PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Chardan Pty Ltd v Sunshine Coast Regional Council & Ors* [2019] QPEC 7
PARTIES:	**CHARDAN PTY LTD (ACN 617 650 996)** **T/AS OCEAN BOULEVARD** (Applicant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (First respondent) **and** **DANIEL CHARLES GEORGE** (Second respondent) **and** **GARY JOHN COLEMAN AND GLENDA JOY COLEMAN** (Third respondents) **and** **KATIE ELIZABETH MILLER AND PAUL DOUGLAS MILLER AND JACQUELINE LOVATT** (Fourth respondents) **and** **STEPHANIE GUILMARTIN** (Fifth respondent) **and** **JANE BARBARA KETT** (Sixth respondent) **and** **GREGORY BERGEL AND SHERYL ANNE BERGEL** (Seventh respondents) **and**

CALUM MACLEAN

(Eighth respondent)

and

BILL MACMILLAN AND TANNIS MACMILLAN

(Ninth respondents)

and

KENNETH ERIC GOULD AND ELAINE MARY GOULD

(Tenth respondents)

and

DAVID JOHN WALKER AND JANICE KAY WALKER

(Eleventh respondents)

and

VIVIENNE JANE COPPINS

(Twelfth respondent)

and

RODNEY NORMAN ROATZ AND SANDRA KARDUM-ROATZ

(Thirteenth respondents)

and

DAMIEN JOHN ZIETH AND REBECCA NARELLE ZIETH

(Fourteenth respondents)

and

BABOGY VARUGHESE

(Fifteenth respondent)

and

LAUREN MICHELLE URQUHART

(Sixteenth respondent)

and

GARY MILTON COOK AND LYNN COOK

(Seventeenth respondents)

and

JOHN GERARD STANLEY

(Eighteenth respondent)

and

KEVIN JOHN SPENCER

(Nineteenth respondent)

and

GLENN KEITH BERGHOFER

(Twentieth respondent)

and

THOMAS JAMES MCKEE

(Twenty-first respondent)

and

ALAN DOUGLAS NORRIS AND CAROLINA HENDRIKA NORRIS

(Twenty-second respondents)

and

BRETT ALLEN SATO

(Twenty-third respondent)

and

SHANI LOUISE DRIVER

(Twenty-fourth respondent)

and

JOANNE HELEN SOUTHALL

(Twenty-fifth respondent)

and

COLIN DAWSON HEMMING AND BETH MARJORIE HEMMING AND WILLIAM EDWARD MALLETT AS TRUSTEE

(Twenty-sixth respondents)

and

MICHAEL GILBERT BROWN AND LESLEY JOYCE BROWN

(Twenty-seventh respondents)

and

KEVIN NORMAN CHENEY

(Twenty-eighth respondent)

and

CHRISTOPHER JAMES FREDERICK HANCOCK AND MARILYN ANNE ELIZABETH HANCOCK

(Twenty-ninth respondents)

and

ANNIE ANDREWES

(Thirtieth respondent)

and

PETER GEOFFREY BARTA

(Thirty-first respondent)

and

JOEL DEREK LESLIE SAUNDERS

(Thirty-second respondent)

and

REBECCA CLARE MCGEE

(Thirty-third respondent)

and

PAUL WARREN MCRAE

(Thirty-fourth respondent)

and

KEPPESSE PTY LTD (ACN 006 413 181) AS TRUSTEE

(Thirty-fifth respondent)

and

BODY CORPORATE FOR THE OCEAN BOULEVARD COMMUNITY TITLES SCHEME 24396

(Thirty-sixth respondent)

FILE NO:	4228/18
DIVISION:	Planning and Environment Court
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	15 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2019, with written submissions delivered on 22 February 2019
JUDGE:	Williamson QC DCJ
ORDER:	**I will hear from the parties as to further orders.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – SERVICE - Whether r.12 of the *Planning & Environment Court Rules 2018* requires personal service of an Originating application.
LEGISLATION:	*Acts Interpretation Act 1954* ss.4, 39 & Schedule 1 *Planning and Environment Court Act 2016*, ss. 10 & 11 *Planning and Environment Court Rules 2018*, ss.4, 12 & 19 *Statutory Instruments Act 1992*, ss. 4, 7, 14 & Schedule 1 *Uniform Civil Procedure Rules* 1999, rr.3, 8, 105, 106 & 107
CASES:	*Ainsworth v Redd* (1990) 19 NSWLR 78 *Di Carlo v Kashani-Malaki & Anor* [2012] QCA 320 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85
COUNSEL:	A Storie (Solicitor) for the Applicant M Batty for the First Respondent
SOLICITORS:	Connor O'Meara Solicitors for the Applicant Sunshine Coast Regional Council legal services for the First Respondent

