HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

JOSHUA JAMES PIKE & ANOR APPELLANTS

AND

KYM LOUISE TIGHE & ORS RESPONDENTS

Pike v Tighe
[2018] HCA 9
14 March 2018
B33/2017

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 to 5 of the orders made by the Court of Appeal of the Supreme Court of Queensland on 23 December 2016 and, in their place, order that:*

   (a) *the appeal be dismissed; and*

   (b) *the matter be remitted to the primary judge for the making of final orders.*

3. *The first respondents pay the appellants' costs of this proceeding and the proceedings in the courts below.*

On appeal from the Supreme Court of Queensland

Representation

D R Gore QC with J G Lyons for the appellants (instructed by Wilson/ryan/grose Lawyers)

D A Savage QC with A L Raeburn for the first respondents (instructed by Connolly Suthers Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Pike v Tighe

Town planning – Conditions on development – Where development approval permitted reconfiguration of lot into two lots – Where development approval subject to conditions – Where conditions included requirement to provide easement to allow access, on-site manoeuvring and connection of services and utilities – Where easement executed by registered proprietors of original lot did not comply with condition – Where Council approved survey plan to give effect to reconfiguration – Where titles for new lots created – Whether successor in title obliged to provide easement complying with condition.

Town planning – Enforcement orders – Where Planning and Environment Court of Queensland may make enforcement order if satisfied that development offence "has been committed" – Where development offence to "contravene" development approval – Whether successor in title committed development offence by failing to provide easement complying with condition.

Words and phrases – "binds the owner, the owner's successors in title and any occupier of the land", "contravene", "development", "development approval", "development offence", "enforcement order", "fail to comply with", "land", "lot", "the land the subject of the application to which the approval relates".

Acts Interpretation Act 1954 (Q), s 36(1), Sched 1.
Sustainable Planning Act 2009 (Q), ss 7, 10(1), 244(a), 245, 580, 601(1)(a), 604(1)(a), 605(1)(e), Sched 3.

1 KIEFEL CJ, BELL, KEANE, GORDON AND EDELMAN JJ. The first question in this appeal is whether s 245 of the *Sustainable Planning Act* 2009 (Q) ("the Act") obliges a successor in title to ownership of a parcel of land created by the reconfiguration of a larger parcel to comply with a condition of the approval for the reconfiguration that should have been, but was not, satisfied by the original owner prior to completion of the reconfiguration. If that question is answered in the affirmative, the further question arises as to whether the Planning and Environment Court of Queensland may make an "enforcement order" under ss 601, 604 and 605 of the Act requiring the successor in title to fulfil the condition.

2 Both questions should be answered in the affirmative for the reasons that follow.

Facts

3 On 29 May 2009, the Townsville City Council ("the Council") issued a decision notice under the *Integrated Planning Act* 1997 (Q) ("the IPA") (the predecessor to the Act), approving an application by the then registered proprietors of land for development by way of the reconfiguration of the existing lot into two lots. The approval was subject to certain conditions. Relevantly, condition 2 was in the following terms[1]:

> "**Access and Utilities Easement**
>
> An easement(s) to allow pedestrian and vehicle access, on-site maneuvering [sic] and connection of services and utilities for benefited lot (2) over burdened lot (1) must be provided. The easement(s) must be registered in accordance with the *Land Title Act 1994*, in conjunction with the Survey Plan."

4 The schedule to the development approval provided that, "[u]nless explicitly stated elsewhere in this permit", all conditions had to be satisfied prior to the Council signing the survey plan[2].

5 In November 2009, the registered proprietors of the original lot executed an easement in terms which did not reflect condition 2. In particular, no mention

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1 *Tighe v Pike* (2016) 225 LGERA 121 at 123 [1].

2 *Tighe v Pike* (2016) 225 LGERA 121 at 123 [2].

was made in the executed easement of on-site manoeuvring and connection of services and utilities. Despite this omission, the Council approved the relevant survey plan to give effect to the reconfiguration[3].

6 In November 2010, the registered proprietors of the original lot executed a second easement that was relevantly identical to the first easement. Subsequently, the titles for lots 1 and 2 were created and the November 2010 easement was registered in relation to each title. The title for lot 1 was endorsed to describe the registered easement as burdening the land in that lot to the benefit of lot 2, and the title for lot 2 was endorsed to describe the easement benefitting the land in that lot[4].

7 On 18 January 2011, the first respondents, the Tighes, were registered as the owners of lot 1. On 11 January 2012, the appellants, the Pikes, were registered as the owners of lot 2[5].

