.

49 The contemporary approach to statutory interpretation is illustrated by *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14], 375 [38]-[39]; *Taylor v Owners-Strata Plan No. 11564* (2014) 253 CLR 531 at 557 [66]; *R v A2* (2019) 93 ALJR 1106 at 1117 [33]-[34].

35. Sixthly, ~~and in addition, (notwithstanding the allegedly *"mandatory language"*[51] of the Conditions and that the making of an application for a development permit *"enlivens the obligation to make an infrastructure contribution"*[52])~~ Sunland acknowledges that the Conditions *"do not clearly stipulate what the due date for payment is to be"*[53] but submits that the Conditions *"contemplate"* a *"due date for payment"* which *"might be"* the date *"when, or a reasonable time after the date when, the Council calculates and requests or demands the payment"*.[54] The submission is confronted by a number of difficulties – ultimately insurmountable – namely:

(a) its submission is that it becomes subject to a legally enforceable obligation to pay infrastructure charges as at the date on which it applies for a development permit. Yet the amount of the infrastructure charges the subject of that obligation is, then, not known.[55] The fact that rates under the planning scheme policies continue to be published does not assist Sunland. The rates are one integer of the calculation. The other (in the case of water and sewerage infrastructure, for example) is the number of ETs.[56] Until the number of ETs is known, the amount of the infrastructure contributions is not capable of being calculated. So, although it may be correct to say that *"... the current rates for those policies can be readily determined"*[57] it is not correct to infer that the amount payable can be determined. It necessarily follows that, even accepting Sunland's submission, the Conditions cannot be effective to levy infrastructure contributions. They do not satisfy the requirement for certainty explained by Dixon J in *King Gee Clothing Co. Pty Ltd v The Commonwealth*[58] and

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50 *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 at [41]; *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* (2009) 167 LGERA 395 at 423 [100].

~~51 At AS[23] and [44]a.~~

~~52 At AS[42].~~

53 At AS[42].

54 At AS[44]c and [44]d.

55 For the reasons noted at paragraph 26 above.

56 Equivalent Tenement (ET) is defined in PSP 3A, s 13.0 in AS Annexure A as *"... a property based in it of measurement used to indicate infrastructure demand for the property. The demand from each property is related to the type of development allowed on the property with a detached dwelling on a standard residential lot being 1 ET. Other residential developments such as flats/units/villas are usually rated at lower ET per dwelling"*.

57 AS[12].

58 (1945) 71 CLR 184 at 197.5-197.7.

Cann's Pty Ltd v The Commonwealth[59]. In the words of Dixon J[60] *"... the power [to levy infrastructure contributions] has not been pursued and is not well exercised"*[61];

(b) further, as is implicit in Sunland's submissions, the identification of a *"due date of payment"* under the Conditions is too elusive to enable a date to be attributed as a matter of construction. Insofar as Sunland's submission infers that a *"reasonable time"* for payment may be implied,[62] that cannot be accepted: *Westfield Management Ltd v Perpetual Trustee Co. Ltd.*[63] Insofar as its submission canvasses alternative possibilities as to the due date of payment,[64] it acknowledges that it is not possible to identify that date as a matter of construction. As a matter of construction, the wording of the Conditions does not permit a certain date to be identified. It must follow that the Conditions lack the certainty necessary to *"unambiguously"*[65] create a legally enforceable obligation;

(c) Sunland finds itself in the same position as was the developer in *Gough & Gilmour Holdings Pty Ltd v Council of the City of Holroyd*,[66] in respect of which Talbot J distinguished *Ryde Municipal Council* (1970) 19 LGRA 321 ~~v~~ and *Matijesevic* [1984] 1 Qd.R 599 on the basis that the Court was not being asked to resolve ambiguity but rather, to *"add that which has been omitted"*. His Honour refused, stating *"it is not for the Court in class four proceedings to infer an agreement between the parties or to imply a term as if it was part of a bi-lateral transaction"*. *Gough & Gilmour Holdings* at [19];

(d) for completeness;

(i) the *contra proferentem* rule does not assist Sunland. It is not a vehicle for the implication of a term, and it cannot otherwise provide a means of satisfying an

