
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : BGC (AUSTRALIA) PTY LTD and SHIRE OF
NORTHAM & ORS [2003] WATPAT 48

CORAM : MR P MCGOWAN

HEARD : 21 JULY 2003

DELIVERED : 21 JULY 2003

FILE NO/S : APP 32 of 2002

BETWEEN : BGC (AUSTRALIA) PTY LTD
Appellant

AND

SHIRE OF NORTHAM
First Respondent

BRIAN DIBBLE
SIMON SOROKINE
Second Respondents

Catchwords:

Development application - Extractive Industry - Environmental Protection Act
section 41(2) - Preliminary point

Legislation:

Nil

Result:

Appeal to proceed to hearing on 11 August 2003

Category: B

Representation:

Counsel:

Appellant	:	Mr M Hotchkin
First Respondent	:	Mr J Skinner
Second Respondents	:	Mr E Samec

Solicitors:

Appellant	:	Hotchkin Hanley
First Respondent	:	McLeods
Second Respondents	:	Kott Gunning

Case(s) referred to in decision(s):

Buttfield v City of Albany [2001] WATPAT 10
City of Cockburn v McNiece Industrial Systems Pty Ltd (unreported Supreme
Court of Western Australia, 24 September 1984)
Deep Blue Enterprises v Town of Port Hedland [2003] WATPAT 32

MR P MCGOWAN:

- 1 This appeal concerns the First Respondent's refusal of the Appellant's application for planning approval for an extractive industry on lot 14, Horton Road, Northam. The First Respondent refused the application and communicated its refusal to the Appellant on 20 February 2002. The appeal is brought from that refusal.
- 2 On 4 June 2002, the Second Respondents, who own property in the vicinity of the property the subject of the Appellant's application, made application for and were joined as Second Respondents. The matter has proceeded on that basis since then. The First and Second Respondents resist the appeal on various grounds. Those grounds include amenity considerations.
- 3 After the institution of the appeal in this tribunal, notification was received from the Environmental Protection Authority, by letter, dated 21st March 2003. The letter was directed to the Principal Registrar of the Town Planning Appeal Tribunal, in relation to this appeal, and reads as follows:

“Please be advised that the Environmental Protection Authority is currently assessing the proposal by BGC Australia Pty Ltd, for land clearing and quarry expansion, Lot 14, Horton Road, The Lakes, under part IV of the *Environmental Protection Act 1986*. The assessment is at the level of public environmental review, and the 8 week public review period for the PER closed on 3 March 2003.”
- 4 There is then a reference to a contact person.
- 5 This appeal was then the subject of a directions hearing, which took place on 1 May 2003. This was some 14 months after the appeal was instituted. At the directions hearing, the Appellant sought to programme the matter through to a substantive hearing. At that time the parties raised with the Tribunal, the fact that the Environmental Protection Authority was still considering the matters referred to in its letter to the Tribunal of 21 March 2003, and no determination had yet been made.
- 6 In a preliminary sense the parties agitated the possibility that that process may, in fact, produce some finality in the foreseeable future, such that the point or purpose of proceeding to a substantive hearing was questionable. Directions were nevertheless made on 1 May 2003, that the matter was set down, on a provisional basis, for 5 days, commencing 11 August 2003.

- 7 In order to deal with those concerns the matter was further adjourned to a directions hearing on 14 July 2003. The purpose of adjourning the matter to a further directions hearing was to look at two aspects. First, what progress, if any, was made in relation to the task being undertaken by the Environmental Protection Authority. And secondly, to review whether or not the matter was going to proceed on 11 August 2003.
- 8 The matter came before the Tribunal on 14 July 2003. At that time, the Appellant, by its counsel, appeared and was in a position to argue that the matter should proceed, for various reasons. Neither counsel for the First or Second Respondents were then prepared to argue the matter. The matter was adjourned, therefore, to today, 21 July 2003.
- 9 The parties have directly raised for the Tribunal's determination, two issues. One of broad ranging significance, and the other of significance, albeit confined to the specific parties and to the issues in this case.
- 10 The first issue that is raised, is raised as a basis upon which the First and Second Respondents rely, to say that, in effect, this Tribunal cannot proceed further to hear this matter, is an issue raised under section 41(2) of the *Environmental Protection Act*. The letter to which I've previously referred, of the 21st March 2003, refers to part (IV) of that Act. Section 41 of that Act, as to sub sections 1 and 2, reads as follows:

“(1) The Authority shall, if it acts under section 41B, in respect of a proposal, notify in writing any relevant decision making authority that the proposal has been referred to the Authority under section 38.

