

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, GORDON, STEWARD AND GLEESON JJ

SUNLAND GROUP LIMITED & ANOR

APPELLANTS

AND

GOLD COAST CITY COUNCIL

RESPONDENT

Sunland Group Limited v Gold Coast City Council

[2021] HCA 35

Date of Hearing: 5 August 2021

Date of Judgment: 10 November 2021

B64/2020

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

S L Doyle QC with S J Webster and C M Doyle for the appellants (instructed by Holding Redlich)

G J Gibson QC with M J Batty and A G Psaltis for the respondent (instructed by HopgoodGanim Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Sunland Group Limited v Gold Coast City Council

Local government – Town planning – Development approvals – Where second appellant purchased undeveloped parcel of land in 2015 – Where preliminary approval granted in 2007 for development project pursuant to *Integrated Planning Act 1997* (Qld) – Where preliminary approval contained "conditions" regarding payment of infrastructure contributions by developers to respondent Council – Where development permits granted in 2016 – Where *Integrated Planning Act* introduced new regime permitting local governments to levy infrastructure charges by notice – Where s 6.1.31(2)(c) of *Integrated Planning Act* preserved as interim measure existing regime of imposing condition on development approval requiring infrastructure contributions – Where new regime maintained by *Sustainable Planning Act 2009* (Qld) and *Planning Act 2016* (Qld) – Where respondent Council issued infrastructure charges notices in accordance with new regime following issue of development permits – Whether conditions in preliminary approval imposed liability to pay infrastructure contributions – Whether conditions proper exercise of power in s 6.1.31(2)(c) of *Integrated Planning Act*.

Words and phrases – "conditions", "development approval", "development permit", "future liability", "infrastructure charges", "infrastructure contributions", "notice alerting the developer to the Council's future intentions", "preliminary approval".

Integrated Planning Act 1997 (Qld), ss 3.1.5, 6.1.31.
Planning Act 2016 (Qld), ss 119, 121.

1 KIEFEL CJ, KEANE AND GLEESON JJ. The issues that arise in this appeal and
the arguments agitated by the parties in relation to their resolution are summarised
by Steward J, with whose conclusions we agree. Gratefully adopting his Honour's
summary, we can proceed directly to state our reasons for agreeing with
his Honour's conclusions and the orders proposed by his Honour.

2 Conditions 13 to 16 of the Preliminary Approval that was granted in 2007
by the Council to the second appellant's predecessors in title did not purport to be,
and were not, conditions of the kind authorised by s 6.1.31(2)(c) of the *Integrated
Planning Act 1997* (Qld) ("the IPA"). They did not purport to "impose a condition
... requiring ... a contribution towards the cost of supplying infrastructure". On the
contrary, they expressly gave notice of the Council's then intention to require
contributions to infrastructure "at the time application is made for a Development
Permit". The point, shortly put, is that the power conferred by s 6.1.31(2)(c) of the
IPA was simply not exercised.

3 While it may be accepted that s 6.1.31(2)(c) of the IPA contemplated that a
condition requiring a contribution to infrastructure may be imposed in a
preliminary approval as a species of development approval, it did not mandate such
a course; and Conditions 13 to 16 simply did not "require" anything of the
developer by way of contribution. As a matter of the ordinary and natural meaning
of words, there is no "requirement" of a contribution where no actual liability is
imposed to make the contribution. It is an abuse of language to suggest that
Conditions 13 to 16 imposed a present liability to pay a contribution that would be
calculated by reference to future events.

4 As Steward J points out in his reasons¹, the case of *Ashtrail Pty Ltd v Gold
Coast City Council*² is an example of a condition of the kind in question made in
exercise of the power given under s 6.1.31(2)(c). A comparison between its terms
and that in the present case is telling.

5 Giving effect to the ordinary and natural meaning of Conditions 13 to 16
avoids the distinctly awkward aspect of the appellants' attempts to establish that a
liability had been imposed in any meaningful way when the data necessary to
quantify the liability were not yet available or even identified. Such data cannot be
available until a development permit approves the carrying out of the works in
respect of which contributions to infrastructure will be required.

1 At [56]-[57].

2 (2020) 4 QR 192.

Kiefel *CJ*
Keane *J*
Gleeson *J*

2.

6 The evident purpose of Conditions 13 to 16 was to ensure that the developer was placed squarely on notice that contributions to infrastructure will be required and when that requirement will be imposed.

7 The appellants argued that Conditions 13 to 16 should be understood to be conditions because they were described as "conditions" and a mere notification of something to be done in the future is not a condition authorised by s 6.1.31(2)(c) and so had no statutory foundation. The argument assumes as a premise that the Council must be taken to have entered upon an exercise of the power under s 6.1.31(2)(c). The argument that conditions should be construed to give them practical effect falls into the same category. Both arguments fail to have regard to what s 6.1.31(2)(c) requires if the power it gives is exercised. Further, the appellants' argument fails to appreciate that no specific power was necessary to include in a preliminary approval a notice alerting the developer to the Council's future intentions.

8 Because Conditions 13 to 16 did not require a contribution towards the cost of supplying infrastructure, it is unnecessary to consider the operation of the transitional provisions of the legislation that followed the IPA.

3.

9 GORDON J. Sunland Developments No 22 Pty Ltd ("Sunland 22"), the second appellant, is part of a property development group of companies controlled by the first appellant, Sunland Group Limited. On 29 May 2015, Sunland 22 completed a \$60 million purchase of a large parcel of undeveloped land located at Mermaid Beach on the Gold Coast ("the Land"). The Land is within the local government area of the respondent, the Gold Coast City Council ("the Council").

10 When Sunland 22 purchased the Land it was subject to a preliminary approval granted on 3 May 2007 by the Planning and Environment Court of Queensland under s 3.1.6 of the *Integrated Planning Act 1997* (Qld) ("the *IPA*"), which approved a multi-stage residential development called "Lakeview at Mermaid" ("the Preliminary Approval"). The Preliminary Approval had an initial term of four years³ but has since been extended by the Council. It remains in effect until 2023.