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59 (1945) 71 CLR 210 at 228.1.
60 *King Gee Clothing Co. Pty Ltd v The Commonwealth* (1945) 184 CLR at 197.8.
61 The wording of the Conditions is to be contrasted with that of the conditions considered in *Mt. Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd.R 347 at 352 Ll15-25, which did satisfy the test in *King Gee Clothing Co*: *Mt. Marrow* at 353 Ll30-40.
62 AS[44]c.
63 [2007] HCA Trans 367 at T126 L5520 - T127 L5532; *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* (2009) 167 LGERA 395 at 423 [97]-[99].
64 AS[44]c.
65 COA RJ [25]. CAB p. 38.
66 [2002] NSWLEC 108.

otherwise fruitless search for a date, time or event sufficient to confer the certainty necessary for Sunland to succeed;

~~(e)~~(ii) the context in which the Conditions appear emphasises the significance of their failure to identify a date, or event, by which the alleged obligation to pay infrastructure contributions is to be satisfied. Each of the other conditions that do impose an obligation do identify an event, or time, by which the obligation is to be satisfied.[67]

Sunland's other submissions

36. As to the further points raised in Sunland's submissions:

(a) it is correct that the Conditions were not included in that part of the Preliminary Approval entitled *"General Advice"*.[68] Perhaps they should have been, given their purpose.[69] But that is a matter of form rather than substance, as the meaning to be attributed to the Conditions turns on their construction, not the label attaching to them. For the reasons given above, the approach adopted by the Court of Appeal was neither *"unconventional"* nor incorrect.[70] And the submission that the Court of Appeal construed the Conditions *"as something other than conditions"*[71] takes the matter no further;

(b) similarly, the fact that the Conditions are identified as *"conditions"*[72] neither determines, nor influences, their construction;~~.~~

(c) there is no issue that s 6.1.31(2)(c) of the IPA authorised local governments to impose conditions on development approvals requiring contributions towards the cost of supplying infrastructure.[73] But that is not the point. It did not *require* a local government to impose such conditions. Further, the failure of the Court of Appeal to expressly refer to that provision[74] is of no consequence. The Court of Appeal comprehensively reviewed the legislative provisions concerning the imposition of the

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67 For example, conditions C17, C20, C24, C27-C35, C37-C39, C41, C43, C50-C56. ABFM pp. 17-25.
68 AS[22].
69 Paragraph 26(e) above.
70 As asserted at AS[25].
71 AS[46].
72 AS[22], [46].
73 AS[23].
74 AS[48].

infrastructure charges.[75] Its failure to refer to that provision is simply a reflection that it did not consider it relevant. Because there was no dispute that the Council had the *power* to impose such a condition, the question of construction was whether it had exercised that power. The Court of Appeal held that it had not. Finally, although no provision of the IPA expressly authorised the inclusion of a condition notifying to the effect that an infrastructure contribution would be required in respect of the future approval of development permits,[76] neither did any provision of the IPA prohibit it;

(d) it is wrong to characterise the construction adopted by the Court of Appeal as rendering the Conditions *"defunct"*.[77] The term implies that the conditions were once operative, but have ceased to be so. But they continue to have utility as described at COA RJ [26];

(e) the point raised at AS[50b] is of no consequence. It does not assist in determining whether, on their proper construction, the Conditions levied infrastructure contributions.

37. In the result, Sunland's submissions fail to demonstrate any error by the Court of Appeal. The issues identified at paragraphs 2 and 3 above should be answered 'No~~Yes~~' ~~and 'No' respectively~~.

Part VI: THE RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION

38. Sunland's case fails because the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* (Qld) (**2011 Amending Act**) (and later, the Planning Act) oblige the Council to issue ICNs when approving development applications for a development permit. In summary:

(a) under IPA, infrastructure contributions were initially calculated by reference to planning scheme policies made by local governments, and were levied by conditions imposed on development approvals. As at the date of the Preliminary Approval, the

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75 COA RJ at [15]-[57]. CAB pp. 35-45.
76 AS[49], [50a].
77 AS[26].