The Act

8 Section 245 of the Act, which substantially reproduced s 3.5.28 of the IPA, provides:

"**Development approval attaches to land**

(1) A development approval –

(a) attaches to the land the subject of the application to which the approval relates; and

(b) binds the owner, the owner's successors in title and any occupier of the land.

(2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured."

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3 *Tighe v Pike* (2016) 225 LGERA 121 at 123 [3].

4 *Tighe v Pike* (2016) 225 LGERA 121 at 123-124 [3].

5 *Tighe v Pike* (2016) 225 LGERA 121 at 124 [3].

9 The term "development" is defined in s 7 of the Act to include reconfiguring a lot. Section 10(1) of the Act defines "reconfiguring a lot" as including "creating lots by subdividing another lot". Section 10(1) also provides that the term "lot" in the Act means a "lot" under the *Land Title Act* 1994 (Q).

10 Section 244(a) of the Act provides that a development approval includes any conditions imposed by the assessment manager (here, the Council[6]).

11 Section 601(1)(a) of the Act authorises a proceeding in the Planning and Environment Court for an "enforcement order", which is defined as "an order to remedy or restrain the commission of a development offence". An offence against s 580 is a "development offence" according to the definition of that term in Sched 3.

12 Section 580 of the Act is entitled "Compliance with development approval". Sub-section (1) states that a person must not "contravene" a development approval (including any conditions). Section 36(1) of the *Acts Interpretation Act* 1954 (Q) provides that "[i]n an Act, a term defined in schedule 1 has the meaning stated in that schedule". Schedule 1 defines "contravene" as including "fail to comply with".

13 Section 604(1)(a) of the Act provides that the Court may make an enforcement order if satisfied that a development offence "has been committed".

14 Section 605(1)(e) provides that an enforcement order may direct a respondent "to do anything about a development or use to comply with this Act".

The Planning and Environment Court

15 On 13 February 2015, the Pikes filed an originating application in the Planning and Environment Court. By their amended originating application dated 17 July 2015, the Pikes sought:

(a) a declaration that condition 2 of the development approval had been contravened; and

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6 See *Sustainable Planning Act* 2009 (Q), s 246(1); Sustainable Planning Regulation 2009 (Q), Sched 6, Table 1.

(b) an enforcement order directing the Tighes to comply with that condition[7].

16 Before the primary judge, the Pikes contended that the conditions of the development approval ran with lot 1 pursuant to s 245 of the Act, and so bound the Tighes, even though the relevant development, ie the reconfiguration of the original lot, had been completed and the easement registered before the Tighes had acquired lot 1[8].

17 The Tighes contended that their title to lot 1 was free of any obligation under s 245 of the Act. The Tighes argued that if a development offence had been committed by reason of the failure on the part of the original registered proprietors of the original parcel of land to comply with condition 2 of the development approval, that failure had nothing to do with them[9].

18 The primary judge granted the Pikes' application, holding that s 245 had the effect that the conditions stipulated in the development approval ran with the land[10]. His Honour held that the Tighes had committed a development offence which warranted the making of an enforcement order to provide the Pikes with an easement conforming to condition 2[11]. The primary judge did not actually make the enforcement order. His Honour expected that the parties would seek to agree upon appropriate terms for compliance with condition 2 as the basis for the enforcement order[12]. For reasons that are not apparent from the record, that expectation was not met. In this Court, the parties were agreed that in the event that the appeal to this Court were to succeed, the matter should be remitted to the primary judge for the making of final orders.

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7 *Tighe v Pike* (2016) 225 LGERA 121 at 124 [4].

8 *Pike v Tighe* [2016] QPEC 30 at [13].

9 *Pike v Tighe* [2016] QPEC 30 at [39].

10 *Pike v Tighe* [2016] QPEC 30 at [111].

11 *Pike v Tighe* [2016] QPEC 30 at [111], [115].

12 *Pike v Tighe* [2016] QPEC 30 at [115].

The Court of Appeal

19 The Court of Appeal of the Supreme Court of Queensland allowed the Tighes' appeal.

20 Before the Court of Appeal, the Pikes supported the decision of the primary judge and sought, in the alternative, to sustain the primary judge's decision on the basis that the registered proprietors of the original parcel had committed a development offence by failing to provide the easement in conformity with condition 2 of the development approval so that the Planning and Environment Court was empowered to make an enforcement order against the Tighes on the basis that a development offence had been committed within the meaning of s 604(1)(a) of the Act.