(2) A decision making authority that

- (a) has referred a proposal to the Authority under or in compliance with a requirement made under section 38 or has been notified under subsection (1) that a proposal has been referred to the Authority under that section; or
- (b) has been required, under section 38(3) to refer a proposal to the Authority

shall not make any decision that could have the effect of causing or allowing the proposal to be implemented, until

(c) it is informed under section 40(1)(a) that the Authority considers that the proposal should not be assessed by the Authority under this Part and the period within which an appeal against that decision may be lodged under section 100(1) has expired without the lodging of such an appeal or, if such an appeal has been lodged within that period, that appeal has been determined; or

(d) an authority is served on it under section 45(7)

as the case requires.”

- 11 As can be seen from those subsections, the critical and relevant provision is the reference to decision making authority; because it is a decision making authority to which section 41, subsection (2) expressly speaks, and it is a decision making authority which, in effect, is bound or precluded from further proceeding, in the words of the section,

“To make any decision that could have the effect of causing or allowing the proposal to be implemented”

- 12 It is necessary, therefore, to have regard to the definition of decision making authority, as it appears in the *Environmental Protection Act*. It can readily be seen that it has two parts. The full definition provides as follows:

“decision-making authority means public authority empowered by or under

(a) a written law; or

(b) any agreement

(i) to which the State is a party; and

(ii) which is ratified or approved by an Act

to make a decision in respect of any proposal and in Division 2 of Part IV, includes, in relation to a particular proposal, any Minister prescribed for the purposes of this definition as being the Minister responsible for that proposal;”

- 13 In understanding that definition, it should be understood that it incorporates in itself a further defined term. Public authority is a defined

term in the provisions of the *Environmental Protection Act*. Public authority is defined to mean:

“Minister of the Crown, acting in his official capacity, department of the Government, State agency or instrumentality, local government or other person, whether corporate or not, who or which under the authority of a written law administers or carries on, for the benefit of the State, or any district or part thereof, a social service or public utility.”

- 14 It is readily apparent that if one were to have regard simply to the expression decision making authority, not being the term as defined under the Act, then it could be appreciated that this Tribunal is a decision making authority. The statutory framework under which the Tribunal operates, and the issues which fall for determination, by any measure, and in ordinary parlance, would make it a decision making authority. However, this is a defined term. Not only is it a defined term, it itself incorporates as an intermediate step, compliance with the other defined term, public authority.
- 15 In my view, unless it can be established that the Tribunal is a public authority it could not meet the definition of decision making authority under the *Environmental Protection Act*. The issue, therefore, is to have regard to in what sense it can be said that this Tribunal is a public authority. Now, at the outset, there are certain indicia of this Tribunal which have been gathered by the Appellant in its submissions, which are worth repeating:
- (1) An appeal to this Tribunal is necessarily an appeal inter partes. In addition, by reason of the provisions of section 62, the Tribunal may invite parties with a relevant interest to make submissions and be heard in relation to the matter the subject of the appeal.
 - (2) Second, any determination made by this Tribunal is made after a hearing. The hearing includes a hearing in accordance with the provisions of section 51(7) of the Act.
 - (3) Thirdly, the hearing, which under provisions of section 51(3), is a hearing conducted in public.
 - (4) Fourthly, the parties may be legally represented.

- (5) Fifthly, the Tribunal must give written reasons, pursuant to the provisions of section 64.
 - (6) And lastly, and by no means least: There is a right of appeal to the Supreme Court, albeit limited to questions of law in accordance with the provisions of section 67.
- 16 All of which create a set of circumstances from which, in my view, the proper categorisation of the role being discharged by this Tribunal, in dealing with an appeal, is in the nature of exercising judicial power. There is a distinction between a judicial body and a body exercising judicial power. There is a further distinction between a body exercising judicial power and a body which exercises administrative power.
- 17 Counsel for the Second Respondent sought to obtain comfort for the view or the contention that the nature of this Tribunal was akin to discharging administrative power, by reference to the decision of the Full Court of the Supreme Court of this State, in the *City of Cockburn v McNiece Industrial Systems Pty Ltd* (unreported Supreme Court of Western Australia, 24 September 1984) which has been recently followed in *Buttfield v City of Albany* [2001] WATPAT 10.
- 18 However, a reading of both those decisions highlights the fact that the nature of the powers of the Supreme Court are different to the nature of the powers held by this Tribunal. But that in no way suggests that the Tribunal is not exercising judicial power when dealing with matters with which it is properly seized. The issue in both those cases was whether the categorisation of a use class was itself a determination as a matter of fact, such that there was not the exercise of discretionary power, which was a requisite trigger required under section 8 of the *Town Planning and Development Act*. As such, therefore, it was determined that in those circumstances, if that was the case, there would be no right of appeal.
- 19 In neither case was the Full Court, nor this Tribunal, expressing a view that when it was seized of jurisdiction, the role that it discharged was not the exercise of judicial power. As a matter of observation, the views expressed in *Buttfield*, and the views expressed by the former Chief Justice in *City of Cockburn v McNiece*, have recently been adopted in *Deep Blue Enterprises v Town of Port Hedland* [2003] WATPAT 32.
- 20 The point of highlighting that is to deal with the suggestion that the Tribunal stands in the shoes of, in this case, the local authority from which an appeal is brought. It was contended that that could lead to the result that, in effect, whatever limited or constrained the local authority, equally