IPA stated that the power to prepare a planning scheme policy for infrastructure would expire on a stipulated date, which was later extended by gazette notice;[78]

(b) the IPA also provided for the introduction of a new regime for levying infrastructure charges.[79] The new regime provided for infrastructure charges to be levied by ICNs issued by local governments (rather than by conditions attaching to development approvals);[80]

(c) upon the commencement of the SPA on 18 December 2009, the Preliminary Approval was taken to be a preliminary approval under SPA s 242;[81]

(d) also, upon its commencement, the SPA stipulated a date for the expiration of planning scheme policies;[82]

(e) the transition towards the new regime was recognised by the SPA (SPA s 347) and later mandated by amendments to the SPA effected by the 2011 Amending Act which commenced on 6 June 2011;

(f) the 2011 Amending Act introduced s 648F (later renumbered to s 635). Section 635 of the SPA relevantly provided to the effect that if a development permit has been given and an adopted charge applies for providing trunk infrastructure for the development "*the local government must give the applicant an infrastructure charges notice*";

(g) the 2011 Amending Act also amended the SPA by inserting s 880. Importantly, s 880(2)(b) expressly prohibited local governments from imposing conditions under planning scheme policies of the type referred to in each of the Conditions. Section 880(3)(b)(ii) provided that sub s (2) did not stop local governments collecting infrastructure contributions payable under conditions lawfully imposed under a planning scheme policy;

(h) the Planning Act commenced operation on 3 July 2017. Section 119 of the Planning Act continued the regime for the levying of infrastructure charges established by the

78 IPA s 6.1.20.
79 IPA ss 5.1.3 and 5.1.5.
80 IPA s 5.1.8.
81 SPA s 808.
82 SPA s 847.

2011 amendments to the SPA. Relevantly, s 119 of the Planning Act was materially identical to s 635 of the SPA. It provided to the effect that if a development permit has been given and an adopted charge applies to providing trunk infrastructure for a development "*the local government must give a notice* (an infrastructure charges notice) *to the applicant*"; and

(i) the transitional provisions included s 286. Section 286(1) and (2) of the Planning Act provided, in effect, that a preliminary approval under the repealed the SPA continues to have effect according to its terms and conditions even if they could not be imposed under the Planning Act.

10 39. The Queensland Court of Appeal has consistently recognised[83] that s 635 of the SPA imposes an obligation on local governments to levy infrastructure charges by giving an ICN to an applicant after approval of a development permit and that the obligation is unqualified.

40. By the amendments introduced by the 2011 Amending Act, any infrastructure charges now levied in respect of development the subject of a development permit must be levied in accordance with the requirements of that statutory regime, not the earlier regime that prevailed under the IPA.

41. Sunland relies on s 880(3)(b)(ii) of the SPA[84] to avoid the conclusion that an ICN must be issued pursuant to s 119 of the Planning Act. However, that provision does not operate as Sunland submits.[85]

20 42. The provision is not to the effect that a local government that issues a development permit to which ss 347, 635 and 880(2)(b) of the SPA applies may (let alone must) ignore the requirements imposed by those provisions.

43. The provisions operate harmoniously. Section 880(3)(b)(ii) permits local governments to collect infrastructure contributions payable under conditions lawfully imposed on development approvals under the previous regime. But that is not this case: in this case, there can be no assessable development of the land absent a development permit.

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83 *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2017] 1 Qd.R 13 at 33 [46]; *Gold Coast City Council v Sunland Group Ltd* (2019) 1 QR 304 at [98], [100], [140] and [141]; *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191 at [17].

84 AS[37].

85 AS[38].

44. In the result, although s 880(3)(b)(ii) does permit local governments to continue to collect infrastructure contributions in the circumstances to which it applies, it does not authorise local governments to ignore their obligation to issue ICNs for infrastructure charges in relation to development permits approved under the SPA.

45. Similarly, with respect to development permits that may be approved under the Planning Act, because the Planning Act continues the infrastructure charges regime mandated by the amendments to the SPA effected by the 2011 Amending Act, s 286 of the Planning Act does not produce a different outcome. Like s 880(3)(b)(ii) of the SPA, it operates according to its terms until such time as it is overtaken by the subsequent approval of a development permit.