11 Under s 6.1.31(2)(c) of the *IPA*, the Council had power to impose a condition on a development approval (which included a preliminary approval⁴) "requiring ... a contribution towards the cost of supplying infrastructure ... under" a planning scheme policy about infrastructure. The determinative question in this appeal is whether the Council exercised that power and imposed conditions requiring infrastructure contributions in the Preliminary Approval. The answer is no.

12 Sunland's appeal from the decision of the Court of Appeal of the Supreme Court of Queensland, which held that the primary judge erred in declaring, among other things, that the Council had the power to collect infrastructure contributions calculated under and in accordance with the Preliminary Approval, should be dismissed with costs.

13 I agree with Steward J's conclusion that, if the conditions in the Preliminary Approval about contributions towards the cost of supplying infrastructure were purportedly imposed under s 6.1.31(2)(c) of the *IPA*, the conditions were not an effective exercise of that power; objective criteria or standards fixing such contributions were not set out in the Preliminary Approval. However, unlike Steward J, I consider that the Council did purport to impose those conditions under s 6.1.31(2)(c) of the *IPA*. Accordingly, it is necessary to set out my own reasoning.

14 The second question raised in the appeal – whether the Council is subject to an overriding statutory duty to issue "infrastructure charges notices" under s 119 of the *Planning Act 2016* (Qld) – need not be explored. Sunland did not contend

3 *IPA*, s 3.5.21(1)(a).

4 *IPA*, Sch 10 para (b) of the definition of "development approval".

that the Council lacked power to issue those infrastructure charges notices if the conditions in the Preliminary Approval were not validly imposed pursuant to s 6.1.31(2)(c) of the *IPA*.

Preliminary Approval

15 The Preliminary Approval approved "[t]he development application ... subject to the conditions of approval as contained in Schedule A". Section C of Sch A set out the conditions attached to the Preliminary Approval. This appeal is concerned with the four conditions (Conditions 13 to 16) under the heading "Infrastructure Charges", which purported to provide for contributions towards the cost of supplying infrastructure to be paid by the developer of the Land to the Council. It is sufficient for present purposes to set out Conditions 15 and 16:

"15 Contributions toward Water Supply Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions.

Contributions shall be calculated at rates current at due date of payment. Council acknowledges that credits exist over the site as a consequence of previous payments and that the calculation of this contribution will recognise these existing credits.

16 Contributions toward Sewerage Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions.

Contributions shall be calculated at rates current at due date of payment. Council acknowledges that credits exist over the site as a consequence of previous payments and that the calculation of this contribution will recognise these existing credits."

The planning scheme policies referred to in Conditions 13 to 16 ("the Planning Scheme Policies") were made by the Council under a transitional regime set out in the *IPA* and had statutory effect pursuant to s 6.1.20 of the *IPA*.

16 When Sunland 22 purchased the Land in 2015, there was approximately \$19 million of existing infrastructure credits applicable to the development approved in the Preliminary Approval. These are the credits referred to in Conditions 15 and 16.

17 Between 16 December 2015 and 30 September 2016, Sunland lodged a series of development applications. The Council granted development permits for

each application. The Council issued infrastructure charges notices to Sunland under the then-applicable legislation, the *Sustainable Planning Act 2009* (Qld), in respect of each application. The infrastructure charges notices did not assess charges or allow credits in accordance with Conditions 13 to 16 in the Preliminary Approval.

Statutory interpretation, instruments and certainty

18 What power the Council had to impose conditions requiring infrastructure contributions is a question of statutory construction. "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have"⁵. That duty remains constant, regardless of whether the words of a statutory provision are uncertain or unclear⁶. "When inconsistencies or ambiguities appear they are dealt with by [c]ourts according to the established principles of statutory interpretation"⁷.

19 There is no general principle that uncertainty in an instrument made pursuant to power given by an Act spells legal invalidity⁸. The instrument must, however, "be shown to be within the powers conferred by the statute" under which it purports to be made⁹. The fact that there is no void-for-vagueness doctrine in Australia is not inconsistent with the proposition that there may be a failure to exercise power pursuant to a statutory provision if, properly construed, the statutory provision requires that the exercise of the power possess certainty in some respect in order for there to be a valid exercise of power¹⁰.

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

6 *Brown v Tasmania* (2017) 261 CLR 328 at 373 [149], 471 [452], 487 [507].

7 *Brown* (2017) 261 CLR 328 at 471 [452], quoting *Kennedy v Lowe; Ex parte Lowe* [1985] 1 Qd R 48 at 49. See also *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529 at 562.

8 *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 at 71.

9 *Mixnam's Properties Ltd v Chertsey Urban District Council* [1964] 1 QB 214 at 237, cited with approval by Kitto J in *Television Corporation* (1963) 109 CLR 59 at 71.

10 *Television Corporation* (1963) 109 CLR 59 at 71, citing *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 and *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210.

20 The question then is whether, as a matter of statutory construction, there is a requirement of certainty inherent in the provision pursuant to which the power is exercised¹¹. In this case, the question is whether the provision under which Conditions 13 to 16 were purportedly imposed – s 6.1.31(2)(c) of the *IPA* – is "to be read as 'requiring certainty of expression as a condition of [its] valid exercise' so that 'in the end, the question comes back to ultra vires'"¹². Where the power is a power to impose a charge or price, an objective standard must be prescribed¹³. The charge or price must be "an ascertainable fact or figure"; it cannot be left as "a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment"¹⁴. If the result is not a charge or price that is fixed, then "the power has not been pursued and is not well exercised"¹⁵.

21 Before turning to the proper construction of s 6.1.31(2)(c) of the *IPA*, it is necessary to notice but reject the approach to construction contended for by Sunland. Sunland's contention that the existence of ambiguity in the instrument does not itself result in invalidity and that, where possible, ambiguity should be resolved against the Council as the drafter of the Preliminary Approval is contrary to principle and precedent. The instrument is to be construed and its validity assessed in accordance with the principles in *King Gee Clothing Co Pty Ltd v The Commonwealth*¹⁶ and *Cann's Pty Ltd v The Commonwealth*¹⁷ and not by recourse to the principles directed at saving bargains between consensual parties¹⁸.