[1] The Applicant (***Chardan***), by its Originating application, seeks declaratory relief pursuant to s.11 of the *Planning and Environment Court Act 2016* (***PECA***). The application, which was filed on 26 November 2018, seeks relief about the lawfulness of an existing land use, namely the use of units in an apartment complex situated at Alexandra Headland. The central issue to be determined in the proceeding is whether the units in the apartment complex, save for the manager's unit, can lawfully be used for permanent residential occupation.

[2] Chardan is the owner of the onsite management rights of the apartment complex, which is located in the First respondent's local government area. The Second respondent owns the Resident Manager's unit within the premises. The Third to Thirty-fifth respondents are owners of the remaining units. The Thirty-sixth respondent is the body corporate for the premises.

[3] It is submitted on behalf of Chardan that it has complied with the statutory requirements with respect to service of the Originating application. It has given all but one (the Twenty-fourth respondent[1]) of the named respondents a copy of the proceeding by post. The named respondents comprise both natural persons, and body corporates.

[4] An issue has arisen about the mode of service adopted for the Originating application on natural persons. The Court is asked to determine whether the *Planning and Environment Court Rules 2018* (**PECR**) require personal service of the Originating application on natural persons named as respondents to the proceeding. The issue was raised tentatively in oral submissions at the first mention of the proceeding before the Court. It was properly raised by Mr Batty of counsel to ensure the Court was not led into error.

[5] The resolution of the issue turns, in part, on r.12 of the PECR, which states:

> "***12 Originating application must be served on other parties***
>
> *Unless the P&E Court otherwise orders under rule 19, an applicant must, within 10 business days after filing the originating application,* ***serve*** *a copy of the application on each other party to the P&E Court proceeding.*"
>
> *Note—*
>
> *For the requirement to serve a copy of a notice of appeal under the Planning Act to other parties, see the Planning Act, section 230"*
>
> (emphasis added)

[6] Rule 12 requires an applicant serve a copy of the Originating application on each other party to the proceeding, save where an order is made under r.19. No such order has been made in this proceeding. The character of order that is envisaged as the exception to r.12 is set out in r.19(2), which states:

> "*(2) If the P&E Court considers it appropriate because of urgent circumstances in a particular case, the court may, without the applicant in the P&E Court proceeding giving notice to any other entity –*
>
> *(a) order the proceeding be heard and decided; and*
>
> *(b) make any other order in relation to the proceeding.*"

[7] Whilst r.12 of the PECR provides for the requirement to serve an Originating application, it does not expressly prescribe the mode of service to be adopted. I was not referred to, nor could I identify any other rule in the PECR that prescribed the mode of service for an Originating application.

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[1] Court doc no. 9, paragraphs 10 – 15, 18.

[8] An examination of the word '*serve*' in r.12 does not provide assistance as to the required mode of service under the PECR. The word is not defined in Schedule 1 of the PECR. Nor is it defined by any provision of the PECR. The orthodox approach to statutory interpretation in such circumstances requires the word be given its ordinary meaning, informed by the context in which it appears.

[9] Having regard to the context in which 'serve' appears in r.12, there are two dictionary definitions to which I have had regard. The New Shorter Oxford English Dictionary (Fourth Edition) defines '*to serve*' to mean '*deliver a writ or other legal document to (a person) in a legally formal manner'*. The Macquarie Dictionary (Revised Third Edition) defines '*serve*' as '*to make legal delivery of (a process or Writ)'*. Both definitions involve delivering a legal document in a legally formal manner. Neither definition is sufficiently expansive to provide for the mode of delivery as part of the ordinary meaning of the word. The plain meaning of the word '*serve*' in r.12 of the PECR does not, of itself, therefore provide for the mode of service for an Originating application.

