PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No.2)* [2019] QPEC 26
PARTIES:	**COUNCIL OF THE CITY OF THE GOLD COAST** (Applicant/Respondent) **v** **ASHTRAIL PTY LTD (ACN 057 404 074)** (First Respondent/Applicant) **and** **TALRANCH PTY LTD (ACN 077 382 453)** (Second Respondent/Applicant)
FILE NO:	87/2018
DIVISION:	Planning and Environment Court
PROCEEDING:	Stay application
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	18 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2019
JUDGE:	RS Jones DCJ
ORDER:	**1. It is ordered that:** **Upon the undertakings given by Talranch Pty Ltd and Tenkate Property Pty Ltd that:** **(a) Talranch Pty Ltd, without further order of the court will not dispose of any of its estate or interest in its real property.** **(b) Tenkate Property Pty Ltd (ACN 608 219 512) as trustee of the Tenkate property trust and of the Banyo property trust undertakes that pending the determination of the appeal to the Court of Appeal:** **(i) if any of Lot 1 on SP290803 (title reference 51126526), Lot 3 on SP290803 (title reference 51126528), Lot 4 on SP290803 (title reference 51126529) or Lot 8 on SP209803 (title reference 51126533) situated at 37 Newhaven Street, Everton Park in the**

state of Queensland are sold, the net proceeds of any such sale/sales will be paid into court;

(ii) if Lot 16 on SP220551 (title reference 50778298) situated at 80 Blizinger Road, Banyo in the state of Queensland is sold then the net proceeds of that sale will be paid into court;

2. The operation of paragraph 1 of the orders made by this court on 29 March 2019 be stayed pending the determination of any application for leave to appeal that decision and, in the event that leave is granted, the determination of the appeals by the Court of Appeal;

3. The parties have liberty to apply in respect of any of the orders made by this court on 18 June 2019.

Legislation

Planning and Environment Court Act 2016 (Qld)

Planning Act 2016 (Qld)

Uniform Civil Procedure Rules (1999)

Cases

Commissioner of Taxation of the Commonwealth of Australia v The Myer Employer Ltd [1986] 160 CLR 220

Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor [2019] QPEC 12

Croney v Nand [1999] Qd R 342

Denning v Jet Development Pty Ltd & Anor [2006] QCA 544

Drew v Makita (Australia) Pty Ltd [2008] QCA 312

Erinfold Properties Ltd & Anor v Cheshire County Council [1974] 1 Ch 261

Pianta v National Finance and Trustee Ltd (1964) 38 ALJR 232

Ross & Anor v Carvallio & Anor [1995] WASC 152 (31 January 1996)

COUNSEL: Mr R Litster QC with Mr K Wylie of counsel for Ashtrail Pty Ltd and Talranch Pty Ltd
Mr R Bain QC with Mr D Purcell of counsel for the Council

SOLICITORS: Synkronos Legal for Ashtrail Pty Ltd and Talranch Pty Ltd
McInnes Wilson Lawyers for the Council

[1] This proceeding is concerned with an application brought by Ashtrail Pty Ltd (Ashtrail) and Talranch Pty Ltd (Talranch) seeking to stay the effect and consequences of an order made by this court on 29 March 2019, pending the outcome of an application for leave to appeal to the Court of Appeal and, in the event of leave being granted, the determination of the appeal by that court. For the reasons given, it is ordered that:

1. Upon the undertakings given by Talranch Pty Ltd and Tenkate Property Pty Ltd that:

   (a) Talranch Pty Ltd, without further order of the court will not dispose of any of its estate or interest in its real property.

