

3/2018

Decisions delivered as a Planning & Environment Sessional Member of VCAT:

- [*Chellappah v Monash CC \[2018\] VCAT 1068*](#)
Section 77 [*Planning and Environment Act 1987*](#) – variation of a restrictive covenant- Clause 52.02 Monash City Planning Scheme – Construction of two dwellings – [*Section 60\(5\) Planning and Environment Act 1987*](#) – beneficiaries to the covenant – detriment as a consequence of variation of covenant
- [*Omerogullari v Kingston CC \[2018\] VCAT 1020*](#)
Section 82 review under the [*Planning and Environment Act 1987*](#); Kingston Planning Scheme; two dwellings; General Residential Zone 2, calculation of garden area, amenity impacts; effect of adverse possession claim
- [*Farah v Boroondara CC \[2018\] VCAT 726*](#)
Section 79 review under the [*Planning and Environment Act 1987*](#); Boroondara Planning Scheme; Two dwellings, Neighbourhood Residential Zone Schedule 3, bulk and building form, minimal change, preferred neighbourhood character
- [*Kapitany v Casey CC \[2018\] VCAT 615*](#)
Section 97P [*Planning and Environment Act 1987*](#) – [*Section 97N\(1\)\(a\) Planning and Environment Act 1987*](#) – Certificate of Compliance – use of land for warehousing and storage of, and retail sale of, rocks, minerals, fossils and like items – Sufficiency of evidence
- [*OP Robinson Pty Ltd v Boroondara CC \[2018\] VCAT 379*](#)
Section 77 of the [*Planning & Environment Act 1987*](#); Boroondara Planning Scheme; General Residential Zone; Eighteen townhouses; Building bulk; Vehicle access from ROW; Removal of tree
- [*Aleksov v Glen Eira CC \[2018\] VCAT 391*](#)
Section 77 [*Planning and Environment Act 1987*](#) – removal of a restrictive covenant – Clause 52.02 Glen Eira Planning Scheme – Section 60(5) [*Planning and Environment Act 1987*](#) – beneficiaries to the covenant – detriment as a consequence of removal of covenant, vexatious or not in good faith test, comparison with planning scheme provisions

- [*P Lee and Company Pty Ltd v Whittlesea CC \[2018\] VCAT 276*](#)
Section 149(1)(a) and 149A of the *Planning & Environment Act 1987*; Whittlesea Planning Scheme; Interpretation of condition involving two authorities; Whether proposed vegetation offsets should be considered to satisfy the permit condition requirements; Relevance of change in native vegetation framework and transitional guidelines.
- [*Yuksel v Maroondah City Council \[2017\] VCAT 965*](#)
[Section 77](#) of the [*Planning and Environment Act 1987*](#), Maroondah Planning Scheme, General Residential Zone (GRZ), neighbourhood character, visual bulk, vegetation removal and landscape character
- [*Geraldton Capital Pty Ltd v Latrobe CC \[2017\] VCAT 839*](#)
Section 77 of the *Planning & Environment Act 1987*; Latrobe Planning Scheme; Mixed Use Zone; Service station; Policy; Traffic; Amenity
- [*Enterprise World Pty Ltd v Moreland CC \[2017\] VCAT 749*](#)
Application under [section 81\(1\)\(a\)](#) of the [*Planning and Environment Act 1987*](#) to review the refusal to grant an extension of time to commence and complete the development approved under Permit No. MPS/2013/92
Application under [81\(1\)\(a\)](#) of the [*Planning and Environment Act 1987*](#) to review the failure to extend time for the certification of a plan of subdivision under Permit No. SP/2014/192
Application under [section 77](#) of the [*Planning and Environment Act 1987*](#) to review the refusal to grant an amendment to Permit No. MPS/2013/92/A

Counsel Assisting Retainers:

2011 to 2012 **COUNSEL ASSISTING THE VICTORIAN COMMISSION FOR GAMBLING AND LIQUOR REGULATION**

Private hearings regarding renewals or cancellation of bookmakers' licences

2013 to 2015 **COUNSEL ASSISTING THE VICTORIAN FREEDOM OF INFORMATION COMMISSIONER**

In late 2012, the Victorian Government appointed a Freedom of Information Commissioner. In my role as Counsel assisting the Commissioner I advised generally on matters regarding administrative law, settling draft decisions for the Commissioner on a regular basis, conducting conciliations under the *Freedom of Information Act 1982* on behalf of the Commissioner and appearing as Counsel on behalf of the Commissioner before VCAT where required.