46. Under the Planning Act, such an approval also enlivens an obligation by a local government to issue an ICN which, in turn, prevails over a earlier preliminary approval.

47. In the circumstances, even if, contrary to Council's primary submission, the Conditions did levy infrastructure contributions, the 2011 Amending Act (and now the Planning Act) obliges the Council to issue an ICN in respect of a development permit given subsequent to the Preliminary Approval.

48. That statutory obligation prevails over conditions imposed in the Preliminary Approval.

49. Sunland acknowledges that when the conditions stated in s 119(1) of the Planning Act are satisfied, the Council is obliged to give an ICN, and that, once given, the charge imposed by the ICN is the source of the obligation to pay infrastructure charges.[86] But it submits that the requirement stated in s 119(1)(b) is not satisfied in the circumstances of this case and, alternatively, that if there is conflict between s 119 and s 286, s 286 would prevail as the more specific transitional provision.[87]

50. The first submission should not be accepted. The concurrent operation of s 119 and s 286 has the consequence that (assuming the construction of the Conditions is resolved in Sunland's favour), it would be obliged to pay infrastructure contributions in accordance with the identified planning scheme policies, but entitled to have the amount of those contributions taken into account when determining the amounts payable under ICNs given under s 119(2).

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86 AS[57].
87 AS[58] and [53].

51. There is no basis for reading in the limitation contended for by Sunland.[88] No such limitation appears on the face of s 119(1)(b), nor is such a limitation called for in the context of the broader scheme of the legislation. The Preliminary Approval is overtaken by a subsequent development permit, and it is that which engages the operation of s 119.

52. Further, there is no basis for treating s 286 as the more specific provision. It is s 119 that addresses the specific subject matter of levying charges and the obligation of a local government to give an ICN in consequence of a development approval. Although s 286 addresses transitional provisions, it is but one of a number of sections in Chapter 8, Part 1, Division 2 which is entitled "General Provisions", and which address a variety of topics. For the reasons addressed above, even if it be accepted, in Sunland's favour, that a further application for a development permit would trigger a requirement to perform an obligation imposed by the Conditions to pay infrastructure contributions, it does not follow that the Council is relieved of the obligation (and denied the entitlement) to give an ICN as provided for by s 119(2). As noted above, that obligation is triggered by the giving of a development permit, not the making of an application for such permits.

53. The issue identified at paragraph 4 above should be answered "Yes".

Part VII: TIME ESTIMATE

54. The Respondent estimates that approximately two hours will be required for the presentation of its oral argument.

Dated: ~~12~~14 January 2021

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88 AS[58].

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B64 of 2020

BETWEEN:

SUNLAND GROUP LIMITED ACN 063 429 532
First Appellant

AND

SUNLAND DEVELOPMENTS NO 22 ACN 164 903 011
Second Appellant

AND

GOLD COAST CITY COUNCIL
Respondent

ANNEXURE A
CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

Legislation	Version
Queensland	
Integrated Planning Act 1997 (Qld), ss 3.1.5, 3.1.6, 3.5.14A, 3.5.28, 4.3.3, 5.1.3, 5.1.5, 5.1.8, 6.1.20, 6.1.31(2)(c) and Chapter 4 Part 3 Divs 4 and 5.	Reprint No 10A
Planning Act 2016 (Qld), ss 49, 65(1), 73, 119, 180, 286, 350(3) and Schedule 1.	Reprint as at 9 May 2018
Statutory Instruments Act 1992 (Qld), s 7.	Reprint as at 1 January 2021
Sustainable Planning Act 2009 (Qld), ss 241(1), 242, 243, 245, 345, 347, 367-377, 601, 604, 635, 808, 847 and 880.	Reprint as at 19 May 2017
Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011 (Qld).	As enacted 6 June 2011
Gold Coast City Council – Planning Scheme Policy 3A – Water Supply	From Scheme Version 1.1 Amended January 2007
City Plan for the City of Gold Coast (2016)	As commenced 2 February 2016