   (b) Tenkate Property Pty Ltd (ACN 608 219 512) as trustee of the Tenkate Property Trust and of the Banyo Property Trust undertakes that pending the determination of the appeal to the Court of Appeal:

      (i) if any of Lot 1 on SP290803 (title reference 51126526), Lot 3 on SP290803 (title reference 51126528), Lot 4 on SP290803 (title reference 51126529) or Lot 8 on SP209803 (title reference 51126533) situated at 37 Newhaven Street, Everton Park in the state of Queensland are sold, the net proceeds of any such sale/sales will be paid into court;

      (ii) if Lot 16 on SP220551 (title reference 50778298) situated at 80 Blizinger Road, Banyo in the state of Queensland is sold then the net proceeds of that sale will be paid into court;

2. The operation of paragraph 1 of the orders made by this court on 29 March 2019 be stayed pending the determination of any application for leave to appeal that decision and, in the event that leave is granted, the determination of the appeal by the Court of Appeal;
3. The parties have liberty to apply in respect of any of the orders made by this court on 18 June 2019.

Background

[2] The substantive proceeding was concerned with an application brought by the Council of the City of Gold Coast (the Council) against Ashtrail and Talranch. The relief sought was essentially for declaratory relief and consequential enforcement

orders pursuant to s 11 of the *Planning and Environment Court Act* 2016 (PECA) and s 180 of the *Planning Act* 2016.

[3] The Council was successful in the substantive proceedings and, as a consequence, this court on 29 March 2019 made the following declarations and orders:

> "Pursuant to section 11 of the *Planning and Environment Court Act* 2016 (Qld) it is declared that:
>
> 1. On or about 15 February 2010, a development permit for a material change of use … took effect;
> 2. That Development Approval has not lapsed;
> 3. Conditions 5, 6, 10, 12 and 16 of the Development Approval have not been complied with; and
> 4. The Respondents' contravention of the Development Approval constitutes a development offence pursuant to section 164 of the *Planning Act* 2016 (Qld).
>
> Further, it is ordered pursuant to s 180 of the *Planning Act* 2016 (Qld) that:
>
> 1. The respondents' are required to comply with conditions 5, 6, 10, 12 and 16 of the Development Approval;
> 2. It is further ordered that the parties be heard if necessary to establish a timetable for compliance with conditions 5 and 6; and
> 3. ….."

[4] As identified above, the relief sought is that the operation of Order 1 be stayed pending the outcome of proceedings in the Court of Appeal. It is uncontroversial that this court has the power to grant the relief sought. However, the Council opposes the granting of any stay.

[5] The full force and effect of conditions 5, 6, 10, 12 and 16 of the Development Approval are set out in the substantive reasons of this court and it is unnecessary to repeat them here.[1] It is sufficient to state for the purposes of this proceeding that conditions 5 and 6 required the applicants to pay in the order of $1.14 million by way of infrastructure charges for water supply network infrastructure and sewerage network infrastructure. Conditions 10, 12 and 16 were concerned with the design and construction of road works, design and construction of footpaths and bikeways and the dedication of land for road widening respectively.

[6] The appeal from this court to the Court of Appeal being limited to matters of law requires the leave of that court. It is unnecessary to dwell on the matters raised on

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1 *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2019] QPEC 12 at pp 15 and 16.

behalf of the applicants to justify leave being granted. It is though appropriate to identify that the grounds of appeal clearly raise matters of law to be determined by the Court of Appeal in the event that leave were granted.

Underlying principles

[7] There was no dispute about the relevant fundamental underlying principles applicable to a proceeding such as this. They were:

(i) Prima facie, the successful party in litigation should not be denied the fruits of its judgment;

(ii) While it is no longer necessary to establish special or exceptional circumstances to warrant a stay, some particular feature about the case which would warrant departure from the prima facie position must be established;

(iii) Typically, such features would require consideration of:

(a) An analysis of the prospects of a successful appeal (or leave to appeal being granted);

(b) Whether a refusal of the stay would render the appeal nugatory;

(c) The prospect of remedial harm to the applicant if the stay is refused but the appeal ultimately successful.

[8] It is taken as given that the applicants will prosecute their appeal proceedings expeditiously and without undue delay as is required under r 5 of the *Uniform Civil Procedure Rules* (1999).