11 *Television Corporation* (1963) 109 CLR 59 at 71.

12 *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 230 [152], quoting *Cann's* (1946) 71 CLR 210 at 227 and *King Gee* (1945) 71 CLR 184 at 196.

13 *King Gee* (1945) 71 CLR 184 at 197.

14 *King Gee* (1945) 71 CLR 184 at 197.

15 *King Gee* (1945) 71 CLR 184 at 197.

16 (1945) 71 CLR 184.

17 (1946) 71 CLR 210.

18 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCATrans 367 at lines 5521-5537; see also lines 4391-4398. cf *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2006] NSWCA 245 at [40], citing *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-437.

Where there is an exercise of power for the imposition of a charge, the very nature of the power usually necessitates certainty in the imposition of the charge.

Exercise of power required certainty

22 Under s 6.1.31(2)(c) of the *IPA*, the Council had power to impose a condition on a development approval "requiring ... a contribution towards the cost of supplying infrastructure ... under" a planning scheme policy about infrastructure. Under the *IPA*, a "preliminary approval" and a "development permit" were each types of "development approval"¹⁹. A "preliminary approval" approved development, but did not authorise development to occur²⁰. A "development permit" authorised development to occur, relevantly subject to any preliminary approval relating to the development the permit authorised (including any conditions in the preliminary approval)²¹.

23 The power under s 6.1.31(2)(c) to impose, by instrument, an obligation to make a contribution towards the cost of supplying infrastructure in accordance with a planning scheme policy required that the instrument contain the information needed to identify the amount to be paid. The amount had to be able to be objectively determined and ascertained. If, as here, the amount to be paid was to be calculated at rates applicable on a future day – the "due date of payment" – the future day had to be capable of being ascertained with certainty.

24 The need for certainty with respect to the due date of payment is reinforced by the fact that failure to pay contributions as required by a condition imposed under s 6.1.31(2)(c) amounted to a contravention of a development approval and was, therefore, a development offence²². Proceedings could be brought by way of prosecution for the imposition of a penalty for a development offence²³ or for enforcement orders to remedy or restrain the commission of a development offence²⁴, or both²⁵. A person subject to a condition imposed under s 6.1.31(2)(c)

19 *IPA*, Sch 10 para (b) of the definition of "development approval".

20 *IPA*, s 3.1.5(1).

21 *IPA*, s 3.1.5(3).

22 *IPA*, s 4.3.3(1), Sch 10 definition of "development offence".

23 *IPA*, s 4.3.18(1).

24 *IPA*, s 4.3.22(1)(a).

25 *IPA*, s 4.3.25(2).

"is entitled to know exactly what obligations [the condition] imposes"²⁶. "[T]here must be sufficient specification" to enable such a person to comply with their obligations in order for a condition to be validly imposed under s 6.1.31(2)(c) of the *IPA*²⁷.

Power not exercised

25 The Council purported to impose Conditions 13 to 16 pursuant to s 6.1.31(2)(c) of the *IPA* in the Preliminary Approval. The Council imposed Conditions 13 to 16 under the heading "Infrastructure Charges". Each of Conditions 13 to 16 purported to provide for contributions towards the cost of supplying infrastructure to be paid by the developer of the Land to the Council in accordance with an identified planning scheme policy. The language of the conditions (which are in relevantly identical terms) is important. The first sentence – infrastructure contributions "shall apply at the time application is made for a Development Permit" – is most naturally read as purporting to impose an immediate obligation, which would crystallise when a subsequent event takes place. The second sentence – "[t]he contribution to be paid to Council shall be in accordance with" the Planning Scheme Policies – expressly identifies the method for quantifying the infrastructure contributions "to be paid"²⁸. The third sentence – "[c]ontributions shall be calculated at rates current at due date of payment" – purports to identify the point in time for determining one necessary integer (applicable rates) for calculating infrastructure contributions.

26 But the due date of payment, and hence the quantum of the contribution, is objectively unascertainable²⁹ – indeed, it may be at the "discretion" of the Council³⁰. Put in different terms, there is no "sufficient specification"³¹ nor any "objective standard"³² prescribed in Conditions 13 to 16 (when read with the

26 cf *Re JJT* (1998) 195 CLR 184 at 230 [155].

27 cf *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 48 [49].

28 See *IPA*, s 6.1.20(2).

29 cf *Cann's* (1946) 71 CLR 210 at 227.

30 cf *King Gee* (1945) 71 CLR 184 at 197.

31 cf *Plaintiff S156* (2014) 254 CLR 28 at 48 [49].

32 *King Gee* (1945) 71 CLR 184 at 197.

Planning Scheme Policies) which could be applied to identify the due date of payment.

27 The earliest due date would be the date an application for a development permit is approved. But there is a range of potential due dates and it is not clear from the terms of Conditions 13 to 16 or the Planning Scheme Policies whether the due date is, for example, any of the following dates, or the last of those dates: the date a development permit *is approved*³³; the date a development permit *takes effect* (that being the point at which development may commence)³⁴; a *reasonable time after* a development permit is approved or takes effect; a *reasonable time after* the Council calculates the contribution and requests or demands payment; or *as soon as possible after*³⁵ the development permit is approved, the development permit takes effect or the Council calculates the contribution and requests or demands payment.

28 Those possibilities are not exhaustive. Indeed, some of the Planning Scheme Policies contemplate that a developer may "apply to Council for a relaxation of the yield factor" (an integer used to calculate the contribution to be paid), following which the Council would "determine if [the] policy yield factor is to be used or revised"³⁶. The due date might be a reasonable time after, or as soon as possible after, that process is complete. Two of the Planning Scheme Policies also state, in respect of staged developments, that "[t]he assessment of the total ultimate equivalent tenement demand for the initial stage will take place at the time of building approval or reconfiguration of a lot" (which is presumably a reference to a building approval under the *Building Act 1975* (Qld)³⁷) and that "developer contributions will be *payable at that time* in respect of the initial stage" (emphasis added), whereas for subsequent stages "the equivalent tenement demand

33 IPA, s 3.5.11(1)(a).

34 IPA, ss 3.5.19, 3.5.20. The date a development approval takes effect depends on whether there was a submitter for the development application and/or any appeal regarding the development approval.