List of Significant Cases¹

AB & R Sultana Pty Ltd as Trustee for The Sultana Investment Trust and Unit Trust & Ors v Johnstone Shire Council & Ors [2004] QPELR 538

Environment — Planning and development — Material change of use — Development approval

Appeal against approval of development application for material change of use on subject land to shopping centre. Subject land located in central business district. Whether change of use on subject land to shopping centre contrary to applicable strategic plans and development control plans. Whether change of use justified by socio-economic need in local area. Whether change of use likely to cause increased concentration of traffic in local area. Whether change of use likely to adversely affect local amenity. Held: Appeal dismissed. Change of use not inconsistent with strategic plans and development control plans applicable to central business district in which subject land located. Change of use reflective of socio-economic need in local area. Change of use not likely to adversely affect local amenity.

AB & R Sultana Pty Ltd v Johnstone Shire Council [2004] QCA 251; [2005] QPELR 89; BC200404957

Local government — Town planning — Planning schemes — Parking

Application for leave to appeal from decision of Planning and Environment Court (PEC). Applicant owners of warehouse complex. Respondent local planning authority. Developer sought approval to develop site to house discount department store. Substantial part of development used to provide on-site car-parking accommodation. Council approved proposal notwithstanding applicant's objections. Approval included departure from car parking requirements in local plan. Whether any arguable case that PEC erred in affirming council approval. Held: Application for leave refused. No arguable case demonstrated.

Allen & Anor v Cairns Regional Council & Anor No. 3 [2016] QPEC 25

Planning and Environment – Costs - Where application for a declaration that an existing use was lawful - where Calderbank offer to respondent neighbour - where the applicant and council incurred costs after the Calderbank offer - where the applicant and Council would have incurred substantial costs if the respondent neighbour had withdrawn opposition - whether respondent neighbour should pay costs of obtaining the declaration

Beach Club Port Douglas Pty Ltd v Douglas Shire Council [2005] QPEC Cairns 16 May 2005

Planning - Declarations - Douglas Shire Planning Scheme - meaning and calculation of gross floor area - s. 4.1.21(1)(b) *Integrated Planning Act*

BM2008 Pty Ltd (in liq); Re [2010] VSC 337

Corporations – Transfer of shares after resolution for the voluntary winding up of a company - Request for liquidator's consent to transfer - Liquidator gives conditional consent - Application to set aside condition of consent to transfer - Court's power to set aside condition where the condition is "not in the best interest of the company's creditors as a whole" - *Corporations Act 2001* (Cth) s 493A - Member's voluntary winding up - Declaration of solvency - Surplus of assets available for distribution after payment of debts in full - Whether a shareholder who is entitled to share in the surplus rateably is a "creditor" of the company for the purposes of section 493A - *Corporations Act 2001*(Cth), ss 493A, 501, 553A, 563A - Words and Phrases - Meaning of "creditors" in s 493A of the *Corporations Act 2001*

¹ 20180701

Bowyer Group Pty Ltd v Cook Shire Council & Anor [2018] QCA 159

Environment and Planning – Environmental Planning – Development Control – Applications – Form and Contents of Application – Consent and Identity of Owner – where the second respondent was granted development approval for a material change of use of land for an extractive industry – where the applicant, an owner of adjoining land, commenced an appeal against the decision to grant the approval in the Planning and Environment Court – where the applicant contended, as a preliminary issue, that the development application was not a properly made application as it was not accompanied by the consent of the holders of a Crown lease of the land – where the Planning and Environment Court found the application was properly made, being accompanied by the consent of the State as the owner of the land – consideration of the meaning of the word “owner” in the phrase “owner of the land the subject of an application” in s 263(1) of the Sustainable Planning Act 2009 – whether the holders of a rolling term lease for pastoral purposes under the Land Act 1994 are “owners” of the relevant land within the meaning of that provision Land Act 1994 (Qld)

Brons v Cairns City Council [2005] QPELR 172

Application for declaration — Whether brothel code assessable development — Whether land within an industrial area — Words and phrases “industrial area” — s 63A(3) Prostitution Act 1999 (Qld)

Browning & Sargent v Cairns City Council & Anor [2000] QPEC 025

Environment — Planning and development — Conditions of development approval — Unlawful use of land

Where use of land as camping ground approved subject to conditions. Where land owner not using land within consent granted. Where accommodation units erected on land not within consent. Where land owner not complying with conditions of consent. Where court order that letting of use of units unlawful. Where accommodations of land owner in converted bus and caravans unlawful. Held: Period granted in which to obtain approval for use of bus and caravans for temporary accommodation. Continued use of land under consent suspended until further order

Browning v Cairns City Council [2002] QPELR 577

Contempt — Contempt of court — Court's jurisdiction to deal with proceedings — Application for contempt orders

Respondent failed to comply with court orders relating to use of site for camping area. Applicant asked respondent be dealt with for contempt of court. Applicant was respondent's neighbour. Respondent claimed court had no jurisdiction to deal with contempt proceedings on basis that Australian Constitution guaranteed right to trial by jury for criminal offences. Respondent relied on (QLD) Criminal Code s 22 which provided that person was not criminally responsible for offence relating to property for act done or omitted to be done with respect to any property in exercise of honest claim of right and without intention to defraud. Applicant sought order for costs against respondent and council. Applicant claimed council was obligated to bring contempt proceedings against respondent as part of its statutory duty. Held: Court had jurisdiction to deal with respondent for contempt. Respondent was in contempt of court. Respondent fined \$3,000. No costs order made in applicant's favour.