[10] Whilst the PECR do not provide for the mode of service for an Originating application, this does not mean there is a lacuna in the rules. The PECR are not intended to cover the field for all rules having application to P&E Court proceedings. This is made clear by r.4(2) of the PECR, which states:

> "***4 Application of the rules***
>
> ...
>
> *(2) If these rules do not provide for a matter in relation to a P&E Court proceeding and the rules applying in the District Court would provide for the matter in relation to a proceeding in the District Court, the rules applying in the District Court apply for the matter in the P&E Court with necessary changes.*"
>
> (emphasis added)

[11] Rule 4(2) speaks of "*these rules*" not providing for a matter. This is not a defined phrase, but its ordinary meaning is clear enough. It is a reference to the PECR. Where the PECR does not provide for a matter, r.4(2) directs the reader to the rules applying in the District Court. The rules applying in that Court are the *Uniform Civil Procedure Rules 1999* (***UCPR***)[2], which provide for the mode of service for an originating process. An originating process includes an Originating application[3] under the UCPR.

[12] Rule 105 of the UCPR mandates personal service for an originating process, which is to be effected upon all parties to the proceeding. Rule 106 prescribes how personal service is to be performed. The rule states:

> "***106 How personal service is performed***
>
> *(1) To serve a document personally, the person serving it must give the document, or a copy of the document, to the person intended to be served.*

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2 Rule 3 of the UCPR.

3 Rule 8(2) of the UCPR.

(2) However, if the person does not accept the document, or copy, the party serving it may serve it by putting it down in the person's presence and telling him or her what it is.

(3) *It is not necessary to show to the person served the original of the document.*"

[13] Rule 107 of the UCPR is also relevant. It provides for a different mode of service for an originating process naming a corporation as a party. A document required to be served personally on a corporation must be served in the way provided under the *Corporations Act 2001 (Cth)*, or another applicable law.

[14] The PECR does not expressly provide for the matters which are the subject of rr.105, 106 and 107 of the UCPR. A literal approach to the interpretation of r.4(2) of the PECR in such circumstances means that the UCPR rules are treated as prescribing the mode of service for an Originating application. I would pause to observe that there does not appear to be any contextual requirement for the rules in the UCPR to be read subject to '*necessary changes*', as is permitted by r.4(2) of the PECR.

[15] Given the above, it is my view that Originating applications commenced in the Court under PECA are to be served by an applicant on each other party in compliance with the UCPR. In this case, the relevant rules in the UCPR are rr.105, 106 and 107.

[16] All parties to the proceeding were given an opportunity to file written submissions about the issue of personal service. Chardan and the Council were the only parties who elected to file written submissions. They both contend that r.12 of the PECR does not require personal service of the proceedings on a natural person named as a party. Different reasons are advanced in support of their respective positions, there is however substantial overlap in the reasoning.

[17] The primary reason advanced in support of 'ordinary service' is set out in the written submissions filed on behalf of Chardan. It submits that r.105 of the UCPR does not apply in this case because:

(a) the UCPR only applies where the PECR does not provide for a matter;

(b) r.4 of the PECR is not engaged, and the UCPR does not apply because r.12 of the PECR, when read in conjunction with s.39(1)(a) of the *Acts Interpretation Act 1954* (***AIA***), provides for service of an Originating application by post; and

(c) no contrary intention appears in the PECR to displace s.39(1)(a) of the AIA.

[18] To make good the submission set out in paragraph [17](b) above, it was necessary for Chardan to establish that r.4 of the PECR is not engaged because '*these rules*' provide for service of an Originating application on a natural person by post. I was not persuaded that the rules do provide for the mode of service in their own right. Indeed, the submissions made on behalf of Chardan support this view.

[19] The submissions made by Chardan do not suggest that r.12 of the PECR prescribes the mode of service in its own right. On its case, r.12 must be read in combination with s.39(1)(a) of the AIA. The difficulty for Chardan is that s.39(1)(a) of the AIA does not form part of the PECR, that is to say, it is not part of '*these rules*' for the purposes of r.4(2). The AIA is an extrinsic instrument, not unlike the UCPR, for the purposes of r.4(2). This is confirmed by two matters.