limited or constrained this Tribunal when it came to deal with the matters the subject of this appeal.

- 21 There are several steps in that. The first is to underscore, as has been said on many occasions, that this Tribunal is a creature of statute. It exists because the *Town Planning and Development Act* creates it under section 36. An appeal to this Tribunal, as has been pointed out on many occasions, is in the nature of a hearing de novo. That is, the parties, when dealing with the issues the subject of the appeal, are not limited to, nor constrained by, either the reasons advanced by the Respondent for refusal, or necessarily, the reasons advanced by the Appellant as to why application should be granted.
- 22 It is for that reason that, although the matter is necessarily an appeal, in running it as a hearing de novo, the parties lead evidence in order to demonstrate first, in a factual sense, and secondly as a basis for legal arguments and submission why the respective contentions should be received. So, it is in that sense a point of marked distinction between the role of this Tribunal and the role of a local authority.
- 23 Counsel for the First Respondent, Mr Skinner, made the point that a notice under section 38 would have the effect, in accordance with the provisions of section 41(2), of necessarily binding the First Respondent. Whilst that appears to be so - and I didn't understand the Appellant to contend to the contrary - it would take a quantum leap in logic to then conclude that as a result, an appeal to this Tribunal could, without more, lead to the result that this Tribunal is also unable to proceed further.
- 24 The gap in that logic seems to me to be this; in each instance, the test must be whether this is a decision making authority. In arriving at that determination, one must also meet the requirement that this body, this Tribunal, is a public authority. The critical aspect of that definition, which I explored with counsel for the First Respondent in some detail, was, what aspect of that definition is it said demonstrates that this Tribunal is a public authority? Counsel for the First Respondent contended that, effectively, the role that this Tribunal plays in relation to appeals brought to it, meant that what it was doing was, in effect, administering a social service for the benefit of the state. And, in so doing, picks up the three elements required in order to meet the definition of public authority.
- 25 There are a number of difficulties with this point. The first, and perhaps the most obvious starting point, is to note that the definition of public

authority appearing in the *Environmental Protection Act*, is, word for word, the same definition for the same term as it appears in section 2 of the *Town Planning and Development Act*.

- 26 If the argument was that public authority necessarily includes this Tribunal, and the same defined term, with the same words ascribed to its definition, appears in the *Town Planning and Development Act*, it would be an odd result to then say that the Tribunal, which itself is a defined term appearing in the *Town Planning and Development Act*, is necessarily a public authority. There is both a lack of logic upon a first reading of the defined term, and then a lack of persuasion in the argument advanced on behalf of the First Respondent, that the nature of what this Tribunal is concerned with, in the discharge of the appeal function, involves administering a social service for the benefit of the state. I am not persuaded that that is the case.
- 27 It is also not a case, as a matter of statutory interpretation, where either the expression decision making authority, or public authority, admits for the purpose of the argument of two competing contentions, nor is it a case where there is an absurd result produced as a result of the views that I have expressed, such that one could justify a purposive interpretation to have regard, in the broader sense, to what it was that the Act intended in the use of these two defined terms. The words as defined, in my view, are clear and do not admit of that result. But even if I was wrong in that regard, there's nothing in the Act which, read purposively, would lead to the result that this Tribunal, or for that matter, any other Tribunal, or court, would, in some broad sense, be brought into the definition of public authority because it was felt that section 41(2) was intended, or should have the broadest possible operation.
- 28 I am persuaded by counsel for the Appellant, that there is no reason to venture into that area. But, as I say, even if I'm wrong, the express use of such defined terms could only have led to the result to which I've referred. If it was in any way contemplated to have a broader, more limiting result, and in some way to constrain tribunals and courts, then one would have expected a clear statement to that effect.
- 29 The process undertaken in the course of the disposition of an appeal in this Tribunal, is necessarily different to the process to which the Environmental Protection Authority made reference in its letter of 21 March 2003 to the Tribunal. They are different. A suggestion that this is necessarily a parallel path is probably the highest at which it could be put.