35 cf *Acts Interpretation Act 1954* (Qld), s 38(4).

36 Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions (20 December 2007) at 39; Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions (20 December 2007) at 40. See also Planning Scheme Policy 16 – Policy for Infrastructure Recreation Facilities Network Developer Contributions (February 2006) at 21-22.

37 See IPA, s 6.1.25(1A).

... will be assessed at the time of the building approval or reconfiguration of a lot for that stage and contributions will be payable, at the rates then in force, prior to the final plumbing inspection or certification of classification, whichever is earlier, or sealed reconfiguration plan for that stage"³⁸.

29 The significance of the inability to ascertain the due date can be tested by reference to the enforcement regime. If the Council wished to commence proceedings to prosecute Sunland for failing to comply with Conditions 13 to 16³⁹, how could it establish that Sunland had failed to pay contributions calculated at the rates applicable at the due date of payment? If enforcement orders were sought by the Council seeking payment of contributions required under Conditions 13 to 16⁴⁰, how could a court ascertain the amount payable by reference to the rates applicable at the due date of payment? Parliament could hardly have intended that a condition could be validly imposed under s 6.1.31(2)(c) that is so uncertain that it is incapable of being properly enforced pursuant to the enforcement regime established in the *IPA*. The consequence of the unascertainable due date of payment is that the power to impose conditions requiring the payment of infrastructure contributions under s 6.1.31(2)(c) was not pursued or exercised⁴¹.

30 The condition referred to in *Ashtrail Pty Ltd v Gold Coast City Council*⁴² provides an illustration of the degree of certainty that one might expect to see in a condition imposing an obligation to make infrastructure contribution payments calculated at rates applicable on a particular due date of payment. And many other conditions in the Preliminary Approval expressly identified or fixed an event or time by which an obligation was to be satisfied⁴³. Nothing in these reasons should be read as deciding or suggesting that those conditions are not valid.

38 Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions (20 December 2007) at 42; Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions (20 December 2007) at 42.

39 *IPA*, s 4.3.18(1).

40 *IPA*, s 4.3.22(1)(a).

41 cf *King Gee* (1945) 71 CLR 184 at 197.

42 (2020) 4 QR 192 at 201 [18].

43 For example: Condition 11 required that "[a]ll works identified on the approved staging plan shall be completed by the applicant by the time specified in the staging plan"; Condition 38 required that "Oil and Grit Separators ... shall be installed in each basement carpark level ... prior to the stormwater discharging to the existing

31 It may be accepted that preliminary approvals (including the Preliminary Approval in this case) establish the framework for future development of land. It does not follow, however, that conditions in a preliminary approval do not impose rights and obligations that govern the future development of land. Such a conclusion would be contrary to the statutory framework, which expressly provides that a preliminary approval is a type of "development approval"⁴⁴; conditions attaching to a development approval are part of the approval⁴⁵; a development approval attaches to land and binds the owner, the owner's successors in title and any occupier of the land⁴⁶; a failure to comply with a condition in a development approval amounts to a contravention of a development approval and is, therefore, a development offence⁴⁷; and proceedings may be brought by way of prosecution for the imposition of a penalty for a development offence⁴⁸ or for enforcement orders to remedy or restrain the commission of a development offence⁴⁹, or both⁵⁰.

32 As explained, the error here was that Conditions 13 to 16 were not drafted with the necessary certainty. In order to meet that uncertainty, the Council submitted that the lack of precision provided a basis for construing Conditions 13 to 16 so that they did not impose any enforceable obligation to make infrastructure contributions under s 6.1.31(2)(c), but nonetheless had utility by notifying the

lake or Council stormwater network"; Condition 41 required that, "[p]rior to the issue of a Development Permit for Building Work, the developer shall submit a report to Council demonstrating" certain matters about stormwater, water storage and irrigation; and Conditions 43 and 52 respectively required that certain land "shall be transferred free of cost to Council" and "works identified on the approved landscape plan for the Local Parks shall be completed" prior to "the issue of a certification of classification for building works or the occupation of any building in the precinct ..., whichever occurs first".

44 IPA, Sch 10 para (b) of the definition of "development approval".

45 IPA, s 3.5.11(1)(a) and (b), Sch 10 definition of "development approval"; see also s 3.1.5(1) and (3).

46 IPA, s 3.5.28(1).

47 IPA, s 4.3.3(1), Sch 10 definition of "development offence".

48 IPA, s 4.3.18(1).

49 IPA, s 4.3.22(1)(a).

50 IPA, s 4.3.25(2).

developer of the Council's intention that infrastructure contributions would apply in the future. The Council submitted that the Court should construe s 6.1.31(2)(c) of the *IPA* as *only authorising* conditions to be imposed in a development permit, with the exception that infrastructure conditions might be able to be imposed in a preliminary approval "for a small or very particular type of development" (although the Council was unable to identify any example of such a circumstance). Those submissions cannot be accepted. There is nothing in the text of s 6.1.31(2)(c) or the wider statutory context to support such a construction. Section 6.1.31(2)(c) conferred a power to impose a condition on a "development approval". It did not draw a distinction between a condition imposed in a preliminary approval and a condition imposed in a subsequent development permit. There was no separate provision in the *IPA* expressly authorising the inclusion of a condition in a preliminary approval notifying an applicant that infrastructure contributions would be required in respect of the future approval of development permits. Instead, to ensure consistency between a preliminary approval and a subsequent development permit the *IPA* required that, except in limited (and presently irrelevant) circumstances⁵¹, a condition in a subsequent development permit *could not be inconsistent with* a condition in an existing preliminary approval with respect to the same land⁵².

⁵¹ *IPA*, s 3.5.32(2).

⁵² *IPA*, s 3.5.32(1)(a); see also s 3.1.5(3)(b)(ii).