Browning v Cairns City Council [2002] QPELR 583; [2002] QCA 161; BC200202251

Practice and procedure — Appeal — Extension of time — Delay

Application for extension of time within which to appeal contempt order. Application out of time. Merits review of order rather than question of law would be raised by appeal. Whether extension of time should be granted. Held: Application dismissed. No sufficient explanation for delay.

Cairns City Council v Hawtin Earthmoving Pty Ltd & Anor [1999] QPEC 37; [2000] QPELR 74

Environment — Zoning — Lawful use — Use without interruption

Where land contained within residential zone. Where land had long term use for storage of machinery, business records and equipment associated with earthmoving business. Where prohibited use under current and former planning schemes. Where land previously zoned rural. Whether use previously lawful. Whether use domestic industry. Held: Lawful use had continued without interruption.

Cairns Earthmoving Contractors Pty Ltd v Mareeba Shire Council & Ors [2000] QPEC 019; [2000] QPELR 233

Environment — Waste — Regional waste disposal facility — Material change of use

Where council refused application for material change of use of subject land for development of regional waste management facility. Where land zoned rural and rural residential. Where current use cattle grazing. Where land remote site sparsely vegetated. Where land in general area identified by relevant planning project as most suitable for waste disposal facility. Where no referral agencies opposed development. Where close scrutiny given to proposal by council. Where council's shire planner recommended approval of development on conditions. Where council strategic plan designated land for future industry. Whether unacceptable risks of environmental damage by erosion or leaching. Whether need for facility dependent on approval of proposal only. Held: Proposal consistent with council planning and strategies and refusal of application unreasonable.

Cairns Regional Council v Liu & Ors [2016] QPEC 31

Planning and Environment – Application – declaratory and consequential relief pursuant to ss 456, 601 & 604 of the *Sustainable Planning Act 2009* (Qld) – characterisation of balcony enclosure as assessable development - whether the respondent carried out assessable development without an effective development permit for the development – expert opinion evidence - whether declaratory and enforcement orders should be made in the exercise of discretion - costs.

Carwoode Pty Ltd v Cardinia Shire Council (2008) 31 VPR 247; [2008] VCAT 1334

Planning - EPBC Act and Tribunal jurisdiction, futility, Ministerial call-in powers, Freeway service centres, excision of lot in Farming Zone, access to land in a public acquisition overlay, Casey-Cardinia Growth Area, interpretation of Clause 52.30, rural v urban freeway, Freeway Service Centre- Design Guidelines, Growling Grass Frog, natural justice, Tribunal inspection procedures, *Charter of Human Rights and Responsibilities Act 2006*.

Coral Sea Developments Pty Ltd v Cairns City Council [2000] QPELR 259

Subdivision application — Refusal of application — Whether proposal was consistent with the surrounding subdivision — Whether the proposal would provide for the orderly development — Lots were of an average size of 4000 square metres — Lots in the vicinity were much smaller

Cousins v Johnstone Shire Council & Anor [2006] QPEC 126

Planning – material change of use – transitional planning scheme - whether the land is exempt, assessable or impact assessable development – preservation of development and use rights

Curtain v Eacham Shire Council [2006] QPEC Cairns 164

Planning – Reconfiguration and refusal by local council – *Integrated Planning Act 1997* Qld – Eacham Shire Council Planning Scheme – conflict – sufficient planning grounds

Daikyo (North Queensland) Pty Ltd v Cairns City Council & Ors [2003] QPEC 022; [2003] QPELR 606

Local government — Town planning — Height of floor — Flood protection

Appeal against conditions of preliminary approval of change of use and development permit. Respondent imposed condition on preliminary approval of appellant's development application concerning height of ground floor above sea level. Third co-respondent claimed height of ground floor insufficient protection against marine flood in event of tropical cyclone. Whether height of ground floor above sea level sufficient protection against marine inundation. Held: Appeal dismissed. Height of ground floor above sea level sufficient protection against marine inundation. Third co-respondent failed to demonstrate sufficient reason for increasing standard height above sea level.

Delfin Property Group Pty Ltd v Thuringowa City Council [2000] QPELR 282

Environment — Subdivision — Conditions of approval — Construction of stormwater drain

Whether sufficient nexus between condition of approval and subdivision. Whether condition lawful. Whether prior agreements between developer and council-imposed obligation on relation to construction of drain. Where conditions imposed on approval of subdivision application. Where condition required construction of extensive drainage works servicing relevant catchment area. Where subdivision to have little adverse effect on flooding. Held: Construction of drain to ultimate profile not lawful condition.