[9] It is well established that when assessing whether an arguable appeal exists it is neither appropriate nor possible for the parties to fully argue the merits of the appeal in a stay application. In *Croney v Nand,*[2] the Court of Appeal said:

> "The prospects of success of the appeal is not a matter which the Court considering a full stay application should generally speculate about. Making an assessment of whether the appellant has an arguable case is undertaken to ensure the appeal has not been lodged simply to delay execution."[3] (footnotes deleted)

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2 [1999] Qd R 342, 349 at [38] per McPherson and Pinkus JJA and Jones J.

3 See also *Ross & Anor v Carvallio & Anor* [1995] WASC 152 (31 January 1996) per Anderson J; *Erinford Properties Ltd & Anor v Cheshire County Council* [1974] 1 Ch 261, 268 per Megarry J.

[10] In *Drew v Makita (Australia) Pty Ltd,*[4] Keane JA (as he then was) said:

> "As is often the case, on an application for a stay, the Court to whom the application is made can do no more by way of preliminary assessment of the prospects of the defendant's appeal than to determine whether the appeal is arguable, at least in the sense that the defendant's prospects are not so poor as to relieve this Court of the need to concern itself to ensure that the appeal not be rendered nugatory by the refusal of the stay.
>
> In my opinion, I am not able to say that the appeal is so hopeless that this Court should not be concerned with the prospect that the appeal will be rendered nugatory."

[11] Thankfully, I was spared from the obligation of having to resolve any dispute about whether an arguable appeal was apparent because of the sensible concession made on behalf of the Council, where it was said:[5]

> "The Appellant's grounds of appeal are technical legal points, and whilst Council submits that the Applicant's prospects on appeal are limited, it does not suggest they are unarguable to any extent to which they raise novel matters of law in this jurisdiction.
>
> In that premise, Council submits that the prospects of the appeal in this instance does not substantively inform the exercise of the discretion in this application, but rather that the question of whether the application for the stay ought to be granted turns on the determination of whether:
>
> (a) the appeal might be rendered nugatory by a refusal of the stay; and
>
> (b) whether the Respondents would be irremediably prejudiced if the stay (were) not granted and its appeal were ultimately to be upheld." (footnotes deleted)

[12] In dealing with the submissions made on behalf of the Council, I should also observe that in circumstances where if the applicants were required to perform their obligations under conditions 10, 12 and 16 and were later successful on appeal, they could not be reasonably returned to the status quo. To put it another way, the Council accepted that the dispute before the court on this occasion was really concerned with the operation of conditions 5 and 6 of the development approval.[6]

[13] Turning then to the next issue, that is insofar as conditions 5 and 6 are concerned, would compliance be rendered nugatory in the event of a successful appeal, Mr Litster QC, senior counsel for Ashtrail and Talranch, had to properly concede that no such risk existed in this case. There could be no sensible suggestion that a public authority such as is the case here would not be capable of repaying the monies involved and nor would it act in any inappropriate way to avoid such repayment.

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4 [2008] QCA 312 at p 4.
5 Applicant's written submissions, paras 22 – 23.
6 Applicant's written submissions, para 4.

The balancing act

[14] At the end of the day, the critical elements of the competing positions of the parties were: first, whether to not grant a stay would result in "*irreparable harm*" to the applicants, the "*Tenkate Group*" and/or other third parties. And, on the other hand, whether to grant the stay would cause unwarranted prejudice to the Council.

[15] In the written submissions filed on behalf of Talranch and Ashtrail it was said:[7]

> "Were the operation of the Enforcement Order neither suspended nor stayed, the outcome of the Application for Leave to Appeal (and any consequent Appeal) would be rendered nugatory, because:
>
> (a) compliance with conditions 5 and 6 would result in irreparable harm to the **Tenkate Group**, either through the closure of the training business or, at best, the sale of land used by that business to third parties which could not be subsequently reversed;
>
> …
>
> In addition to the irreparable harm to the **Tenkate Group**, third parties would also be adversely impacted were the training business to close. In particular:
>
> (a) There are 1,419 students that are currently enrolled for traineeship and apprenticeship qualifications. As well as financial consequences, those students would face uncertainty in relation to course credits assuming other places are available;
>
> (b) The training business provides just short of 6,000 units of competency courses for industry qualifications annually. Closure of the training business would remove those training opportunities; and
>
> (c) 72 people employed in the training business would lose their jobs.
>
> In contrast, Council points to no meaningful prejudice were the operation of the Enforcement Order suspended or stayed until further order of this court or the Court of Appeal. …" (Footnotes deleted – emphasis added).