- 33 STEWARD J. Sunland Group Limited and Sunland Developments No 22 Pty Ltd ("the appellants") seek to enforce against Gold Coast City Council ("the Council") what they claim are certain "conditions" for the payment of infrastructure contributions in relation to the construction of a multi-staged residential development called "Lakeview at Mermaid" as contained in a preliminary approval ("the Preliminary Approval"). The Council contended that these "conditions" create no obligation to make infrastructure contributions and that, following the grant of applicable development permits to the appellants, the Council must instead levy infrastructure charges by notice, in accordance with Ch 4 of the *Planning Act 2016* (Qld). The amount the appellants must pay for infrastructure under the *Planning Act* exceeds the amount purportedly payable under the "conditions" set out in the Preliminary Approval. For the reasons which follow, the Queensland Court of Appeal⁵³ was correct in deciding that the appellants were obliged to pay infrastructure charges in accordance with the *Planning Act*.

Successive regimes for infrastructure contributions

- 34 In 2007, the Queensland Planning and Environment Court ordered that the future development of "Lakeview at Mermaid" be approved. At that time, the *Integrated Planning Act 1997* (Qld) ("the IPA"), a predecessor to the *Planning Act*, provided for the issue of two types of development approvals: preliminary approvals and development permits⁵⁴. A preliminary approval approved a development to the extent stated in the approval and subject to any applicable conditions⁵⁵. It did not, however, authorise the development to occur⁵⁶. Such authority was conferred by a development permit⁵⁷. Once granted, development could then take place to the extent stated in the permit, and subject to the conditions in the permit and in any preliminary approval⁵⁸. What the Court had ordered in 2007 was the issue of a preliminary approval. It manifested itself as "Schedule A" to that order. Although the IPA did not oblige a developer to obtain a preliminary approval before obtaining a development permit⁵⁹, such an approval, as explained

53 *Gold Coast City Council v Sunland Group Ltd* [2021] QPELR 662.

54 *Integrated Planning Act 1997* (Qld), s 3.1.5.

55 *Integrated Planning Act 1997* (Qld), s 3.1.5(1)(a)-(b).

56 *Integrated Planning Act 1997* (Qld), s 3.1.5(1).

57 *Integrated Planning Act 1997* (Qld), s 3.1.5(3).

58 *Integrated Planning Act 1997* (Qld), s 3.1.5(3)(a)-(b).

59 *Integrated Planning Act 1997* (Qld), s 3.1.5(2).

below, conferred certain benefits for the future development of applicable land. Preliminary approvals lasted for four years⁶⁰, but their term could be extended⁶¹. This took place here on two occasions and the Preliminary Approval remains current.

35 In 2015, one of the appellants purchased the undeveloped land the subject of the proposed "Lakeview at Mermaid" project and the appellants applied for a series of development permits. From July 2016 to December 2016, the Council resolved to grant these. Between the grant of the Preliminary Approval and the issue of the development permits, town planning law in Queensland had changed twice. In 2009, the *IPA* was repealed by the *Sustainable Planning Act 2009* (Qld) ("the *SPA*") and in 2017 that Act was replaced by the *Planning Act*⁶².

36 In 1997, the *IPA* introduced a new regime to permit local governments to levy infrastructure charges by notice to a developer⁶³. However, by s 6.1.31(2)(c), the *IPA* also preserved, as an interim measure⁶⁴, a capacity for a council to impose a condition on any development approval requiring a developer to pay various contributions for infrastructure. This had, in the past, been the means used by local governments in Queensland to obtain infrastructure contributions from developers⁶⁵. The appellants claim that this power was exercised in relation to "Lakeview at Mermaid" when the Preliminary Approval was obtained.

37 The new regime for levying infrastructure charges by notice, rather than as a condition on a development approval, was maintained by both the *SPA* and the

60 *Integrated Planning Act 1997* (Qld), s 3.5.21(1)(a).

61 *Integrated Planning Act 1997* (Qld), s 3.5.22.

62 The *Planning Act 2016* (Qld) received assent on 25 May 2016; however, but for one provision, the Act came into force on 3 July 2017, repealing the *Sustainable Planning Act 2009* (Qld).

63 *Integrated Planning Act 1997* (Qld), Div 4 of Pt 1 of Ch 5. See also Queensland, Legislative Assembly, *Integrated Planning Bill 1997*, Explanatory Notes at 179.

64 *Integrated Planning Act 1997* (Qld), s 6.1.31(3)(b). See also Queensland, Legislative Assembly, *Integrated Planning Bill 1997*, Explanatory Notes at 228-229.

65 Queensland, Legislative Assembly, *Integrated Planning Bill 1997*, Explanatory Notes at 228-229.

*Planning Act*⁶⁶. These Acts contained transitional rules, which the appellants relied upon, and which they said preserved the legal effect of the Preliminary Approval. The Council contended that those transitional rules in relation to the conditions in the Preliminary Approval which deal with infrastructure contributions no longer apply (it otherwise agreed that other parts of the Preliminary Approval still have legal effect). It submitted that it is obliged by the *Planning Act* to levy infrastructure charges in accordance with the new regime⁶⁷. The essence of the dispute between the parties thus concerned which regime for the payment of infrastructure contributions applied following the issue of the development permits in 2016.

38 The appellants accepted that if the infrastructure contribution provisions in the Preliminary Approval did not have the effect of creating a liability to pay infrastructure contributions, and thus were not conditions of the kind authorised by s 6.1.31(2)(c) of the *IPA*, it would necessarily follow that the Council was correct to levy infrastructure charges pursuant to the *Planning Act*⁶⁸. For the reasons that follow, the Preliminary Approval did not create a liability for the appellants to pay infrastructure contributions. Accordingly, it is unnecessary for this Court to consider the effect of the many transitional provisions contained in the *IPA*, the *SPA* and the *Planning Act*.