Gillion Pty Ltd v Scenic Rim Regional Council and Ors [2013] QPEC 15

Planning and Environment: Merits appeal to regularise an existing use of commercial extraction of groundwater declared by this Court to be unlawful; where issues of impact on groundwater Aquifers, noise associated with use and traffic safety over haul route.

Conflict with Planning Scheme: where Respondent alleges that use conflicts significantly with Planning Scheme from Strategic Provisions to Precinct Provisions, whether amenity (both tangible and intangible) provisions in Planning Scheme are in conflict with the use, where Co-respondents allege use conflicts with Commercial Extraction of Groundwater Code; where Respondent alleges that use is an Inconsistent Use in the Tamborine Mountain Zone Code and is therefore a locationally inconsistent use in significant conflict with the Planning Scheme as a whole, where appellant accepts that there is conflict but categorises it as technical or mechanical.

Grounds: whether sufficient grounds exist to approve notwithstanding conflict, whether absence of unacceptable impacts on "hard" amenity is a "ground"; where appellant argues that there is a strong planning need for groundwater from this site, where only witness called in support of this ground is principal of appellant company.

Traffic Issues: where traffic safety issues in traffic evidence, where DTMR brought in as a Referral Agency by some of the Co-respondents, where DTMR and appellant reached agreement after all traffic evidence of conditions to be imposed if appeal allowed, where DTMR conditions require a change of the haul route from Tamborine Mountain Road to Tamborine/Oxenford Road which will take water tanker through "Gallery Walk", a major tourist hub on the Mountain, where conditions will require appellant to upgrade important intersection at Curtis Falls another tourist hub on the Mountain.

Amenity: whether impacts on intangible aspect of amenity leads to conflict with Planning Scheme, where hard impacts can be made acceptable by the imposition of condition.

Prior Lawful Use Right: whether this Court in enforcement proceedings decided that appellant had pre-existing lawful use rights to extract groundwater from the site under the Superseded Planning Scheme; whether evidence is sufficient to determine the nature of the use in earlier times.

Gillion Pty Ltd v Scenic Rim Regional Council & Ors (2014) QPELR 168 [2014] QCA 21

Environment & Planning – Environmental Planning – Development Control – Matters For Consideration Of Consent Authority – Generally – Consideration Of Planning Schemes – where the applicant applied to the first respondent Council for a development permit for a material change of use of land for the purpose of Commercial Groundwater Extraction – where the proposed use of land conflicted with the local government Planning Scheme – where Council’s refusal to approve the application was upheld by the Planning and Environment Court – whether the primary judge erred in law in holding that a stated precinct intent applied across the Shire instead of merely to the relevant zone – whether that error diminished the importance of a deficiency in the planning scheme – whether that error influenced the primary judge’s decision that the proposed development’s conflict with the planning scheme was significant

Environment & Planning – Environmental Planning – Development Control – Matters For Consideration Of Consent Authority – Generally – Failure To Consider Relevant Matters – where there was a deficiency in the relevant Planning Scheme – whether the primary judge erred in not considering that deficiency when considering the exclusion of the proposed development from the Consistent Use Development Table – where the Planning Scheme contained general provisions applicable to any Commercial Groundwater Extraction development and the proposed development did not contain every element of the general Commercial Groundwater Extraction definition – whether the primary judge erred in failing to consider that definition – where the primary judge made a detailed assessment of the development proposal against specific provisions of the Planning Scheme – whether the primary judge erred in failing to consider that assessment – where it is for the court to determine the importance of a deliberate planning policy underlying the exclusion of Commercial Groundwater Extraction from the Consistent Use Development Table – whether the judge erred in failing to determine the degree of importance

Gillion Pty Ltd v Scenic Rim Regional Council & Ors [2017] QPEC 24

Planning and Environment – Application to proceed with changed development application – “permissible change” – Whether “substantially different development” under s 367(1)(a) of SPA – nature and scope of change compared to original proposal – proposal premised on various operational constraints to be secured by conditions.

