PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Jimbelung Pty Ltd v Beaudesert Shire Council & Ors* [2005] QPEC 025
PARTIES:	**JIMBELUNG PTY LTD ACN 061 358 987** Appellant v **BEAUDESERT SHIRE COUNCIL** Respondent And **TAMBORINE MOUNTAIN NATURAL HISTORY ASSOCIATION INC** First Co-Respondent And **TAMBORINE MOUNTAIN PROGRESS ASSOCIATION INCORPORATED** Second Co-Respondent And **BARRY J KOGEL AND MARY BERNADETTE COMISKEY** Third Co-Respondents And **IAN CHRISTIAN THOMAS AND SHEILAH MAREE THOMAS & ORS** Fourth Co-Respondents And **FRIENDS OF MOUNT TAMBORINE ASSOCIATION INC** Fifth Co-Respondent
FILE NO/S:	1628 of 1998
DIVISION:	Planning & Environment Court
PROCEEDING:	Application
ORIGINATING COURT:	Planning & Environment Court of Queensland, Brisbane
DELIVERED ON:	15 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2005; written submissions received 18 March 2005
JUDGE:	**Alan Wilson SC,DCJ**

ORDER: **Declare that, before the Appellant may take any further step in this matter, it must seek an order under *UCPR* r 389**

CATCHWORDS: PLANNING LAW – PROCEDURE – *Planning and Environment Court Rules* 1999 – construction of PEC Rule 3 – whether a party who has not taken a step in a proceeding in the Planning & Environment Court for two years is required to seek an order under *UCPR* Rule 389 before taking a new step.

Cases considered :

AAPT CDMA Pty Ltd v Logan City Council (2001) QPEC 020
Beaudesert Shire Council v Brecevic (2003) QPEC 052
Demish Pty Ltd v Kaskabas (2001) QPEC 023
Crowther v State of Queensland (2003) QPEC 017
Gold Coast City Council v Metrostar Pty Ltd (2004) QPEC 029
Hamill v Brisbane City Council (2004) QPEC 030
Kennedy v Gold Coast City Council [2002] QPELR
Landel Pty Ltd v Redland Shire Council (2000) QPEC 082
Mills v Townsville City Council (No 2) (2003) QPEC 018
Noosa Gateway Pty Ltd v Noosa Shire Council (2004) QPEC 034
Ogle v Pine Rivers Shire Council (2004) QPEC 071
Powell v Bowen Shire Council [2000] QPEC 035
Tait v Townsville City Council (2001) QPEC 010
Tyler v Custom Credit Corporation Limited (2000) QCA 178
Ugarin Pty Ltd v Logan City Council (2003) QPEC 047

COUNSEL: Mr S Ure for the Appellant
Mr Young, Solicitor for the Respondent Beaudesert Shire Council
Mr S Keliher for the Fifth Co-Respondent

SOLICITORS: Varro Clarke & Co for the Appellant
Corrs Chambers Westgarth for the Respondent
Environmental Defenders Office for the Fifth Co-Respondent

[1] This is an old matter in which the Appellant, by application filed 25 February 2005, sought directions about its future conduct. On the return date the Fifth Co-Respondent raised a preliminary point that, no step having been taken in the proceeding for more than two years, the Appellant required an order of the court under the *Uniform Civil Procedure Rules*, r 389(2), before anything else could be done. The Appellant disputed an order of that kind was necessary. A timetable was set for written submissions about the point. The submissions for the Respondent Council were under the hand of Mr Cochrane of Counsel.

[2] *UCPR* r 389 provides:

> **389 Continuation of proceeding after delay**
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> (1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed.
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> (2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice.
>
> (3) For this rule, an application in which no order has been made is not taken to be a step."

[3] The Planning and Environment Court is a court of record established under the *Integrated Planning Act* 1997 (*IPA*)[1]. Section 4.1.10 enables rules to be made for the court, which are subordinate legislation, and s 4.1.11 enables general directions to be given about the court's procedures, or in specific matters:

> **4.1.10 Rules of court**
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> (1) The Governor in Council, with the concurrence of 2 or more District Court judges of whom the Chief Judge is to be 1, may make rules about anything—
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> (a) required or permitted to be prescribed by the rules; or
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> (b) necessary or convenient to be prescribed for the purposes of the court.
>
> (2) Without limiting subsection (1), the rules may provide for the procedures of the court, including matters that may be dealt with in chambers or by a court official.
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> (3) The procedures of the court are governed by the rules.
>
> (4) The rules are subordinate legislation.
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> **4.1.11 Directions**
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> (1) To the extent a matter about court procedure is not provided for by the rules, the matter may be dealt with by directions under this section.
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> (2) The Chief Judge of District Courts may issue directions of general application about the procedure of the court.
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> (3) A judge may issue directions about a particular case before the court when constituted by the judge.

