

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Fraser Coast Regional Council v Zacka & Ors* [2019] QPEC
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PARTIES: **FRASER COAST REGIONAL COUNCIL**
(applicant)

v

PAUL MICHAEL ZACKA
(first respondent)

AND

HELEN JOY ZACKA
(second respondent)

AND

MICHAEL JAMES ZACKA
(third respondent)

FILE NO/S: 2400 of 2009

DIVISION: Planning and Environment

PROCEEDING: Application

ORIGINATING
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 14 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 11 and 12 April 2019

JUDGE: Kefford DCJ

ORDER: **I order:**

- (a) **BGM Projects Pty Ltd is to be joined as a respondent to this proceeding; and**
- (b) **this proceeding should be heard together with Planning and Environment Court Application No. 2312 of 2018.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION – applications in pending proceeding – where the substantive proceeding seeks enforcement orders under the *Integrated Planning Act 1997* – where the enforcement orders relate to alleged unlawful operational work being bulk earthworks and alleged unlawful tidal works by the respondents – where the respondents rely on discretionary reasons to avoid the relief

sought – where the discretionary reasons contain allegations that BGM Projects Pty Ltd made representations that the Council ought to have known were not correct – where the Council applied for an order that BGM Projects Pty Ltd be included as a party – where the Council applied to have this proceeding heard together with Application No. 2312 of 2018, being a proceeding for enforcement orders commenced by BGM Projects Pty Ltd – whether the presence of BGM Projects Pty Ltd is necessary to enable the court to adjudicate effectively and completely on all matters in dispute in the proceeding – whether the presence of BGM Projects Pty Ltd would be desirable, just and convenient to enable the court to adjudicate effectively and completely on all matters in dispute in the proceeding - whether the proceedings should be heard together with the enforcement proceedings commenced by BGM Projects Pty Ltd

LEGISLATION:	<i>Planning and Environment Court Rules 2018</i> (Qld), r 4 <i>Uniform Civil Procedure Rules 1999</i> (Qld), r 69
CASES:	<i>Leda Holdings Pty Ltd v Caboolture Shire Council</i> [2006] QCA 41; [2007] 1 Qd R 467, applied <i>MAM Mortgages Ltd (in liq) & Anor v Cameron Bros & Ors</i> [2002] QCA 330, cited
COUNSEL:	B Job QC and D Purcell for the applicant R Litster QC and L Sheптоoha for the second and third respondents T Sullivan QC and R Quirk for BGM Projects Pty Ltd
SOLICITORS:	Connor O’Meara for the applicant Hopgood Ganim for the second and third respondents Clinton Mohr Lawyers for BGM Projects Pty Ltd

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Introduction

- [1] Michael James Zacka and Helen Joy Zacka own land at Bushnell Road, Burrum Heads, Hervey Bay. It adjoins land owned by BGM Projects Pty Ltd.
- [2] The Council alleges the Zackas have undertaken unlawful development on their land, in the form of filling and excavation to construct a dam and a bund. The Council alleges that the unlawful development causes flooding on BGM Projects’ land. It seeks enforcement orders to require the Zackas to refrain from committing a development offence, as well as enforcement orders to remedy the effect of the development offences.

- [3] The Council has made two applications in this proceeding. One is an application for an order that this proceeding be heard together with Planning and Environment Court Application No. 2312 of 2018. The other is an application for an order that BGM Projects be joined as a party to the proceeding.

Should there be a joint hearing?

- [4] Planning and Environment Court Application No. 2312 of 2018 is a proceeding commenced by BGM Projects. It seeks enforcement orders to require the Zackas to refrain from committing a development offence, as well as enforcement orders to remedy the effect of development offences. The relief in that proceeding is premised on materially the same facts and circumstances as the relief sought by the Council in this proceeding.
- [5] The Zackas have applied to strike out or permanently stay BGM Projects' proceeding. That application was heard at the same time as the applications in this proceeding. The Zackas were unsuccessful.¹ In that event, the Zackas concede that the proceedings should be heard together.
- [6] I am satisfied that it is appropriate for the proceedings to be heard together. There is significant commonality in the issues and the evidence to be addressed in both proceedings. The same legislative instruments will require consideration. There are likely to be savings in time and money to all parties. There is common representation. In those circumstances, I am satisfied that a joint hearing would facilitate the just and expeditious resolution of the issues, and avoid undue delay, expense and technicality.