[20] First, there is no express provision of the PECR or AIA, which provides that s.39(1)(a) should be read as if it forms part of '*these rules*' for the purposes of r.4(2). The incorporation of the provision into the PECR could, in my view, only then arise as a matter of context, or by implication.

[21] Second, as a matter of context or implication, I accept that the PECR may be read in conjunction with s.39(1)(a) of the AIA. The combination of ss.7, 14(1) and Schedule 1 of the *Statutory Instruments Act 1992* (***SIA***) confirms that s.39 of the AIA applies to Statutory Instruments[4], and the PECR is a Statutory Instrument[5]. This does not however mean that s.39(1)(a) forms part of the PECR. Something more would, in my view, be required for the provision to be treated as part of the PECR. The ordinary meaning of s.39(1)(a) of the AIA does not provide that '*something more*' to which I have referred.

[22] Section 39(1)(a) is contained in Part 8 of the AIA and states:

> *"**39 Service of documents***
>
> *(1) If an Act requires or permits a document to be served on a person, the document may be served—*
>
> *(a) on an individual—*
>
> *(i) by delivering it to the person personally; or*
>
> *(ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document;…"*

[23] Section 39(1) of the AIA, properly construed, does not as a matter of context or implication suggest it should be read as forming part of the PECR. The provision does not purport to operate as a definition of the word '*serve*' or a derivative of it, that is to be applied where words of this nature appear in another enactment or statutory instrument. I regard this as a matter of significance. It has the effect, in my view, of the provision taking on the character of a general provision providing guidance on how a document may be served where required under an enactment. That guidance identifies that number of modes of service may be adopted. The provision does not express a preference for one mode over another. It should also be noted that types of documents to which the provision applies is a broad church that includes court documents. This is confirmed by the definition of '*document*' in Schedule 1 of the AIA, which states:

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4 s.14(1) and Schedule 1 (which includes Part 8 of the AIA) of the *Statutory Instruments Act 1992*.

5 s.7 *Statutory Instruments Act 1992*.

"***document*** *includes –*

(a) any paper or other material on which there is writing; and

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and

(c) any disc, tape or other article or any other material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)."

[24] Given each of the matters I have referred to above, it is my view that s.39(1)(a) of the AIA is not to be treated as if it forms part of the PECR, either expressly or by implication. In those circumstances, the provision does not directly affect the operation of r.4(2) of the PECR. Rule 4(2) requires an examination of whether '*these rules*' provide for a matter. That is answered by reference to the PECR, and not s.39(1)(a) of the AIA in the circumstances of this case.

[25] I accept, at first blush, that it may be thought my reasoning suggests there are two ways an applicant may comply with r.12 of the PECR. One is mandated by r.4(2) of the PECR read with the UCPR. The other mode of service is prescribed in s.39(1)(a) of the AIA. The two alternatives are inconsistent. The requirement under r.105 of the UCPR to personally serve a natural person named as a party to an Originating application is different to what is contemplated by s.39(1)(a) of the AIA. This inconsistency is however resolved by reference to s.39(3) of the AIA. It is also resolved, if necessary, by reference to s.4 of the AIA and s.4 of the SIA.

[26] Section 39(3) of the AIA states:

"*(3) Nothing in subsection (1) –*

(a) affects the operation of another law that authorises the service of a document otherwise than as provided in the subsection; or

(b) affects the power of a court or tribunal to authorise service of a document otherwise than as provided in the subsection."

[27] Section 39(3)(a) of the AIA resolves the inconsistency to which I have referred above. Section 39(3) has the effect of displacing s.39(1)(a) in favour of the UCPR, to the extent of any inconsistency about personal service. This is of little surprise given the UCPR is specific to originating processes, and prescribes a mode of service for that category of document.

[28] The inconsistency can also be resolved by reference to s.4 of the AIA which states:

"*The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in the Act.*"

[29] The above provision is similar to s.4 in the SIA which states:

"*The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any instrument.*"

[30] Both s.4 of the AIA, and s.4 of the SIA, provide that a provision, such as s.39(1)(a), may be displaced by a contrary intention in a statute or statutory instrument. In my view, rr.12 and 4(2) of the PECR, read with rr.105, 106 and 107 of the UCPR[6], displace the application of s.39(1) of the AIA by contrary intention. The contrary intention requires personal service of an Originating application for a natural person named as a party to the proceeding.