[16] The reference to the "Tenakte Group" highlighted above is a reference to a group of inter-related companies identified by Mr McCann as being:[8]

Entity	**Trustee (where applicable)**	**Role**
The Tenkate Training School Trust	Tenkate Training School Pty Ltd	Main operating entity providing training services. Also hold the majority of plant & equipment used in the business.
Ashtrail Pty Ltd		Holds RTO licence

7 Respondent's written submissions, paras 12 – 14.
8 Exhibit 5, para 36.

The Tenkate Family Unit Trust	Talranch Pty Ltd	Own business premises at Ormeau, Morayfield and Dinmore
Major Personnel Services Pty Ltd		Employs staff
Risencorp Pty Ltd		Holds some plant and equipment used in the business
The Tenkate Property Trust	Tenkate Property Pty Ltd	Property development at 37 Newhaven Street, Everton Park. Units in process of being sold.
The Banyo Property Trust	Tenkate Property Pty Ltd	Holds investment property at 80 Blinzinger Road, Banyo
The Alexander & Noeleen Tenkate Family Trust	Leftstock Pty Ltd	Previously held investment property at 2/20 Balowrie Street Hamilton (recently sold). Has provided $3.3m loan to the Tenkate Training School Trust.
The Noeleen Tenkate Testamentary Trust	NT Test Pty Ltd	Holds shares in Wesfarmers and Suncorp. Has provided loans to family members and related entities.

[17] Before going on to deal with the substance of the submissions made on behalf of Ashtrail and Talranch, it is appropriate to deal with the assertion that the Council was unable to point to any "*meaningful prejudice*". Apart from being denied the immediate benefit of the judgment, it is correct that Mr Bain QC, senior counsel for the Council, did not attempt to point to any other specific prejudice which might befall either the Council or its constituents in the event that compliance with conditions 5 and 6 were stayed. That said, he quite reasonably raised the concern of the Council that, in the event that the appeal was unsuccessful, those companies would not be able to meet their financial obligations. In this context, it is of significance that Ashtrail itself has no assets. The primary concerns of the Council were that Talranch might dispose of its assets including real property, or otherwise dilute the net value of those assets by way of adding to debt. Those concerns will be dealt with below when dealing with the undertakings provided by Mr Litster QC.

[18] In support of the substantive submissions, both Ashtrail and Talranch relied heavily on the evidence of a chartered accountant, Mr McCann. Mr McCann is an

experienced chartered accountant with a significant understanding of the financial affairs of corporations.[9] During the course of submissions though, Mr Bain raised a number of concerns about aspects of his evidence. Those concerns were directed to, most importantly in my view, reliance on outdated valuation material, the nature and extent of the assumptions and limitations expressly identified in his reports and, largely as a consequence of those matters, the lack of any definitive conclusions.

[19] While I can accept that there is a genuine basis for the criticisms raised by Mr Bain, I am nonetheless satisfied that substantive parts of Mr McCann's evidence can be relied upon for the purposes of disposing of this application.

