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# Fletch Pty Ltd v. Gladstone Regional Council & Anor [2010] QPEC 63 (29 July 2010)

Last Updated: 4 August 2010

[2010] QPEC 63

PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

P & E Appeal No 325 of 2008

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|---|---|
| FLETCH PTY LTD | Appellant |
| and<br>GLADSTONE REGIONAL COUNCIL & ANOR | Respondents |

BRISBANE

..DATE 29/07/2010

ORDER

CATCHWORDS

Judiciary Act 1903 (Cth), s 78B

Integrated Planning Act 1997, s 4.1.23(2)(b) and generally
Sustainable Planning Act 2009, s 457

Developer appeal against refusal of application for material change of use - by interlocutory application, appellant seeks "full approval of its development application", alternatively removal of the appeal to the Federal Court (as having jurisdiction) - Commonwealth and State Attorneys-General rejected or did not respond to notices of an alleged constitutional matter - no such matter or issue clearly identified - arguments that planning controls were unconstitutional, as inconsistent with landowners' common law rights, untenable in light of High Court authority - appellant ordered to pay costs of its application - appeal to proceed to hearing in the usual course.

HIS HONOUR: This is an appeal commenced on the 23rd of December 2008 in which the appellant complains of the Council's rejection of its application for a development application seeking a material change of use for visitor accommodation and a caretaker's residence, essentially a caravan park which was going to add a residential component to an existing tourist related facility.

The application before the Court today was filed only last Monday. It seeks that the Court "grant full approval of

development application," and if not that it remove the proceedings to the "Federal Court, under notice of constitutional matters 78B of the Judiciary Act 1903 and have these matters heard by a Court of competent jurisdiction for such matters."

The appellant is represented by Mr Fletcher, an officer of it. He has taken the steps contemplated by section 78B which might have attracted the interest of Attorneys at Commonwealth and State level.

The only positive responses, indicating a lack of interest in becoming involved, are from the Commonwealth Attorney and the Attorneys of South Australia and Western Australia. As Mr Fletcher says, the others have had ample time to express an interest. It's reasonable to assume they have none. The respondent Council, represented by Mr Job, resists the granting of the primary relief sought in the application which, in the circumstances, one would expect to follow, if it's to occur at all, a conventional hearing on the merits.

So far as the constitutional issue is concerned, Mr Job says, not surprisingly, that he's not prepared to meet it today; indeed, his proposal was that directions be given requiring Mr Fletcher to provide particulars to clarify what his point is. He contemplated a hearing at a later date.

In my opinion the Court ought to deal with the supposed (totally undefined) constitutional issue now rather than put the parties to the additional trouble and cost which a deferred determination would necessarily involve. There's a public interest in limiting the Council's exposure to costs and Mr Fletcher has complained of the extent of costs that the appellant has been exposed to already.

The application has attached to it a large number of documents which, in my view, make it clear that the principal

point Mr Fletcher is running is inconsistency with the appellant's rights as a fee simple owner of the planning controls administered by the respondent Council. That argument which is one of a kind that finds favour in many quarters, although, effect cannot necessarily be given to it: see per Callinan J in Chang v Laidley Shire Council [2007] HCA 37; [2007] 234 CLR 1 at 35.

The point, for purposes of this Court, in my view, must be regarded as determined against what might be called the common law rights or interests of a land owner by Bone v Mothershaw [2002] QCA 120; [2003] 2 Qd R 600. The High Court refused special leave to appeal from Court of Appeal's decision in B29/2002 [2003] HCATrans 829 (25 June 2003).

I have the advantage of having participated in that litigation at District Court level – see [2001] QDC 255. As it happens I was the Judge of this Court involved in Chang, which seems to me a case which has no particular relevance here. I participated, too, in the saga of litigation between Milmerran Shire Council and Mr Smith, which has been before this Court on many occasions; see [2008] QPEC 73; [2009] QPLR 193, where a number are collected and the Court of Appeal's determination at [2009] QCA 103. This is not the only outing the parties had in the Court of Appeal.

At [2005] QDC 372 I rejected Mr Smith's contention that the Integrated Planning Act 1997 had no application and that the rights of a fee simple owner of land justified construction without any approval or permit being obtained. Judge Quirk had already rejected Mr Smith’s constitutional challenges to the IPA at [2003] QPEC 068.

I've had the opportunity to consider arguments of the same general kind on other occasions including in the District Court at Mackay: Boulton v Whitsunday Shire Council, Appeals 6 and 7 of 2003, 20 October 2003: [2003] QDC 576. This involved contentions that for constitutional reasons local government rates could not be levied and/or could not be sued

for in the District Court of Queensland.

I've had to deal with similar arguments in other proceedings (some listed in Boulton) and thus I feel some confidence in expressing the view that they are untenable.

The appellant should not be concerned that I am rejecting its case out of hand, without consideration of its merits. The appellant has been represented by two different law firms in the appeal. It is now self-represented, with recourse, the Court is told, to “other” advice and assistance. The arguments that may be about to be raised may be a revelation to Mr Fletcher, but they are not novel to the Court.

It's not just the fee simple point that Mr Fletcher wants to ventilate, basing himself on the electorate's rejection of a proposal to recognise local government in the Commonwealth Constitution.

Mr Fletcher is apparently contending that the whole notion and panoply of local government is somehow insupportable. That is an indefensible interpretation to put on the failure of the referendum. Local government existed long before the Commonwealth of Australia and its Constitution were ever imagined. The failure of the referendum about local government does not generate “a matter arising under the Constitution as involving its interpretation” for purposes of s 78B.

Local government is a creature of State law in fields where, for relevant purposes, the States have been and continue to be sovereign. What local governments such as the respondent Council do is done as the relevant emanation of State sovereignty.

Mr Fletcher presents no case which gives the Court pause to contemplate that there is any constitutional issue here for purposes of section 78B. In my opinion that provision imposes no restraint upon this Court's determining the appeal. The appellant should not be offered an opportunity to clarify or refine its "points". I note that in the High Court special leave application referred to, the presiding Judge, McHugh J, observed that the applicant was seeking to dispute the powers of the Queensland Parliament to enact certain provisions of the Local Government Act. His Honour said there were no prospects of success on that ground.

It's not possible to say that the observation is directly relevant for present purposes but it's enough to give me confidence, as I said, that there is no constitutional issue here.

There's an odd tension in Mr Fletcher's application between the two heads of relief it contains. One would have thought that, if there were anything in any point about impotence of a local Government to have a say in land use matters, there'd be no point whatever, in the Court presuming to grant a development approval on the basis that that's what the local government ought to have done. It strikes me as absurdity to assert that a local government is bound to rubber stamp development applications like the appellant's without any enquiry.

In my opinion, this appeal ought to retain its place in the list to permit the appellant to advance it towards a conventional determination on the merits.

The application filed the 26th of July 2010 is dismissed.

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HIS HONOUR: There's some contention about the Council's application for costs, as to whether that application which it seems to me can be supported under section 4.1.23(2)(b) of the Integrated Planning Act 1997 or the corresponding section 457(2)(b) of the Sustainable Planning Act 2009 ought to be reserved or determined now.

Mr Fletcher favours the former course which I had originally proposed; however Mr Job draws my attention to communications within the last couple of days which have the Council, by solicitors, placing Mr Fletcher on notice that the view was taken that the provisions just referred to were pertinent and that the Council was likely to seek costs in the circumstances rather than reserve costs to trouble a Judge on another day.

It is appropriate to order that the appellant pay the respondents' costs of the application filed on the 26th of July 2010 to be assessed.

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