The legal effect of the Preliminary Approval infrastructure "conditions"

39 Division 6 of Pt 5 of Ch 3 of the *IPA* conferred a general power to impose conditions in a preliminary approval or development permit. Amongst other things, a condition must "be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development" and must "be reasonably required"⁶⁹. A condition must not, however, be "inconsistent with a condition of an earlier development approval still in effect for the development"⁷⁰. That included a preliminary approval⁷¹. In addition, in a case

66 See, eg, *Sustainable Planning Act 2009* (Qld), ss 635, 637; *Planning Act 2016* (Qld), ss 119, 121.

67 *Planning Act 2016* (Qld), s 119.

68 Pursuant to Subdiv 2 of Div 2 of Pt 2 of Ch 4.

69 *Integrated Planning Act 1997* (Qld), s 3.5.30(1).

70 *Integrated Planning Act 1997* (Qld), s 3.5.32(1)(a).

71 Schedule 10 to the *Integrated Planning Act 1997* (Qld) defined "development approval" to include both a preliminary approval and a development permit.

where the new regime for levying infrastructure charges applied⁷², a development approval could not contain a condition imposing an obligation for the payment of money for the "establishment, operating and maintenance costs" of infrastructure⁷³. However, where the new regime had yet to commence to be applied by a council, s 6.1.31(2) of the *IPA* authorised the inclusion of just such a condition in a development approval. That sub-section provided:

"For deciding the aspect of the application relating to the local planning policy, the planning scheme policy or planning scheme provision –

- (a) chapter 5, part 1 does not apply; and
- (b) section 3.5.32(1)(b) does not apply; and
- (c) the local government may impose a condition on the development approval requiring land, works or a contribution towards the cost of supplying infrastructure (including parks) under a policy or provision mentioned in subsection (1)(b)."

40 Adopting the language of s 6.1.31(2)(c), to succeed the appellants needed to demonstrate that the "conditions" in the Preliminary Approval, upon which they relied, constituted a requirement for "a contribution towards the cost of supplying infrastructure".

41 Section 6.1.31(2)(c) was contained in Ch 6 of the *IPA*, which was headed "Transitional provisions". As already mentioned, the power to impose infrastructure contribution conditions within a development approval was only ever intended to be temporary in nature. This is explained in the Explanatory Notes to the *Integrated Planning Bill 1997* (Qld), which state⁷⁴:

"The provision is included to provide flexibility for local government in its transition to the new system. Without this clause local governments would be unable to charge for infrastructure unless they had infrastructure charges plans prepared under the Bill. It is recognised that the preparation of these plans will take time and that appropriate transitional provisions need to be in place to ensure the move to infrastructure charges under infrastructure charges plans occurs as smoothly as possible."

72 *Integrated Planning Act 1997* (Qld), Pt 1 of Ch 5.

73 *Integrated Planning Act 1997* (Qld), s 3.5.32(1)(b).

74 Queensland, Legislative Assembly, *Integrated Planning Bill 1997*, Explanatory Notes at 228-229.

17.

42 The "conditions" ("Conditions 13 to 16") said by the appellants to be authorised by s 6.1.31(2)(c) appeared in the Preliminary Approval under the heading "Infrastructure Charges" and were as follows:

- "13 Contributions toward Recreational Facilities Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 16 – Policy for Infrastructure Recreation Facilities Network Developer Contributions.

Contributions shall be calculated at rates current at due date of payment.

- 14 Contributions toward Transport Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 19 – Policy for Infrastructure Transport Network Developer Contributions.

Contributions shall be calculated at rates current at due date of payment.

- 15 Contributions toward Water Supply Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions.

Contributions shall be calculated at rates current at due date of payment. Council acknowledges that credits exist over the site as a consequence of previous payments and that the calculation of this contribution will recognise these existing credits.

- 16 Contributions toward Sewerage Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions.

Contributions shall be calculated at rates current at due date of payment. Council acknowledges that credits exist over the site as a consequence of previous payments and that the calculation of this contribution will recognise these existing credits."

43 The appellants emphasised that the Council has continued to publish up-to-date rates for the Planning Scheme Policies referred to in Conditions 13 to 16, thus permitting the correct contributions for infrastructure to be determined.

44 The Preliminary Approval also contained clauses or conditions which dealt with other topics, such as "Assessment Framework", "Staging", "Public Access", "Water Supply", "Sewerage", "Traffic and Access", "Drainage and Filling" and "Open Space Park Dedication". Importantly, the Approval also recorded that it "shall establish the planning framework for future development on the site". It also stated that the "Preliminary Approval is not for the detailed design or layout of the development. The detailed design and layout shall be determined following the submission of additional information with future development applications."

45 A principal purpose of obtaining a preliminary approval was that it could vary the effect of any local planning instrument when future applications for development permits were being considered⁷⁵. In addition, the preliminary approval gave a developer a measure of certainty. As already mentioned, no condition in any subsequently issued development permit was permitted if it was "inconsistent" with a condition found in an earlier preliminary approval⁷⁶. The Explanatory Notes stated⁷⁷:

"[Section 3.5.32(1)(a)] prevents a condition being imposed that is inconsistent with a condition of an earlier approval. For example, a preliminary approval is given for a change of use from rural to residential and a condition is imposed that specifies the maximum dwelling density for the land. The preliminary approval dealt with the broad conceptual aspects of the change of use and contemplated a range of dwelling types and densities up to the maximum density specified. A subsequent application is required to allocate those different dwelling types and densities around the site. Any subsequent application could not be conditioned to set a different maximum dwelling density. That has already been set and any conditioning on a subsequent application purporting to set a new limit would be inconsistent with the earlier approval."

46 The foregoing language, with its reference to a preliminary approval containing "broad conceptual aspects", is entirely consistent with the characterisation of such an approval as being a "framework" for future development, which is then to be followed by a more detailed and specific instrument, namely a development permit or permits.

47 If Conditions 13 to 16 are no more than a "framework" for the future imposition of a liability to pay infrastructure contributions by a development

75 *Integrated Planning Act 1997* (Qld), s 3.1.6.

76 *Integrated Planning Act 1997* (Qld), s 3.5.32(1)(a).