[20] Mr McCann carried out an analysis of the ability of Ashtrail, Talranch and other entities within the so called "*Tenkate Group*" to meet the conditions from various sources. He looked at funds immediately available to those companies, funds generated from trading, the ability to raise funds, by way of examples through additional loans or new loans, and finally, the realisation of assets. In his summary, he set out his conclusions and the potential impact on both Ashtrail and Talranch if conditions 5 and 6 were to be met within a timeframe of anything less than six months. Under the heading "*conclusion – ability to make payments due*" Mr McCann reported:[10]

> "If sufficient time was available to allow the Tenkate Group (to) realise property assets and generate funds from trading, then I consider that approximately $1m could likely be raised in the reasonably foreseeable future i.e. over six to twelve months.
>
> However, the total amount required to achieve compliance with the Development Approval conditions and to pay the legal fees arising in these proceedings will be significantly in excess of $1.5m.
>
> In order to meet this total sum, further funds would be required either from the sale of the Dinmore property (if available…. from additional borrowings ….or through generating funds from trading over an additional period of time…)".

[21] Under the heading "*impact on respondents*" he reported:[11]

> "The Tenkate Group does not have sufficient available funds at the current date to meet an immediate requirement to pay amounts due under Development Approval conditions 5 and 6.

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9 It should be noted that evidence of the type produced by Mr McCann was not placed before me in the substantive proceeding.

10 Exhibit 5, paras 28 – 30.

11 Exhibit 5, paras 31 – 33.

> If enforcement of payment was sought in the short term this **could have** the following consequences:
>
> (a) The Major Training Group business would cease to operate;
>
> (b) The directors would need to consider the appointment of an administrator or liquidator to Tenkate Group companies and corporate trustees; and
>
> (c) This would likely precipitate actions from National Australia Bank to protect its interests…" (emphasis added)

[22] The reference to the "*Major Training Group*" is a reference to the business name under which Ashtrail conducts its business on the subject land. As was identified by Mr McCann, the Major Training Group is a Registered Training Organisation (RTO). Both the RTO licence and that trading name are held by Ashtrail. The businesses being carried out under the name of Major Training Group are located at the subject Ormeau/Yatala site, at 5 Nolan Road, Morayfield and 21 Monigold Place, Dinmore. As has already been identified, it was Mr McCann's opinion that to sell any of those properties, and, in particular, the Ormeau/Yatala site, would be likely to have major negative ramifications for both Ashtrail and Talranch. Whilst the consequences referred to by Mr Litster may not be inevitable, the liquidation of one or more of the properties the Major Training Group carries out its businesses on raises the real risk of not only major ramifications for the companies involved but, as a consequence, also for employees and currently enrolled students.

[23] The evidence of Mr McCann has led me to conclude that, in reality, in the short to medium term, neither the applicants nor the Tenkate Group as a whole would be capable of meeting the financial obligations under conditions 5 and 6 other than through the sale of real property. And, bearing in mind the potential consequences of the subject land and the sites at Dinmore and Morayfield being sold, in the event that those monies had to be paid, the major source of funding would most likely come through the sale of properties located at Banyo and Everton Park.

[24] While I was referred to numerous cases during the course of this proceeding, I consider it necessary to refer to only a few. Mr Litster referred to the decision of the High Court in the *Commissioner of Taxation of the Commonwealth of Australia v The Myer Employer Ltd*[12]. In that case Dawson J was concerned with an application made by the Commissioner of Taxation for a stay pending the hearing and determination of

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12 [1986] 160 CLR 220, 223 per Dawson J.

his appeal to the High Court from the full court of the Federal Court. While it needs to be kept in mind that under the relevant rules of the High Court the discretion to grant a stay had been determined to be only exercised where special circumstances existed, that would usually occur when it was necessary to prevent the appeal, if successful, from being nugatory. That said the following observations of his Honour are relevant:

> "….Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation **and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed. …**" (Citations deleted – emphasis added)

[25] There is little room for doubt that, in the event that those properties from which the Major Training Group conduct its businesses were sold, neither of the applicants here could be substantially restored to their former position. However, the evidence makes it tolerably clear that the most likely outcome in the event that a stay were not granted would be the sale of those properties currently held by Tenkate Property Pty Ltd as trustee of the Tenkate Property Trust and as trustee of the Banyo Property Trust. While falling under the general description of being part of the Tenkate Group, that company is nonetheless a separate corporate entity.