Iliopoulos v BM2008 Pty Ltd (in liq) [2010] FMCA 376; BC201003637

Bankruptcy – Application to set aside bankruptcy notice – asserted cross-demand – consideration of matters raised by cross-demand

Iliopoulos v BM2008 Pty Ltd (in liq) [2010] FCA 787

Bankruptcy - Appeal – Application to extend time for compliance with a bankruptcy notice – alleged cross-claim, set-off cross-demand arising by virtue of entitlement to share in the distribution of company surplus upon completion of a voluntary winding up – assets of corporation said to include causes of action against directors, former directors and a related company – uncertainty as to existence and potential value of causes of action – whether cross-claim, set-off, cross-demand is equal to or exceeds the judgment debt

Iliopoulos v BM2008 Pty Ltd (in liq) [2010] HCA Trans 326

Special Leave Application – Bankruptcy – conflict between Courts of Appeal of Victoria and New South Wales – whether derivative proceedings open when a company is in liquidation – inappropriate vehicle for grant of special leave.

lphostrou & lphostrou and ors (No. 2) [2011] FamCA 84

Family law – courts and judges – Recusal – Evidence Act 1995 (Cth) Family Law Act 1975 (Cth) *British American Tobacco Services Limited v Laurie* [2011] HCA 2 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 *Gould & Gould* unreported 29 June 2004 per Fogarty, Kay & Renaud JJ discussed *In the Marriage of Farnell* (1996) FLC 92-681) *Johnson v Johnson* (2000) 201 CLR 488; (2000) FLC 93-014 *Livesey and the New South Wales Bar Association* (1983) 151

CLR 288 *McDonald* (O’Ryan J, unreported 8 October 2001) *Re JRL; Ex Parte CJL* (1986) 161 CLR 342

Iphostrou & Iphostrou and ors (No 3) [2011] FamCA 138

Family law – costs – costs against legal practitioner - indemnity costs - s 106B s and 117(2A) proceedings under the *Family Law Act 1975* (Cth) - *Colgate Palmolive Co and Anor v Cussons Pty Ltd* (1993) 118 ALR 248 - standards of a reasonably competent legal practitioner the categories of circumstances which enliven the discretion to award indemnity costs are not closed - *Yunghanns v Yunghanns* (2000) FLC 93-029

Langton & Anor v Douglas Shire Council [2014] QPEC 71

Environment and Planning – Appeal – where the appellants appealed against the decision of the respondent to refuse a request to extend the relevant period of a development approval – where there has been a significant shift in how the land is treated in the planning scheme – whether the development approval is consistent with the current laws and policies applying to the development - whether the development approval should be extended for a further four years

Lewis v Mareeba Shire Council & Anor; Mareeba Investments Pty Ltd v Mareeba Shire Council & Anor [2000] QPEC 056; [2000] QPELR 432

Local government — Town planning — Development consent — Piecemeal applications
Submitter appeals raising question of whether application not validly made because piecemeal. Where development application to build shopping centre with 106 on-site car parking spaces and 51 on-street car parking spaces. Where notice for preliminary approval granted instead of development permit. Where preliminary approval subject to condition that railway land rezoned. Where co-respondent lodged application for rezoning of railway land. Whether application piecemeal. Whether Pioneer Concrete rule applies under Integrated Planning Act. Held: Application piecemeal. What was approved was not what was applied for *Pioneer Concrete* applies.

Livingstone Shire Council v Hooper & M3 Architecture (Architects in Association) & Ors [2003] QPEC 063

Application by local government for declaration of invalidity of private building certifier’s decision to approve development application for 12 storey building at Yeppoon – developer asserted proposal was for an accommodation building (as of right use) as “serviced apartment(s)” – applicant asserted proposal was a multiple dwelling (a use requiring Council consent) – proper characterisation of proposal considered – whether applicant (which wrongly believed a local Planning Policy effectively established a height limit) was seeking to do indirectly what it could not do

Mareeba Shire Council v Laghaifar [1999] QPELR 179

Environment — Planning and development — Requirement of impact assessment — Offences

Whether activities of land owner required impact assessment in relation to development application. Whether use being made of land was commercial use. Where land owner established compacted lanes on subject land leading to adjacent commercial premises under construction. Where lanes contended to be access for purpose of constructions works. Where lanes for purpose of car parking and commercial access to adjacent property required approval. Held: Development offence committed. Restraining orders made.

McDonald v Douglas Shire Council [2002] QPEC 19; [2002] QPELR 461

Local government — Town planning — Currency of town planning consent — Application for declaration that consent current

Whether town planning consent current. Council consented to application for recreational resort and convention centre on 30 November 1990. Consent was granted pursuant to (QLD) Local Government Act 1936. 1936 Act made no provision for automatic lapse of consent which continued in force unless revoked. (QLD) Local Government (Planning and Environment) Act 1990 commenced on 15 April 1991. Council granted landowner building permit in May 1993. In December 1993 landowner contracted with builder to 'substantially start' works. In 1994 some physical work was done on site pursuant to contract. Council claimed consent lapsed on 15 April 1995 pursuant to s 4.13(18) of 1990 Act. Council claimed regardless of whether or not construction of buildings on site had commenced within prescribed time, use of land as resort had not. Alternatively council claimed use of premises constructed pursuant to permit had ceased for period of at least 12 months. Held: On objective view, work on developing land had ceased for well over stipulated time. As result permit had lapsed and rights which it conferred extinguished.