77 Queensland, Legislative Assembly, *Integrated Planning Bill 1997*, Explanatory Notes at 124.

permit or permits, then the appellants' case must fail. It was not suggested that there now existed any lawful capacity to issue a development permit or permits containing infrastructure contribution conditions consistently with the Preliminary Approval; nor was it suggested that there was that capacity in 2016 when development permits were issued to the appellants by the Council. The *Planning Act* contains no provision equivalent to s 6.1.31(2)(c) of the *IPA*. The appellants' case was that there was no need for any such new conditions to be created, as the liability or liabilities for infrastructure contributions had already been created by Conditions 13 to 16. That contention suffers from two substantial flaws.

48 First, none of Conditions 13 to 16 specified any clear date for the payment of infrastructure contributions. Each stated that contributions "shall apply at the time application is made for a Development Permit" and that they were to be calculated at the "rates current at due date of payment". However, that "due date of payment" was never set out.

49 Secondly, whilst Conditions 13 to 16 provided that contributions "shall apply at the time application is made", the appellants conceded that the amount of the contribution could only ever be ascertained following the issue of a development permit or permits. This was because the relevant Planning Scheme Policies referred to in Conditions 13 to 16 required the number of an applicable property-based unit of measurement, called an "equivalent tenement", to be determined in order to calculate each contribution. The number of such tenements could only ever be known once the permit or permits had been issued. Moreover, it was said to be unlikely that the parties would fix the time for liability as being when permit applications were to be made, because of the "inherent unfairness to the developer" to pay money in circumstances when it was possible that no permit might ever be issued.

50 The appellants contended that these concerns merely raised issues of construction, which the Court could resolve in their favour. The conditions were to be read, it was said, not in a "technical way", but so as to bring about a practical result and resolve any uncertainty in the language used. The appellants referred to *Westfield Management Ltd v Perpetual Trustee Company Ltd*, where Hodgson JA said that a development consent should be construed, like a contract, to preserve its validity and to avoid uncertainty⁷⁸. Hodgson JA referred⁷⁹ to *Upper Hunter*

78 [2006] NSWCA 245 at [40] (Tobias and Basten JJA agreeing).

79 *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 at [40] (Tobias and Basten JJA agreeing).

County District Council v Australian Chilling and Freezing Co Ltd, where Barwick CJ observed⁸⁰:

"But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. Lord Tomlin's words in this connexion in *Hillas & Co Ltd v Arcos Ltd* ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G) & Nephew Ltd v Ouston* is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved." (footnotes omitted)

51 On this approach, the Court was urged not to scrutinise Conditions 13 to 16 "in the same way as the words used by a parliamentary [draftsperson]"⁸¹.

52 Addressing the two flaws referred to, the appellants conceded that the conditions do not clearly stipulate what the due date for payment is to be, and that the "inelegant drafting is unfortunate". They nonetheless submitted that the conditions created obligations to pay infrastructure contributions and, for that purpose, emphasised the words in each condition that contributions "shall apply". In that context, it was submitted that the failure to choose a date was curable. Correctly construed, payment was to take place either within a reasonable time after the date when the Council was to calculate and then request or demand payment, or as soon as possible after that time in accordance with s 38(4) of the *Acts Interpretation Act 1954* (Qld). That sub-section, if applicable, provides that "[i]f no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens".

53 Next, the appellants submitted that the phrase "at the time application is made" should be understood as referring to the process whereby a development application is lodged and then considered by the Council, and a development

80 (1968) 118 CLR 429 at 436-437 (McTiernan, Kitto and Windeyer JJ agreeing).

81 *Hall & Co Ltd v Shoreham-By-Sea Urban District Council* [1964] 1 WLR 240 at 245 per Willmer LJ; [1964] 1 All ER 1 at 5.

permit ultimately issued. Reading the phrase in this way meant that the liability to pay an infrastructure contribution only arose when a development permit was issued. This construction also resolved the difficulty concerning the ascertainment of the applicable number of "equivalent tenements"; these would be known at the time when the process of "application" would be completed with the issue of a permit or permits.

54 The premise of the appellants' contentions concerning the construction of Conditions 13 to 16 is, with respect, mistaken. It assumed that the Conditions served the purpose of creating a future certain liability or liabilities to make payments by way of infrastructure contributions, and that each condition should thereby be construed to secure that end. But, for the reasons already given, conditions in a preliminary approval serve the task of providing a "framework" for the issue of future development permits. They do not create the final rights and duties that might govern the development of land. In that respect, the failure to specify a due date for payment, or a formula for calculating such a date, is entirely consistent with the real purpose of Conditions 13 to 16. That purpose was to prescribe and fix, in general terms, key attributes of the content of a future liability or liabilities to pay infrastructure contributions upon the issue of a development permit or permits. Until then, the occasion for the imposition of a condition requiring a "contribution towards the cost of supplying infrastructure", for the purposes of s 6.1.31(2)(c) of the *IPA*, could not yet have arisen and might never arise. Such development permits, if issued at a time when the power conferred by s 6.1.31(2)(c) still existed and was applicable, could not then contain an infrastructure contribution condition which would be "inconsistent" with Conditions 13 to 16⁸².

55 Similarly, the use of the phrase in each Condition "[c]ontributions ... shall apply" is a reference to the future creation of a liability or liabilities to pay infrastructure contributions. Significantly, the Conditions do not employ the present tense and instead use the word "apply" rather than language more directly associated with the creation of a pecuniary liability, such as the phrase "must pay"⁸³.

56 In argument, the Council identified how a condition of a kind that could have been authorised by s 6.1.31(2)(c) might have been drafted and then appeared in a development permit. *Ashtrail Pty Ltd v Gold Coast City Council*⁸⁴ concerned

82 *Integrated Planning Act 1997* (Qld), s 3.5.32(1)(a).

83 See, eg, *Ashtrail Pty Ltd v Gold Coast City Council* (2020) 4 QR 192 at 201 [18] per Morrison JA (Mullins JA and Callaghan J agreeing).