[26] Quite clearly, the giving of undertakings which would adequately protect against the "*untoward consequences of the grant of a stay*" would be a relevant consideration.[13] During the course of submissions, in response to concerns raised by Mr Bain on behalf of the Council, Mr Litster gave the following undertaking in respect of interests in land held by Talranch. He said:[14]

> "Your Honour, I am instructed to offer an undertaking on behalf of Talranch Pty Ltd to – without further order of the court, not dispose of any of its real property."

[27] While that undertaking is clearly relevant, it needs to be considered in the light of two particular matters. There was no undertaking not to further encumber the property and, as has already been identified, the sale of real property owned by Talranch is the least likely outcome. That said, neither of those matters render this undertaking of no or little worth. In this regard, it is also of relevance that, notwithstanding the time

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13 *Denning v Jet Development Pty Ltd & Anor* [2006] QCA 544 per Keane JA (as he then was).

14 Transcript (T) 10-32 ll 44-46.

that has elapsed since the substantive proceedings were foreshadowed, there has been no suggestion that Talranch has either attempted to dispose of real property, or to dilute its net worth by mortgage, charge or otherwise.

[28] As a consequence of the sale of the two properties at Banyo and Everton Park being the most likely source of meeting any obligation to the Council, I raised the prospect of the relevant corporate entity (or entities) giving an undertaking in respect of each of those properties. By email dated 6 June 2019,[15] undertakings identical to that set out in paragraph 1 herein were given. By a later email of the same date, Mr Bain advised that he had "*instructions that the council is content of his Honour (to) proceed as proposed and without further appearances*". For the sake of completeness I will make those emails an exhibit in the proceedings.[16]

[29] In reality, the most likely consequence of granting a stay would be for the benefit of Tenkate Property Pty Ltd, a company part of the so called Tenkate Group but, nonetheless a separate corporate entity. That company was not a party to the substantive proceedings before this court and, accordingly, not a party to the appeal. That however, in my opinion, does not prevent the granting of the stay for the following reasons. First, the discretion to grant a stay in appropriate circumstances is a broad discretion and one that ought to be exercised once it has been demonstrated the circumstances are such as to make the granting of a stay appropriate. I would note here that at no time during this proceeding was it suggested otherwise.

[30] Second, I am unable to accept the submission made by Mr Bain to the effect that, if that company had to sell real property and subsequently Ashtrail and Talranch were to succeed in the Court of Appeal, no serious detriment would occur because the money would find its way back into the company's hands and could be reinvested. According to Mr Bain, "*they can go and reinvest it. They can go and buy another property….they are not having to sell the Mona Lisa…*"[17] That proposition cannot be accepted. The payment or repayment of money in lieu of obtaining or retaining ownership of real property does not place the deprived proprietor in substantially the

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15 Exhibit 8.
16 Exhibit 8.
17 T10-41 ll 1-22.

same situation. As much is recognised by the application of the equitable remedy of specific performance.[18]

[31] The final consideration is the undertakings provided by Talranch and Tenkate Property Pty Ltd. There are of course no certain guarantees but, in my view, the granting of these undertakings provides a considerable degree of protection of the interests of the Council. In this context, I would also repeat what I have said earlier, namely that since these proceedings had been foreshadowed there has been no suggestion that any of those corporations prepared to provide undertakings have attempted to sell or dilute the value of real property held by them. Finally, in this context, at least insofar as the subject land is concerned, it is appropriate to bear in mind that the development conditions run with the land and, as Mr Litster emphasised, pursuant to s 180 of the *Planning Act* 2016 until this court orders otherwise, an enforcement order has been registered on the certificate of title and attaches to the premises and binds the owner, owners successors in title and any occupier of the premises.[19]

[32] For the reasons given, I order in the terms set out in paragraph one herein.

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18 E.g. *Pianta v National Finance and Trustee Ltd* (1964) 38 ALJR 232 per Barwick CJ at 233; *Ross & Anor v Carvallio & Anor* [1995] WASC 152 (31 January 1996).

19 T10-22 ll 38-45.