21 The Court of Appeal rejected the Pikes' contentions. The leading judgment was given by Fraser JA, with whom Morrison JA and Philippides JA agreed. Fraser JA noted that the primary judge did not find that the original registered proprietors had committed a development offence. In the absence of such a finding, the Pikes' alternative contention could not succeed[13].

22 In addition, Fraser JA held that this Court's decision in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*, concerning the *Environmental Planning and Assessment Act* 1979 (NSW), suggested that, if the power to make an enforcement order under s 604 of the Act was to be engaged, the development offence had to have been committed by the person against whom the order was sought[14]. Because the Tighes were not parties to the reconfiguration of the original parcel, condition 2 imposed no obligation on them. Accordingly, they could not have contravened s 580(1) of the Act[15].

23 As to the operation of s 245 of the Act, Fraser JA held that the obligation to provide an easement in condition 2 was not "a continuing and freestanding obligation severed from the simultaneous creation of the approved reconfiguration"; rather, it was "an obligation to register the easement described in condition 2 in conjunction with the Survey Plan and only as a condition of the

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13 *Tighe v Pike* (2016) 225 LGERA 121 at 128 [21].

14 (2004) 220 CLR 472 at 489 [47]-[48]; [2004] HCA 59, cited in *Tighe v Pike* (2016) 225 LGERA 121 at 128 [21].

15 *Tighe v Pike* (2016) 225 LGERA 121 at 134 [37].

simultaneous reconfiguration of the land into Lots 1 and 2"[16]. In his Honour's view, s 245(1) did not impose obligations in relation to the use of the land after the development approval had been "spent" by the completion of the development that it permitted[17].

24 As to the proposition that s 245 binds only the person permitted by the approval to carry out the subdivision of the original lot, the kernel of the reasoning of Fraser JA is in the following passage[18]:

> "In terms of s 245(1), Lot 1 is part of 'the land' which was 'the subject of the application to which the approval relates'. The development permit conditionally approved only the reconfiguration of 'the land' – the original lot – into Lots 1 and 2. It did not approve any reconfiguration of Lot 1 or of Lot 2 after those lots were created. Any such reconfiguration would be unlawful in the absence of a fresh development approval. Upon the [appellants'] argument it is not easy to attribute meaningful content to the provisions in s 245(1) that a development approval 'attaches to' and 'binds' the owner of a lot. In what sense did the development approval attach to Lot 1 and bind its owner where the approval did not authorise any development of that lot and where the development of the original lot which that approval did authorise had been completed when Lot 1 was created?"

25 It is to be noted that Fraser JA, in paraphrasing the terms of s 245(1), glossed the statutory text. Section 245(1) does not attach a development approval to "a lot"; nor does it bind the owner of "a lot". Section 245(1)(a) attaches the development approval to "the land"; and s 245(1)(b) provides that the approval binds "the owner, the owner's successors in title and any occupier of the land".

26 The approach of Philippides JA to the construction of s 245 was similar to that of Fraser JA. Her Honour observed that the reference to "the land" in s 245 of the Act is a reference to the original lot, and that s 10(1) of the Act defined

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16 *Tighe v Pike* (2016) 225 LGERA 121 at 129 [24].

17 *Tighe v Pike* (2016) 225 LGERA 121 at 129-130 [25]-[28].

18 *Tighe v Pike* (2016) 225 LGERA 121 at 129-130 [27].

"reconfiguring a lot" to mean, relevantly, "creating lots by subdividing another lot"[19].

27 By glossing the language of s 245 of the Act in this way, their Honours concluded that the conditions of the development approval for the reconfiguration of the original lot bound only the owner of, and any successors in title to, that original lot.

The arguments in this Court

The Pikes' submissions

28 The Pikes advanced two submissions. First, they repeated their argument that the circumstance that a development offence has been committed is sufficient to engage the power to make an enforcement order, even if the actual offender is not the person against whom the order is sought. Secondly, they said that the circumstance that the Tighes were not a party to the development approval does not mean that an enforcement order cannot be made against them. Having become the registered proprietors of the servient tenement, they failed to comply with the conditions of the development approval binding upon them by reason of s 245(1) of the Act. On that basis, the Tighes had contravened s 580 of the Act so as to engage the power of the Planning and Environment Court to make an enforcement order under s 604(1)(a) of the Act.

29 In developing their second submission, the Pikes argued that s 245(1) continues to operate notwithstanding a later reconfiguration. They contended that the mere registration of the survey plan, absent fulfilment of the conditions of the approval, did not result in the expiration of the conditions, which, by reason of s 244 of the Act, were part of the development approval. Section 245(2) was said to be an express indication that s 245(1) had this continuing operation.

