

SHORT PARTICULARS OF CASES
APPEALS

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SUNLAND GROUP LIMITED & ANOR v GOLD COAST CITY COUNCIL
(B64/2020)

Court appealed from: Supreme Court of Queensland
(Court of Appeal)
[2020] QCA 89

Date of judgment: 1 May 2020

Special leave granted: 13 October 2020

The essential question in this appeal is which of two regimes for a developer's financial contributions to a local government for the funding of infrastructure is applicable to a certain development of real property.

In 2007, the Planning and Environment Court granted a preliminary development approval ("the Preliminary Approval") over a parcel of undeveloped land within the local government area of the Respondent ("the Council"), under the *Integrated Planning Act 1997* (Qld) ("the IPA"). The Preliminary Approval was granted subject to certain conditions. Relevantly, the conditions included requirements that the developer make contributions to the Council for the cost of certain infrastructure (two of the conditions allowing existing credits to offset the contributions payable). The contributions were expressed to be in accordance with certain planning scheme policies ("the Policies"), which had been made by the Council under the IPA.

The Second Appellant is part of a group of companies controlled by the First Appellant (the Appellants together, "Sunland"). In May 2015, the Second Appellant purchased the land the subject of the Preliminary Approval. By that time, the Policies had ceased to have effect and the IPA had been repealed and replaced with the *Sustainable Planning Act 2009* (Qld) ("the SPA"). Although the SPA changed the way in which infrastructure contributions were levied, the Preliminary Approval remained in effect pursuant to transitional provisions in the SPA. Amendments made to the SPA in 2011 required a local government to give an infrastructure charges notice ("ICN") upon the giving of a development approval (where the local government had resolved that an "adopted infrastructure charge" applied to a development). In 2015 and 2016 ICNs were issued to Sunland by the Council upon the latter's approval of development applications lodged by Sunland.

In July 2017 the SPA was repealed and replaced with the *Planning Act 2016* (Qld) ("the Planning Act"), s 286 of which had the effect of preserving the Preliminary Approval.

In 2017 the Sunland Parties commenced proceedings in the Planning and Environment Court of Queensland, seeking declarations that the Council could collect infrastructure contributions, and would apply infrastructure credits, only in accordance with the conditions set out in the Preliminary Approval. The Council however contended that the Policies underlying the conditions in the Preliminary Approval were no longer applicable and that Sunland was required to make payments in accordance with the ICNs. Judge Everson held that the repeal of the Policies was inconsequential and that s 880(3)(b) and (d) of the SPA expressly preserved the infrastructure conditions pertaining to instruments such as the Preliminary Approval. His Honour therefore found in favour of Sunland and

declared that the Council had no power to issue ICNs (by that time, under s 119 of the Planning Act).

The Court of Appeal (Sofronoff P, Philippides and McMurdo JJA) unanimously allowed an appeal by the Council and set aside the declarations made by Judge Everson. Their Honours held that s 880(2)(b) of the SPA prevented the Council from imposing a condition under a planning scheme policy, and further held that s 880(3) of the SPA did not apply, as the conditions of the Preliminary Approval dealing with infrastructure contributions did not of themselves give rise to an obligation to pay such contributions. Rather, a developer's obligation to pay arose only through conditions imposed when a development application was approved by the Council. The Court of Appeal held that the continuing effect of the Preliminary Approval, under s 286(2) of the Planning Act, must be considered in that light. The Council was required to issue ICNs and it had no power to require the payment of infrastructure contributions calculated under the Policies.

The grounds of appeal are:

- The Court of Appeal erred by:
 - construing conditions of a development approval as merely statements as to the scope of future possible conditions to be imposed and not as imposing operable conditions or terms binding on the developer; and
 - resolving an ambiguity in the conditions of a development approval against the developer, rather than, *contra proferentem*, against the respondent Council.