84 (2020) 4 QR 192.

a development approval for a material change of use in relation to land. The approval included five conditions, one of which was for the making of infrastructure contributions towards a water supply network. A comparison of the language used in that condition with the text of Conditions 13 to 16 is illuminating. The condition provided⁸⁵:

"5 Water Supply Network infrastructure contributions

The applicant must pay to Council contributions toward Water Supply Network Infrastructure in accordance with *Planning Scheme Policy 3A - Policy for Infrastructure (Water Supply Network Developer Contributions)* at the rate current at the due date for payment. Payment must be made prior to the earliest of the following events: the endorsement of survey plans, the issue of a certificate of classification for building work, the carrying out of the final plumbing inspection, or the commencement of the use of the premises.

The contribution current at the date of this approval is: ... [\$380,639.64].

The contribution amount payable at the due date for payment will be calculated at the rates current under the Policy ... in force at the date of payment."

57 Unlike Conditions 13 to 16, the foregoing clause precisely identifies the time for payment, as well as the means of calculating the infrastructure contribution, expressing the developer's liability with the phrase "[t]he applicant must pay to Council". The absence of equivalent language in Conditions 13 to 16 is telling. It confirms that the purpose of these Conditions was to ensure, upon the assumption the power conferred by s 6.1.31(2)(c) of the *IPA* continued to exist and was applicable, that the issue of any development permit in the future would involve the imposition of consistent infrastructure contribution liabilities. As such, they were not conditions authorised by s 6.1.31 of the *IPA*, but rather, were authorised more generally by Div 6 of Pt 5 of Ch 3. As it happens, and as already mentioned, by the time the development permits were issued to the appellants in 2016, the power to make such conditions had ceased to exist, having been replaced by the new regime for imposing infrastructure charges.

85 *Ashtrail Pty Ltd v Gold Coast City Council* (2020) 4 QR 192 at 201 [18] per Morrison JA (Mullins JA and Callaghan J agreeing).

Conditions 13 to 16 on the assumption that they were purportedly authorised by s 6.1.31(2)(c)

58 Even if Conditions 13 to 16 did purport to create a liability to pay infrastructure contributions in accordance with s 6.1.31(2)(c) of the *IPA*, they were not a proper exercise of that power. In that respect, and contrary to the submissions of the appellants, Conditions 13 to 16 are not to be construed like any other contract, but rather in accordance with the rules of construction governing the interpretation of Acts of Parliament and subordinate instruments⁸⁶. As this Court said in *Perpetual Trustee Co Ltd v Westfield Management Ltd*⁸⁷ when considering a condition in a development consent:

"Special condition 56 is to be construed and its validity assessed in accordance with the principles explained by Justice Dixon in *King Gee Clothing Company Proprietary Limited v The Commonwealth*, and *Cann's Proprietary Limited v The Commonwealth*, and not by recourse to those principles directed to saving bargains between consensual parties and stated by Chief Justice Barwick in *Upper Hunter County District Council v Australian Chilling and Freezing Company Limited*." (citations omitted)

59 If Conditions 13 to 16 were made in an attempt to comply with s 6.1.31(2)(c) of the *IPA*, then, like the Prices Regulation Order considered by this Court in *King Gee Clothing Co Pty Ltd v The Commonwealth*, the "power has not been pursued and is not well exercised"⁸⁸. In *King Gee*, the power was to fix and declare the maximum price at which certain goods might be sold. Notwithstanding the width of the power conferred, it was found that, at the very least, its exercise had to result in "standards or criteria from which a price may be calculated"⁸⁹. It was not enough "if the price, or some element entering into its composition, [could] be obtained only by estimation or by the exercise of judgment or discretion"⁹⁰. The

86 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195 per Dixon J; *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210 at 227-228 per Dixon J. See also *Brown v Tasmania* (2017) 261 CLR 328 at 470-471 [450]-[452] per Gordon J.

87 [2007] HCATrans 367 at 126-127.

88 (1945) 71 CLR 184 at 197 per Dixon J.

89 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 197 per Dixon J; see also at 190 per Rich J, 192 per Starke J.

90 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 197 per Dixon J.

Prices Regulation Order in *King Gee* used matters of "estimate, assessment, discretionary allocation, or apportionment" to determine, "as a matter of judgment", a fixed maximum price⁹¹. Devoid of "clear objective standards"⁹², it followed that the Order had been invalidly made.

60 Here, the power in s 6.1.31(2)(c) of the *IPA* was to impose a condition relevantly requiring a contribution towards the cost of supplying infrastructure. Conditions 13 to 16, assuming they sought to do this, fail to specify a date or time for the making of that contribution and are therefore an improper exercise of the power. The drafters' attempt to formulate a liability has resulted in language that is too uncertain. And the appellants' efforts to save those Conditions from invalidity is too strained. The Court cannot "add that which has been omitted"⁹³ when it is so integral to a valid exercise of the power. Nor does the appellants' attempt to fix the time of liability by reference to an implied term of "within a reasonable time" or by the statutory language of "as soon as possible" cure matters. In each case, the starting point for an application of these tests is not capable of identification from the language of the Conditions; instead, the appellants have merely assumed that it would be from the moment of the issue of development permits. Whether that assumption is correct cannot be ascertained from the language of Conditions 13 to 16.

Notice of Contention

61 The Council filed a Notice of Contention which assumed, in the alternative, that Conditions 13 to 16 did create valid liabilities pursuant to s 6.1.31(2)(c) of the *IPA*. The contention was that the Council's obligation to levy infrastructure charges under the *Planning Act*⁹⁴ prevailed over any such liabilities. As the assumption upon which the Notice of Contention depended is incorrect, it is unnecessary to consider it any further.

62 The appeal should be dismissed with costs.

91 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 197 per Dixon J.

92 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 198 per Dixon J.

93 cf *Gough and Gilmore Holdings Pty Ltd v Council of the City of Holroyd* [2002] NSWLEC 108 at [19] per Talbot J; *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548-549 [38]-[40] per French CJ, Crennan and Bell JJ; see also at 556-557 [65] per Gageler and Keane JJ.

94 See, eg, *Planning Act 2016* (Qld), s 119.