McDonald v Douglas Shire Council [2003] QCA 203; [2004] 1 Qd R 131; (2003) 126 LGERA 96; [2003] QPELR 586; BC200302486

Local government — Building control — Planning consent — Lapse

Appeal from decision of Planning and Environment Court (PEC) affirming lapse of consent. Council issued planning consent for recreational resort and convention centre. Limited works constructed on site. Consent lapsed if subject of consent did not commence within four years. Whether use subject of consent commenced. Held: Appeal dismissed. No error by PEC in finding consent had lapsed.

McDonald's Australia v Cairns City Council [2008] QPELR 309

Environment — Planning and development — Town planning — Evidence

Determination on evidence of town planners. Statement of applicant provided for information purposes. Applicant claimed opinions of town planners used inappropriately. Whether town planners' opinion evidence of planning scheme admissible. Held: Determination made. Planning schemes question of law for determination of judge hence town planners' opinion evidence of planning scheme not admissible.

Pearson v Thuringowa City Council [2006] 1 Qd R 416; (2005) 142 LGERA 257; [2005] QCA 310; BC200506244

Criminal law — Verdicts — Unsafe and unsatisfactory — Prohibition against use of land

Application for extension of time to seek leave to appeal against conviction. Applicant convicted of using shed in contravention of council's prohibition. Certain types of buildings prohibited from being used for residential purposes. Prior appeal to District Court unsuccessful. Shed used for meal preparation, washing and storage. Applicant slept in camper van. Whether conviction unsafe and unsatisfactory. Held: Application dismissed. No miscarriage demonstrated.

Perth Freight Lines Pty Ltd v BM2008 Pty Ltd (in liq) [2011] VSCA 62

Corporations — Statutory demand — Application to set aside — Whether 'offsetting claim' — Whether 'some other reason' — 'Offsetting claim' arising from alleged entitlement to proportionate share of distributable surplus of creditor company upon completion of voluntary winding up — Alleged entitlement said to arise from transfer of equitable interest in shares of creditor company — No transfer of equitable interest in shares where transfer void by operation of s 493A(1) of the Corporations Act 2001 (Cth) — Decision below not shown to be attended with any doubt — Corporations Act 2001 (Cth) ss 459G, 459H, 459J, 493A.

Perth Freight Lines Pty Ltd & Ors v BM2008 Pty Ltd (in liq) & Ors [2011] VSCA 218

Arbitration — Award — Enforcement by court order — Application for leave to appeal out of time against making of order — Order not in terms of award — Notwithstanding possible error

in order no material prejudice to applicants - Leave refused - Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1) [2005] 2 Qd R 174 - Commercial Arbitration Act 1984 s 33.

[Potter v Macedon Ranges SC & Ors](#) [2012] VCAT 1093

Property - Variation of Restrictive Covenant - Section 77 Planning and Environment Act 1987 -- clause 52.02 Macedon Ranges Planning Scheme - Section 60(5) Planning and Environment Act 1987 - benefitting land - affected persons - amenity

[Prettejohn v Cairns Regional Council & Ors](#) [2012] QPEC 23

Environment and planning - planning schemes - construction of planning schemes - conflict with planning scheme - conflict with the strategic plan- grounds - complex engineering solutions - minor earthworks - visual amenity - *Integrated Planning Act 1997* (Qld), s 4.1.52, s 4.1.52(2), s 6.1.28 - *Local Government (Planning and Environment) Act 1900* (Qld), s 4.4(3)(b), s 4.4(5A), s 5.1(6A), s 6.1.29(3), s6.1.30(3) - *Sustainable Planning Act 2009* (Qld), s 819

[Reana Development Pty Ltd v Thuringowa City Council](#) [2002] QPELR 56

Local government - Town planning - Variation of development permit condition - Appeal relating to development permit condition

Whether there should be standard 'T' intersection form of access to land or modified 'T' intersection. Council approved shopping centre development on land. Condition of approval required access to shopping centre from street to be by way of standard access. Appellant favoured modified 'T' intersection which would prioritise movement in and out of shopping centre from street. Council favoured standard 'T' intersection. Held: Appeal allowed. Access of type proposed by appellant would be preferable to that currently required by council.

[Redlynch Valley Property Co Pty Ltd v Cairns City Council & Ors](#) [2003] QPEC 75

Environment - Planning and development - Appeal - refusal of a development permit for a material change of use - subdivision into 420 allotments - transitional scheme pursuant to the provisions of the *Integrated Planning Act*.