[4] Most proceedings before the court are commenced by lodging an appeal[2] and under *IPA* Ch 4, Pt 1, Div 12 the procedure for hearing an appeal is to be in accordance with the rules of the court or, if the rules make no provision or insufficient provision, the directions of the judge constituting the court[3].

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[1] Ch 4 Pt 1.
[2] *IPA* s 41.39.
[3] s 4.1.49.

[5] The rules of the court are the *Planning and Environment Court Rules* 1999 (PEC Rules). The dispute which has arisen concerns the meaning and effect of PEC r 3, which provides:

> **3 Application of Rules**
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> (1) These rules apply to proceedings in the Planning and Environment Court.
>
> (2) If these rules do not provide for a matter in relation to a proceeding, or proceedings, in the Planning and Environment Court and the rules applying in the District Court would provide for the matter in relation to a proceeding, or proceedings, in the District Court, the rules applying in the District Court apply for the matter in the Planning and Environment Court with necessary changes.

The rule has a footnote at its end, which reads:

> If neither these rules nor the rules applying in the District Court provide for a matter about court procedure, directions may be made under section 4.1.11 of the Act.

[6] Under the *Acts Interpretation Act* 1954 and the *Statutory Instruments Act* 1992 the PEC Rules, being subordinate legislation, fall within the descriptor of a "statutory instrument"[4]. Under s 37 of the *Statutory Instruments Act* 1992, words and expressions used in a statutory instrument have the same meanings as they have in the Act which authorises their making. Pursuant to s 14A of the *Acts Interpretation Act* they are, then, to be construed in a way that will "… *best achieve the purpose of the Act* …"

[7] The Respondents contend that on its proper construction PEC r 3(2) is merely facilitative, and is not intended to import the totality of the *UCPR* into Planning and Environment Court proceedings. That construction is said to be apparent from the terms of *IPA*, ss 4.1.10 and 4.1.11 and, also, *UCPR* r 3 which provides:

> **3 Application**
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> (1) Unless these rules otherwise expressly provide, these rules apply to civil proceedings in the following courts -
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> - the Supreme Court
> - the District Court
> - Magistrates Courts.
>
> (2) In a provision of these rules, a reference to the court is a reference to the court mentioned in subrule (1) that is appropriate in the context of the provision.

[8] The Respondents also referred to PEC rr 20 and 21, which permit applications to the court for orders or directions about the conduct and management of proceedings before it. It is said those rules are of sufficiently wide ambit to permit the Fifth Co-Respondent to apply to have the appeal struck out, without the need to resort to the *UCPR*. It was also said that the most common proceeding in the Planning and Environment Court, an appeal brought under *IPA* s 4.1.52, is not a civil proceeding of the kind contemplated in the *UCPR* but, rather, the hearing anew of an application previously made to a local government and the rules relating to civil proceedings were,

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[4] *Acts Interpretation Act* s 36, definition of 'subordinate legislation'; *Statutory Instruments Act* s 9

then, designed for a different end. I do not think these matters are determinative of the proper construction of the rule; they may be relevant if its meaning is unclear.

[9] In general terms it can be said that r 3(2) is, at least, a clear acknowledgement that the PEC Rules are not intended to be a complete code, covering all circumstances which might arise in proceedings in the court.

[10] More particularly, the circumstances in which recourse might be had to the *UCPR* arise when the PEC Rules do not provide for "… *a matter in relation to a proceeding, or proceedings* …". The Dictionary in the schedule to the PEC Rules defines "*proceeding*" as "… *an appeal and a proceeding started by an originating application*". The word "matter" is not defined but in context plainly means an event, or circumstance or question which is or may be an object of consideration or practical concern[5]. (It cannot have the meaning ascribed to it under the former rules of court, ie as a reference to a cause of action itself, because the clause would become insensible[6].) The phrase refers, then, to procedural matters arising in the course of an appeal or originating application about which the PEC Rules are silent.

[11] Research undertaken by Mr Keliher of Counsel revealed a number of cases in which it seems to have been assumed, in this court, that when procedural matters arose and the PEC Rules were silent, recourse to the *UCPR* was almost automatic[7]. In *AAPT CDMA Pty Ltd v Logan City Council* (2001) QPEC 020 a party sought disclosure from another party of certain documents for which privilege was claimed. PEC Rules 16(5) and 20(2) touch upon the disclosure of documents in this court, and the Respondent contended that *UCPR* r 212 (which concerns disclosure in civil proceedings) had no application. Quirk DCJ said:

> [9] There is nothing in the *Planning and Environment Court Rules* that involves an identification of the duty of disclosure comparable to that found in chapter 7 of the *Uniform Civil Procedure Rules* and having regard to Rule 16(5)(b) I am unable to escape the conclusion that the duty in question is the duty outlined in Chapter 7. The question that therefore arises is whether the correspondence in dispute is required to be disclosed having regard to the provisions of Chapter 7, particularly Rule 212.