[31] The Council's written submissions largely echoed the submissions made on behalf of Chardan, save for one additional point. It submitted that an interpretation of the PECR requiring personal service of an Originating application on a natural person named as a party would be inconsistent with the Court's obligations stated in s.10(1) of PECA. This provision states:

> *"**10 Principles for exercising jurisdiction***
>
> *(1) In conducting P&E Court proceedings and applying the rules, the P&E Court must—*
>
> *(a) facilitate the just and expeditious resolution of the issues; and*
>
> *(b) avoid undue delay, expense and technicality.*

[32] I do not accept this submission. The requirement to personally serve an Originating application seeking declarations about the lawfulness of an existing land use is consistent with s.10 of PECA. It is a requirement that is prescribed having regard to the ordinary meaning of the very rules the Court must apply to a P&E Court proceeding.

[33] The submissions made on behalf of the Council, in substance, invite the Court to depart from the ordinary meaning of the PECR. This proceeds on the footing that it is permissible to do so given the two stated objectives in s.10 of PECA. In my view, it would be contrary to principle for the Court to act on this submission. The stated objectives in s.10(1) do not envisage that the Court will apply the PECR in a way that has the effect of departing from its ordinary meaning to adopt, in lieu, an alternative construction that is asserted to be more expedient, convenient and cost efficient. This is subject to one exception, namely where principles of statutory interpretation would permit a departure from the ordinary meaning of the PECR. There is no such principle that would support the Council's submission. Rather, to depart from the plain meaning of the PECR would be contrary to appellate authority which attaches importance to the mode of service for an originating process, as distinct from other court documents[7]. It would also be contrary to authority with respect to if, and when, the plain meaning of a legislative provision may be departed from by application of the purposive approach to statutory interpretation.

[34] With respect to the importance attached to personal service, this is a point that needs little by way of explanation. The requirement to personally serve a named party to an originating process serves the wholesome purpose of ensuring that all affected parties named in a proceeding are given notice of it, and can exercise their right to participate in the proceeding before any substantive steps are taken.

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6 Which is an "instrument" under s.4 of SIA.

7 *Ainsworth v Redd* (1990) 19 NSWLR 78, 85.

[35] Personal service is but one feature of the PECR intended to ensure a P&E Court proceeding has the best possible chance of progressing absent an underlying concern that a named, or affected party, may emerge late in the piece, after it has progressed a substantial way on the path to hearing. The late injection of a party into a proceeding, even allowing for the best of intentions, is likely to result in delay and additional cost. The Court construing and applying the PECR in a manner that is directed towards the avoidance of such unnecessary delay and cost to the parties is, in my view, consistent with s.10(1) of PECA.

[36] As to the principles relevant to the application of the purposive approach to statutory construction, I do not accept that this approach authorises a departure from the plain and ordinary meaning of rr.4(2) and 12 of the PECR. In my view, the correct approach to the construction exercise is that stated by McHugh J in *Newcastle City Council v GIO General Ltd*[8]:

> *"When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation*[9]*."*

[37] In the context of the PECR, the express words of rr.4(2) and 12 are capable of only one construction, and no other provision of the rules, or PECA, throw doubt on that plain and ordinary meaning. In such circumstances, the Court cannot ignore the ordinary meaning of rr.4(2) and 12 of the PECR. Moreover, it is impermissible for the Court to substitute a different construction to the ordinary meaning of rr.12 and 4(2) because the alternative is thought to be more consistent with s.10(1) of PECA.

[38] For the reasons set out above, Chardan is required to serve these proceedings in accordance with rr.105, 106 and 107 of the UCPR. I will hear from the parties about the further orders, if any, that should be made with respect to service and the future conduct of the proceeding generally.

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8 (1997) 191 CLR 85 at 109.

9 This principle was applied in *Di Carlo v Kashani-Malaki & Anor* [2012] QCA 320 [19].