[Ritek Building Systems \(NQ\) Pty Ltd v Cairns City Council](#) (2005) 142 LGERA 309; [2006] QPELR 143; [2005] QCA 347; BC200507121

Environment - Planning and development - Planning scheme - Boarding house

Application for leave to appeal court decision that designated area did not meet requirement for communal landscaped open space. Council had approved applicant's plans for conversion of part of building into boarding house. Applicant applied to change conditions of existing approval by moving recreational area inside existing structure. Application refused on basis did not offer communal landscaped open space. Whether communal landscaped open space could include area inside building delineated by walls and windows. Whether right of appeal. Held: Application dismissed. Communal landscaped open space did not include area inside building. No right of appeal.

[Rhonwood Pty Ltd v Cairns City Council & Anor](#) [2000] QPEC 024; [2000] QPELR 291

Environment - Planning and development - Notice of development application - Town planning scheme

Where proposed development of 56 holiday units and manager's residence. Whether description of development in public notice. Whether sufficient material lodged with application to council. Whether proposed development contrary to provisions of town planning scheme. Where application lacked internal dimensions, distances to boundary, internal lay out, population density information. Where proposed development in area of substantial tourism and agricultural development. Where subject site within residential zone designated as tourism development area. Whether use of pool for dive instruction required to be included in description. Held: Person making inspection of application would be sufficiently informed of

nature of proposed development. Not established development inconsistent with firm planning policy.

Silverpeach Pty Ltd & Poynter v Cairns City Council & Anor [2008] QPEC 109

Planning – appeal against development approval – Douglas Shire Council Superseded Planning Scheme – conflict – sufficient planning grounds

Simmons v Yarra CC [2014] VCAT 15

Environment — Planning and development – Section 77 of the *Planning and Environment Act 1987*; Yarra Planning Scheme; Mixed Use Zone; Heritage Overlay; Environmental Audit Overlay; Sale and consumption of liquor; Increase patron numbers and hours of operation; Dispersal of commercial activities from Brunswick Street; Amenity of nearby dwellings; Noise, Traffic; Parking; Public safety

Sitelist Pty Ltd v Cairns City Council [2000] QPELR 37

Environment — Planning and development — Need for development — Retail fuel outlet
Where council refused consent to proposal to establish retail fuel outlet in shopping centre car park. Where material change of use. Where site located in commercial centre. Where site located on main city carriageway. Whether need for development. Whether proposed development threat to existing fuel and service station outlets. Whether proposal complied with strategy as to distribution of retail fuel outlets. Whether adverse effect of proposed development on traffic. Held: Proposal consolidated shopping and business centre within strategic plan. Development beneficial to provision of services to community.

SOS Community Action Group & Anor v Reefco Resort Ltd & Cairns City Council [2006] QPEC 069; [2006] QPELR 758

Practice and procedure — Application to strike out grounds of Originating Application — Conflicts test — Planning grounds

SOS Community Action Group Inc v Reef Cove Resort Ltd [2007] QPELR 252; [2006] QCA 519

Practice and procedure — Appeal — Leave to appeal — Prospects of success Application for leave to appeal decision (P&E Court). Applicant commenced proceedings in P&E Court asserting invalidity of local authority's decision to approve reconfiguration of land. Applicant contended reconfiguration of land conflicted with development control plan. P&E Court struck out four of applicant's grounds of alleged invalidity. Whether grounds of appeal without *reasonable* prospects of success. Held: Application dismissed. Grounds of appeal without reasonable prospects of success because approval of reconfiguration of land was not in disagreement with standards of development control plan.

Stockland Developments Pty Ltd v Thuringowa City Council (2007) 157 LGERA 49; [2008] QPELR 151; [2007] QCA 384; BC200709606

Environment — Planning and development — Planning schemes — Development application

Appeal against decision of Queensland Planning and Environment Court (PEC). Second respondent lodged application with council to develop shopping centre. Preliminary approval sought for material change of use of land for commercial under previous planning scheme. Council conditionally approved development application. Appellant appealed decision of council to PEC. PEC refused to declare application not valid. Whether PEC erred in holding application valid per (QLD) Integrated Planning Act 1997 (Act) s 3.1.6. Whether council erred in assessing application under old scheme. Held: Appeal allowed. Application not valid as did not state respects in which proposal met requirements of new scheme. As issue not raised in PEC procedural fairness prevented determination of issue on appeal

Suckling v Mornington PSC [2009] VCAT 870

Environment — Planning and development - Mornington Peninsula Planning Scheme; Application pursuant to Section 82 the Planning and Environment Act 1987; Residential 1 Zone; Design and Development Overlay - schedule 3, overlooking, view sharing, loss of vegetation, building on slope more than 20%.