Should BGM Projects be joined as a party to the proceeding?

- [7] The Council seeks to join BGM Projects to this proceeding pursuant to r 4(2) of the *Planning and Environment Court Rules 2018* (Qld) and r 69 of the *Uniform Civil Procedure Rules 1999* (Qld). The Council contends that BGM Projects' presence is necessary, and also desirable, just and convenient. BGM Projects supports the Council's application.
- [8] The Zackas oppose BGM Projects being joined as a party. It says there is no proper basis for the joinder.
- [9] Rule 69 of the *Uniform Civil Procedure Rules 1999* permits the court, at any stage of a proceeding, to order that a person be included as a party if they are a person whose presence before the court:
- (a) is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding; or
 - (b) would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.
- [10] The second circumstance in which a person may be joined is cast in broader terms than its counterpart.² It is convenient to deal with it first.

¹ See *BGM Projects Pty Ltd v Zacka & Ors* [2019] QPEC 20.

² *MAM Mortgages Ltd (in liq) & Anor v Cameron Bros & Ors* [2002] QCA 330, 27.

- [11] All of the parties accept that the discretion conferred by r 69 of the *Uniform Civil Procedure Rules 1999* should be approached as facilitating the determination of proceedings in accordance with the rules of natural justice. It should not be approached as if it were intended to restrict the availability of the common law right of a person likely to be affected by a decision to be heard in relation to that decision.³ The question is not whether a statutory provision confers a right to be heard, but whether it displays a legislative intention to exclude the rules of natural justice, and in particular the common law right of BGM Projects to be heard in opposition to any potential finding which would prejudice its interests.⁴
- [12] The Zackas advance nine reasons why it is not desirable, just and convenient for BGM Projects to be joined.
- [13] First, the Zackas submit there is no application on foot for BGM to be joined as an applicant to this proceeding. They also submit that were BGM Projects joined as an applicant to this proceeding, it would achieve indirectly that which cannot be achieved directly, as BGM Projects could not now commence a proceeding in the Planning and Environment Court to remedy a development offence under the *Integrated Planning Act 1997*.⁵ This submission is misdirected. The Council seeks an order that BGM Projects be joined as a respondent.
- [14] Second, the Zackas submit that where relief is not sought against a proposed respondent, the only justification for bringing a person before the court is to ensure that the person is bound by the result of the action and adjudication. They say, whatever the outcome, BGM Projects continues to be free to pursue its rights in the Supreme Court and is not prevented from re-litigating facts common to both proceedings. Accordingly, they say the joinder lacks utility. This submission does not accord with r 69 of the *Uniform Civil Procedure Rules 1999*. Rule 69(1)(b)(ii) provides justification for joining a person as a party that is not dependent on a finding that the person will be bound by the result of the action and adjudication.
- [15] Third, the Zackas submit there is no role for BGM Projects in the proceeding. I disagree. On 23 April 2015, the Zackas filed a document titled “*Particulars*” in which it identified the bases upon which they say the court should not exercise its discretion to grant the relief sought by the Council. The Particulars include allegations that when the Council commenced this proceeding, it knew, or ought to have known:
- (a) BGM Projects’ made certain identified representations to the Council prior to November 2006 in order to secure approval for operational works;
 - (b) the representations made by BGM Projects’ were not correct;
 - (c) BGM Projects’ obtained development approvals for works on land adjoining the Zackas’ land, and conditions of those development approvals relating to drainage had not been complied with; and

³ *Leda Holdings Pty Ltd v Caboolture Shire Council* [2006] QCA 41; [2007] 1 Qd R 467, 470 (Keane JA, with Williams JA and McMurdo J agreeing).