30 On behalf of the Pikes, it was noted that the Court of Appeal's construction of s 245 of the Act produced odd consequences. For example, an easement could be registered by the proprietor of the original lot and then surrendered under s 90 of the *Land Title Act*; yet s 245 would not be engaged as the development approval and its conditions would be "spent" upon registration of the survey plan. Further, in the case of a large residential development that had conditions attached to it, if it were discovered after registration of the survey

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19 *Tighe v Pike* (2016) 225 LGERA 121 at 135 [45].

plan that the conditions had not been complied with the Land and Environment Court would lack the power to make an enforcement order against the developer or successor in title. These examples were said to suggest that the construction of s 245 adopted by the Court of Appeal unduly attenuated the scope for protection of the public interest in the efficient and effective use of land. There is force in this submission.

The Tighes' submissions

31 The Tighes contended that the Court of Appeal was right to construe condition 2 as imposing a condition of the reconfiguration of the original lot that terminated upon registration of the easement in conjunction with the survey plan.

32 The Tighes also raised a concern as to the potential effect of the Pikes' construction on indefeasibility of title in relation to Torrens title land. It may be said immediately that this concern ignored the circumstance that the Court of Appeal had held that the case gave rise to no issue of indefeasibility[20]. In this regard, their Honours were correct: as all members of this Court in *Hillpalm* held, where a condition of a development approval runs with land by virtue of a statutory provision to that effect, questions of indefeasibility of title under the Torrens system do not arise[21].

The effect of s 245

33 The Pikes' second submission must be accepted. That being so, it is unnecessary to consider their first submission.

34 In the Court of Appeal, Fraser JA, in holding that s 245 operates only against the person who carries out an approved development, saw no reason to distinguish the present case from *Hillpalm*[22]; but in that case, this Court was concerned with whether effect should be given to a condition of a local council's permission to subdivide land in circumstances where the relevant legislation did not contain an equivalent of s 245 of the Act. Rather, the legislation there in question expressly obliged the person who carried out a subdivision to do so in

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20 *Tighe v Pike* (2016) 225 LGERA 121 at 126 [13].

21 (2004) 220 CLR 472 at 491 [53]-[54], 504-506 [98]-[104], 515 [129].

22 *Tighe v Pike* (2016) 225 LGERA 121 at 128 [21].

accordance with the conditions of the council's consent[23]. So far as the reasons of the majority in *Hillpalm* were concerned, it was important that the legislation did not purport to affect successors in title of the person who subdivided the land[24]. With all respect, the contrast between s 245 of the Act and the legislation under consideration in *Hillpalm* is striking.

35 Section 245(1) is not expressed to operate in relation to the carrying out of an approved development; it expressly gives the conditions of a development approval the character of personal obligations capable of enduring in their effect beyond the completion of the development which the development approval authorised. These obligations expressly attach to "the land the subject of the application to which the approval relates". The natural and ordinary meaning of this language is that it attaches to *all* the land the subject of the application for development approval. The owners of the land in lots 1 and 2 are the successors in title to the owners of the land in the original lot.

36 Section 245 draws a distinction between "the land" as the subject of development and "lot[s]" into which the land may be reconfigured. The Court of Appeal did not observe this distinction. The land to which the development approval "attaches" is all the land the subject of the development application.

37 The term "land" is more broadly defined than the term "lot". "Land" is defined as including any estate in, on, over or under land, and the airspace above the surface of land and any estate in the airspace, and the subsoil of land and any estate in the subsoil[25]. By contrast, the definition of "lot" is restricted to "a separate, distinct parcel of land created on … the registration of a plan of subdivision"[26].

38 The Court of Appeal erred in regarding s 245(1)(b) as applicable only to the successors in title of the unsubdivided original lot. To read s 245(1) in that way is not only to gloss the statutory text impermissibly; it is to deprive the provision of any operation in respect of development by way of reconfiguration of a lot once the lots so produced have been sold by the owner of the original lot.

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23 (2004) 220 CLR 472 at 486 [37], 487-488 [43]-[44].

24 (2004) 220 CLR 472 at 487-488 [43]-[44].

25 *Sustainable Planning Act* 2009 (Q), Sched 3.

26 *Sustainable Planning Act* 2009 (Q), s 10(1); *Land Title Act* 1994 (Q), Sched 2.