Suddaby & Ors v Johnstone Shire Council [2007] QPELR 94

Submitter appeals — Material change of use and reconfiguration — Cassowary habitat — Whether conflict with Strategic Plan and DCP — Good quality agricultural land — Need — Planning grounds

T W Hedley Pty Ltd v Cairns City Council & Anor [2003] QPEC 039; 2004] QPELR 159

Practice and procedure — Costs — Discretion — Delay or obstruction

Application by respondent and co-respondent for costs of appeal. Whether appellant instituted appeal merely to delay or obstruct. Whether appellant's conduct in appeal relevant to determining question of motivation. Whether appellant instituted appeal for reasons of public interest character. Whether litigation in public interest regardless of appellant's purpose. Held: Application dismissed. Institution of appeal solely motivated by resentment at council's refusal of similar application relating to same site and refusal of application to establish detached bottle shop and merely to delay or obstruct. Appellant's conduct of no direct relevance. Raising of issues of public interest character in grounds of appeal of secondary consideration. Appellant raised and called evidence relating to legitimate planning issues and many changes made by co-respondent to detail of proposal which served public interest.

Timbercorp Finance Pty Ltd (In Liq) v Allan [2016] VSC 481 First Revision: 29 August 2016

Practice And Procedure - Service of originating process by agreement - Service interstate - Whether notice under Service and Execution of Process Act 1992 (Cth) ('SEPA') required - Whether writ validly served - Whether agreement for service constitutes a waiver of SEPA notice requirement - Service not effective. Extending validity of writ - Whether good reason shown to extend validity of writ for service - Technical deficiency due to oversight in omitting SEPA notice - Plaintiff made reasonable but unsuccessful efforts to serve the Defendant - Good reason to extend writ shown.

Timbercorp Finance Pty Ltd (In Liq) v Allan (Costs) [2016] VSC 633 First Revision 2 November 2016

Costs - Application by defendant to set aside service of a writ where writ served without notice required by the Service and Execution of Process Act 1992 (Cth) - Application by the plaintiff to extend the validity of the writ in the event that service set aside - Service of the writ set aside and validity of the writ for service extended - Appropriate order for costs having regard to the defendant's deliberate strategy to rely upon the technical deficiency in service and the plaintiff's failure to include the SEPA notice with the service - No order as to costs of either application

Tonak Pty Ltd v Cairns City Council [2002] QPEC 083; [2003] QPELR 373

Application for compensation — Whether Applicant had a prior legal right to use land for the specified purpose — Weight to be given to policy — Coty principle — Admissibility of evidence regarding construction of planning scheme — Claim for disturbance items — s 1A.4(5), s3.5(4)(d), s3.5(5) and s3.5(8)(a) Local Government (Planning and Environment) Act 1990

VFS Group Pty Ltd; Re [2010] VSC 396

Corporations - Application to set aside statutory demand - Offsetting claim - Order by Associate Judge varying the statutory demand and extending time for compliance with the demand for a period of 3 weeks - Appeal against orders - Time for compliance with the demand expired before appeal due to be heard - Orders not authenticated - Orders recalled by the Associate Judge - Associate Judge made a new order extending time for compliance with the demand to a date after the appeal was to be heard - Whether the Associate Judge had

the power to extend the time for compliance after the period for compliance had expired – Whether new order the “last order” for the purposes of s 459F(2)(a)(i) of *Corporations Act 2001* (Cth) – Whether new order “finally determined” the application to set aside the statutory demand for the purposes of s 459F(2)(a)(ii) of *Corporations Act 2001* (Cth) – Associate Judge had no power to make the new order – *Supreme Court (General Civil Procedure) Rules* r 59.02 – *Corporations Act 2001* (Cth) ss 459C, 459F, 459G, 459J.

VFS Group Pty Ltd v BM2008 Pty Ltd [2010] VSCA 277

Corporations - statutory demand - setting aside – Orders by Associate Judge varying statutory demand and extending time for compliance with the demand by 3 weeks – appeal against orders – Time for compliance with the demand expired before appeal due to be heard – Orders not authenticated – Orders recalled by Associate Judge – New orders made extending time for compliance with the demand to a date after the appeal was to be heard – Whether Associate Judge acted within power in extending time for compliance – Whether erroneous assumption made by Associate Judge as to legal consequences of first set of orders – Inherent jurisdiction of Court to recall and replace orders – *Supreme Court (General Civil Procedure) Rules* 2005, rr 36.07, 59.02(1), 60.01(1), 77.01(1), 77.06(8) – *Corporations Act 2001* (Cth) ss 459F(2), 459G, 459J.

Vint v Carpentaria Shire Council & Anor [2005] QPEC 018; [2005] QPELR 547

Costs — whether proceedings frivolous or vexatious — s 4.1.23(2) *Integrated Planning Act* 1997.

Ward & Ors v Tablelands Regional Council [2014] QPEC 72

Environment and Planning – where the parties cannot agree on the wording of condition 3.12(f) – whether disclosing the information proposed to the public is an unreasonable imposition on the development.