⁴ *Leda Holdings Pty Ltd v Caboolture Shire Council* [2006] QCA 41; [2007] 1 Qd R 467, 470 citing *Annetts v McCann* (1990) 170 CLR 595, 598-9 (Mason CJ and Deane and McHugh JJ).

⁵ *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6; *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52.

- (d) the excavation and filling associated with the bund wall reduced ponding of water that had been diverted by works conducted on adjoining land formerly owned by BGM Projects.
- [16] In oral submissions, Mr Litster QC submitted that the focus of these particulars is what the Council knew or ought to have known about where water flowed. If that was the intent, the Particulars could have been drafted to only make reference to the Council's knowledge of particular facts about the state of the relevant land and water flow across it. The Particulars have not been so drafted. Instead, they put the accuracy of representations made by BGM Projects, and the lawfulness of its conduct, in issue. As the findings sought by the Zackas' Particulars directly relate to representations made by BGM Projects and the lawfulness of its conduct, it is desirable, just and convenient for it to be joined as a party to the proceeding so that it may be heard about such matters.
- [17] Fourth, the Zackas submit that all matters relevant to these proceedings can be placed before the Court without the joinder of BGM Projects. It says the Council can call any witnesses it chooses. That may well be the case, but the interests of the Council are not coincident with that of BGM Projects. One would not expect the Council to be concerned about defending BGM Projects against potential adverse findings with respect to representations it made or the lawfulness of its conduct.
- [18] Fifth, the Zackas rely on the age of the proceeding. They note the proceeding has been on foot for over 9 ½ years. They say a significant number of steps in the proceeding have been taken to date, including disclosure, the filing of affidavit material, including expert evidence, without prejudice expert conferences and mediations, the amendment by the Council of its Originating Application, the provision of Particulars identifying discretionary matters, and interlocutory applications. They say substantial costs have been incurred by the current parties. The Zackas submit that if BGM Projects were joined, this proceeding would be reset, which may require the repeat of steps already taken over the last 9 ½ years.
- [19] This reason is not a compelling basis for finding, in this case, that it is not desirable, just and convenient to join BGM Projects as a party when one recalls that the Zackas concede that this proceeding should be heard together with BGM Projects' proceeding. Further, while the proceeding has been on foot for over 9 ½ years, the Zackas only filed their Particulars on 23 April 2015.
- [20] Sixth, the Zackas submit the inclusion of BGM Projects will necessarily increase the time taken to hear and determine this proceeding, increasing costs. Again, given the Zackas concede that this proceeding should be heard together with BGM Projects' proceeding, I am not persuaded that this is necessarily so.
- [21] Seventh, the Zackas submit that if BGM Projects are not joined to this proceeding, the Council is not prevented from responding to the discretionary considerations raised against it by the Zackas. It can call all witnesses capable of giving evidence relevant to those matters. As with the fourth reason advanced by the Zackas, this submission is unpersuasive.
- [22] Eighth, the Zackas submit it is apparent that the real reason for involving BGM is so that the Council can attempt to negotiate an outcome between BGM and the Zackas. They say that is not the Council's role in enforcement proceedings and does not justify the joinder of BGM. I am not persuaded that the Council's application is motivated

by an improper purpose. I am satisfied that it is desirable, just and convenient to join BGM Projects as a party.

- [23] The final reason the Zackas say it is not desirable, just and convenient for BGM Projects to be joined as a party is that the Council has pointed to no case where an order for joinder has been made in similar circumstances. They say this court has previously declined to join persons as respondents to enforcement proceedings. This submission is without merit. Each case must be decided on its own facts.
- [24] Given I am satisfied that it is desirable, just and convenient to join BGM Projects as a party, there is no need for me to consider whether its presence is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding.

Conclusion

- [25] I am satisfied that BGM Projects should be joined as a respondent to this proceeding, and that this proceeding should be heard together with Planning and Environment Court Application No. 2312 of 2018.
- [26] I will hear from the parties in due course about the directions that should be made in each proceeding.