Under the Act, development includes reconfiguration whereby new lots are derived from an original lot relating to the same land. To read s 245 as confined in this way is to treat development by way of reconfiguration differently from other forms of development without any evident reason for doing so. Section 245(2) is significant here. It proceeds on the assumption that "the land the subject of the application to which the approval relates" is all the land contained in the lots created by the reconfiguration. In addition, s 245(2) expressly contemplates that s 245(1) may operate in respect of land comprising any lot derived from the subdivision of a larger lot, thus confirming that the focus of concern of s 245(1) is upon land as the physical subject of use and occupation rather than the more abstract issue of the quality of a registered proprietor's title to a lot.

39 Given that a development approval is generally regarded as "a consent to the world at large in relation to the land which is its subject"[27], s 245 serves the readily intelligible purpose of ensuring that the terms of any development approval regulating the use and occupation of land may be enforced against successors in title to the land. There is no reason to minimise the effect of conditions upon land use and occupation imposed in the public interest by straining against the natural and ordinary meaning of the provision.

40 No other provision of the Act provides that the conditions of a development approval terminate once development authorised by that approval has been carried out[28]. As was noted by Gotterson JA in *Peet Flagstone City Pty Ltd v Logan City Council*, to argue that the conditions imposed on a development approval terminate in the absence of express provision to that effect is to contradict the statutory character of a condition as part of the "community price a developer must pay for a development approval" and a "vehicle for minimising adverse effects" of permitted development[29].

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27 *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 293; [1972] HCA 33.

28 *Peet Flagstone City Pty Ltd v Logan City Council* [2015] QPELR 68 at 73-74 [27]-[28]. See also *Genamson Holdings Pty Ltd v Caboolture Shire Council* (2008) 163 LGERA 386 at 393-394 [22].

29 [2015] QPELR 68 at 74 [28], quoting *Hymix Industries Pty Ltd v Alberton Investments Pty Ltd* [2001] QCA 334 at [23].

41 The terms of condition 2 of the approval of the reconfiguration expressly applied to the land *in* each of the new lots. No violence is done to the language of condition 2 by applying it to the land owned by the current proprietors of lot 1 and lot 2. Indeed, that is the natural and ordinary reading of the language in which condition 2 is expressed.

42 For these reasons, the first question raised by this appeal must be answered in the affirmative.

Power to make an enforcement order

43 Section 245 and condition 2 together obliged the Tighes to provide the easement rights that condition 2 of the development approval required. Condition 2 required that the easement be "provided" by any person bound by it. The Tighes failed to provide the easement required by condition 2 and so contravened s 580 of the Act.

44 As noted above, for the purposes of s 580 of the Act, "contravening" the conditions of a development approval includes – but is not limited to – failing to comply with those conditions. Lest it be said that the Act operates unduly harshly by exposing a successor in title to a lot to a penalty merely by his or her acquiring land which happens to be bound by the terms of a development approval, a successor in title could not be said to have failed to comply with a condition of a development approval where he or she has had no opportunity to comply with it. It is "failure to comply", rather than bare non-compliance, which gives rise to a development offence the commission of which may lead to the making of an enforcement order under s 604(1)(a) of the Act[30]. Further, it may be noted here that the making of an enforcement order under s 604(1)(a) of the Act is discretionary, so that considerations of hardship may be taken into account if they arise.

45 In the present case, more than three years elapsed between the acquisition of lot 2 by the Pikes and the filing of their application to the Planning and Environment Court. During this period, there was lengthy correspondence between the parties in which the Pikes sought compliance with condition 2. The Tighes had ample opportunity to provide an easement in the terms required

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30 See generally *Lambert v McIntyre; Ex parte Lambert* [1975] Qd R 349 at 350; *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 609, 615-616.

by condition 2. They failed to do so, and thereby "contravened" the development approval and committed a development offence against s 580(1).

46 Contrary to the Tighes' submission, the effect of the Act is not that a person is guilty of an offence at the moment he or she purchases land which does not comply with a condition. Rather, an offence will be committed when a reasonable time to comply with the condition has elapsed or if there is a peremptory refusal to comply with the condition.

Conclusion and orders

47 The appeal to this Court should be allowed.

48 Orders 2 to 5 of the Court of Appeal of the Supreme Court of Queensland made on 23 December 2016 should be set aside. In their place, the appeal to the Court of Appeal should be dismissed, and the matter should be remitted to the primary judge for the making of final orders.

49 The first respondents must pay the appellants' costs of this proceeding and the proceedings in the courts below.