The determinations are, however, different. For those reasons I am satisfied that this Tribunal is not bound by the provisions of section 41(2).

30 Having so determined, the next question which was canvassed by all counsel, is whether having regard to the interests of fairness, this matter should, nevertheless, proceed to a hearing.

31 As I have indicated above, this matter is set down for a 5 day hearing, to commence in 3 weeks' time, 11 August 2003. The Second Respondent contends that if the matter were to proceed on that day it would be prejudiced in having, in effect, to participate in such a hearing.

32 There are a number of points that should be made. The first, of course, is that the Second Respondents were not parties to this appeal when it was instituted. The Second Respondents consciously and deliberately made application to be joined as parties to this appeal. They did not have to. They obviously considered their interest, took advice, and chose so to do. Becoming a party to an appeal carries with it certain obligations. It is not merely a right, there are obligations.

33 The appeal is necessarily an inter partes proceeding. Once a second respondent is joined, it also has a role to play in relation to the disposition of matters the subject of the appeal. It is required to, and in this case they have, filed a statement by respondent, in which the Second Respondents set out the bases upon which they positively contend that this appeal should not succeed. Although the statement by respondent was only filed last Friday, in most respects it mirrors the affidavits in support of the application for joinder, which were filed in May 2002. It's not, therefore, lately introduced and is simply recast in a different form. In other words, the Second Respondents had considered their position in relation to the joinder, and had considered the bases upon which they would seek to assert that this appeal should not succeed.

34 Now, when the matter was before the Tribunal on 1 May 2003, although there was some concern as to what might happen regarding assessments made on the *Environmental Protection Act*, the matter was, nevertheless, provisionally listed for hearing on 11 August 2003. If – I'm not sure that counsel for the Second Respondent put it quite as high as this - but if the Second Respondents are not ready to proceed on 11 August 2003, then frankly, that is a matter between them and their solicitors.

35 The date for hearing has been notified some time ago, and the issues have been live, probably since before February 2002, when the First Respondent dealt with the Appellant's application. The First Respondent

did not put its position on the basis that it was not ready to proceed to a hearing. The First Respondent's argument, essentially, was that this appeal may be rendered nugatory because of an adverse determination made, in due course, as part of the Environmental Protection Authority's review.

36 There are several aspects about that. First, it was accepted, for the sake of the argument, that the process referred to in the authority's letter of 21 March 2003, would not come to finalisation before the end of this year. In other words, if the matter were to proceed in August, on 11 August, it would be well in advance of any determination made under the *Environmental Protection Act*. Secondly, there's no information before me to indicate with what issues the authority was concerned, or at what state it is at, or what difficulties there are, if there are difficulties, in bringing the matter to finality any earlier.

37 If the matter proceeds and is determined adversely to the Appellant, the Appellant, effectively concedes, first, that is a risk that the Appellant proposes and has to take. Secondly, the result probably is that, if at that stage the environmental assessment review has not been completed, then a determination of the appeal makes it unnecessary for that process to be completed.

38 Conversely, it was argued that if, in fact, this appeal succeeded, but the environmental assessment was adverse to the Appellant, then it would effectively prevent the Appellant proceeding with the benefit of any decision obtained from the Tribunal. That is, to some extent, an imponderable. However, it does not seem to me to be sufficient to prevent the matter proceeding on the allocated dates.

39 In the course of argument I raised with counsel for the Appellant, whether the Appellant was truly in a position to proceed, Mr Hotchkin assured me that the Appellant was in a position so to proceed. This is a matter not taken lightly, on the basis that it is the Appellant that presses for the matter to a hearing, and puts the matter on the basis that whatever might be happening as far as the environmental assessment review is concerned, the matter should proceed in the Tribunal because the Appellant is both ready to proceed, and is in a position to have the Tribunal determine the matter on the allocated dates.

40 I therefore direct that the matter will proceed on 11 August. That the Appellants file and serve all witness statements by the 30th of July, and the in the nature of this matter, Mr Hotchkin, subject to anything that you

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might say, I'm going to allow the Respondents a longer time both because of the nature of the matters that we've canvassed, and also because, to some extent, you have the burden in this matter.