[12] In *Kennedy v Gold Coast City Council* [2002] QPELR 71 Skoien SJDC said:

> [13] The Act does not identify the necessary parties to the appeal. Therefore, applying rule 3(2) of the *Planning and Environment Court Rules*, reference should be made to the Uniform Civil Procedure Rules 1999 … Rule 62 of the *UCPR* provides that each person "whose presence is necessary to enable the court to adjudicate effectually and completely in all matters in dispute in a proceeding must be included as a party to the proceeding".

[13] These cases reflect, with respect, what is apparent in the Rules: although they deal with a number of procedural elements they are not complete and, where they do not address

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[5] *The New Shorter Oxford English Dictionary*, 'matter'

[6] See, for example, the former Supreme Court Rules, Order 2, Rule 1.

[7] *Powell v Bowen Shire Council* [2000] QPEC 035; *Landel Pty Ltd v Redland Shire Council* (2000) QPEC 082; *Tait v Townsville City Council* (2001) QPEC 010; *Demish Pty Ltd v Kaskabas* (2001) QPEC 023; *Crowther v State of Queensland* (2003) QPEC 017; *Mills v Townsville City Council* (No 2) (2003) QPEC 018; *Ugarin Pty Ltd v Logan City Council* (2003) QPEC 047; Beaudesert Shire Council v Brecevic (2003) QPEC 052; *Ogle v Pine Rivers Shire Council* (2004) QPEC 071; *Gold Coast City Council v Metrostar Pty Ltd* (2004) QPEC 029; *Hamill v Brisbane City Council* (2004) QPEC 030; and, *Noosa Gateway Pty Ltd v Noosa Shire Council* (2004) QPEC 034.

a procedural matter, r 3(2) calls up the *UCPR*. While PEC r 20(2)(c) does permit a party to seek directions "*… about a procedural matter not provided for in these rules or under the Act or another relevant Act"* that appears to be directed towards circumstances not covered by the PEC Rules, or the *UCPR.*

[14] This construction also accords with the philosophy which appears to underlie the legislation, and the Rules. The PEC Rules place some time limits on procedural steps[8], and *IPA* contains a number of stipulations about time applicable to originating proceedings[9]. The procedure in the Brisbane Court, established under PEC Practice Direction 1/2000 and almost universally followed, is for an early directions hearing at which time limits for steps are set. Planning and Environment Court procedures reflect, then, the philosophy expressed in *UCPR* r 5. Those factors make it appropriate that time limits like those established under *UCPR* r 389 should apply to proceedings in the court; and, highly probable that the drafters of the PEC Rules intended just that.

[15] It is no answer to that proposition that the PEC Rules may be of sufficiently wide ambit to permit a party to bring an application to have an appeal struck out; the PEC Rules do not appear to contemplate a more desultory process than the *UCPR* and, rather, apparently share the philosophy behind *UCPR* r 389 described by Atkinson J in *Tyler v Custom Credit Corporation Limited* (2000) QCA 178 as:

> … The consideration that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them.

[16] All these factors point to the conclusion that the drafters of the PEC Rules intended to establish some general guidelines for procedures in the court, but did not intend them to be exhaustive and, where they were silent, for the court to have recourse to the *UCPR.* That construction sits comfortably, too, with the plain meaning of the words in PEC r 3, and the approach to interpretation postulated under the *Acts Interpretation Act.*

[17] *IPA* ss 4.1.10 and 4.1.11, and *UCPR* r 3, do not detract from this conclusion. The power to determine rules and issue practice directions, and give directions in particular matters, are customary adjuncts of a court's power. The absence of any mention of this court in *UCPR* r 3 is not to the point; it is PEC r 3 which calls up the *UCPR* in aid, not the reverse.

[18] *IPA* s 4.1.5A gives the court a wide discretion to deal with non-compliance or partial compliance of *IPA* requirements relevant to proceedings before this court and it was suggested the Appellant's failure to comply with r 389 might be excused under that provision. It relates more directly, however, to technical faults in procedural steps concerning development proposals set out in other parts of *IPA.*

[19] During the hearing oral submissions were made by Mr Ure of Counsel for the Appellant suggesting that, despite the lengthy delay, the parties had not been dormant and there were ongoing negotiations which satisfactorily explained the passage of time and extinguished any suggestion of prejudice to any party. Those submissions were received without objection but were not supported by any affidavit evidence and,

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[8] PEC r 15(2)(a), 16(4) - (7).
[9] *IPA*, ss 4.1.29-37.

having come to the view the Appellant is required to seek an order under r 389 the proper course is to adjourn the matter for the further hearing, allowing sufficient time for the parties to file material if that is desired.