The Council has filed a notice of contention, which raises the following grounds:

- The Court of Appeal failed to decide the Council's submission that if, on their proper construction, the conditions of the Preliminary Approval did impose an obligation to pay infrastructure contributions:
 - amendments to the SPA effected by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* (Qld) and the Planning Act obliged the Council to give Sunland an ICN in respect of any development permit given for development approved (but not authorised) by the Preliminary Approval;
 - once given, an ICN was the source of Sunland's obligation to pay infrastructure charges in respect of development authorised by a development permit; and
 - the Council's obligation to give an ICN upon giving a development permit, and Sunland's obligation to pay any infrastructure charges imposed by an ICN, prevailed over conditions imposed on a preliminary approval under earlier legislation.

HOFER v THE QUEEN (S37/2021)

Court appealed from: Supreme Court of New South Wales
(Court of Criminal Appeal)
[2019] NSWCCA 244

Date of judgment: 18 October 2019

Special leave granted: 12 March 2021

The Appellant was tried before a jury on an indictment containing 11 counts of having sexual intercourse without consent contrary to s 61I of the *Crimes Act 1900* (NSW). Counts one to eight on the indictment were alleged to have been committed against one complainant, C1, on the evening of 29 October or the early hours of 30 October 2014. Counts nine, 10 and 11 were alleged to have been committed against a different complainant, C2, on the evening of 30 October 2014. On 10 May 2016, the jury returned verdicts of guilty on six of the eight counts in respect of C1 and two of the three counts in respect of C2. On 23 September 2016, the Appellant was sentenced to a term of imprisonment of 9 years and 9 months, with a non-parole period of 6 years and 6 months.

At trial, each of C1, C2 and the Appellant gave evidence and were cross-examined. The effect of the Appellant's evidence was that sexual activity had occurred with both complainants, largely as alleged, but that it was consensual.

On appeal, the Appellant contended, amongst other things, that the Crown Prosecutor impermissibly suggested, during cross-examination of the Appellant, that the Appellant was lying about certain matters because his counsel had not put those matters to the relevant complainants in their cross-examination. The Appellant submitted that absent any attempt by his own counsel, which he alleged amounted to incompetence, or the trial judge to lessen the impact of the Crown's questions, the questions were highly prejudicial and resulted in a miscarriage of justice.

The Court of Criminal Appeal (Fullerton and Fagan JJ; Macfarlan JA dissenting) dismissed the appeal. The majority held that no miscarriage of justice was occasioned by the Crown's cross-examination of the Appellant or by reason of incompetence of the Appellant's counsel. Their Honours found that the Crown's questioning was only a fragment of what would have been required to convey to the jury an implication of recent invention. As the jury was not at any stage of the trial invited to reason that because those matters were not put to the relevant complainants it may be reasoned that the accused fabricated them, the impugned questions did not prejudice the Appellant. It could not therefore be said that the failure of the Appellant's counsel to object to the questions or seek a direction from the trial judge on the questioning, amounted to a dereliction of counsel's duty. The majority also considered that if they were wrong that no prejudice was occasioned by the impugned questions, they would nevertheless be satisfied that the evidence properly admitted at trial proved the Appellant's guilt beyond reasonable doubt and thus have applied the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) ("the proviso") to dismiss the appeal.

Justice Macfarlan would have allowed the appeal and quashed the convictions. His Honour considered that the Appellant's interests were prejudiced to a significant extent by the Crown's impermissible questions, which his Honour considered were a substantial part of the cross-examination, and the absence of any attempt by the trial judge to cure that prejudice. His Honour was also not satisfied that the evidence properly admitted at trial proved the Appellant's guilt beyond reasonable doubt and hence the proviso was inapplicable. Had it been necessary to determine, his Honour was of the view that there had been a miscarriage of justice on account of the incompetence of counsel by not taking one of the steps potentially available to him to remedy the prejudice occasioned to the Appellant by the Crown's impermissible questions.

The grounds of appeal are:

- The trial miscarried as a result of the Crown Prosecutor asking impermissible questions and making improper comments when cross-examining the Appellant; and
- The trial miscarried on account of the incompetence of the Appellant's counsel.