Phelps v Development Consent Authority [2009] NTSC 54

PARTIES:	DENISE PHELPS v DEVELOPMENT CONSENT AUTHORITY AND LANDS PLANNING AND MINING TRIBUNAL AND NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No LA1 of 2009 (20621279)
DELIVERED:	21 October 2009
HEARING DATES:	11 & 15 September 2009
JUDGMENT OF:	KELLY J
APPEAL FROM:	Decision of the Lands Planning and Mining Tribunal (Dr Lowndes SM, Chairperson) of 5 December 2008

CATCHWORDS:

APPEAL – APPEAL FROM TRIBUNAL

Appeal from Lands Planning and Mining Tribunal – application to Development Consent Authority – subdivision of land – test for special circumstances – special circumstances considered individually and collectively – restrictive covenants enforceable – error of law – whether error of law affected Tribunal's decision – appeal allowed

Law of Property Act (NT), s 168
Northern Territory Planning Scheme
Planning Act (NT), s 51, s 53, s 133

Baker v R (2004) 223 CLR 513; *Secretary, DSS v Hales* (1998) 153 ALR 259, followed

REPRESENTATION:

Counsel:

Appellant:	A Wyvill
Respondent:	P Barr QC

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Phelps v Development Consent Authority [2009] NTSC 54
No. LA1 of 2009 (20621279)

BETWEEN:

DENISE PHELPS
Appellant

AND:

DEVELOPMENT CONSENT AUTHORITY
First Respondent

AND:

LANDS PLANNING AND MINING TRIBUNAL
Second Respondent

AND:

NORTHERN TERRITORY OF AUSTRALIA
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 October 2009)

The Application

[1] On 2 June 2006 the Appellant applied to the Development Consent Authority ("DCA") for consent to subdivide 6.93 hectares of land at 95 Thorak Road, Berrimah ("the Capital Land") into two lots, one with an area of 4 hectares ("Lot A") and the other with an area of 2.9 hectares ("Lot B")

("the Development"). Consent was required because under the Litchfield Area Plan 2004 (which was then in force) ("the old plan") the minimum lot size was 8 hectares. Under the old plan the DCA could consent to the creation of lots of less than 8 hectares if there were "special circumstances".

[2] The Land shares a boundary with the Knuckey Lagoons Reserve and is next door to a block owned by Greening Australia. The Appellant proposed, as a condition of any consent, to register restrictive covenants over Lots A and B which would restrict the use of the lots to residential, require the preservation of native bushland (apart from clearing for a house site on Lot B), place design restraints on structures, and impose requirements for the environmentally appropriate disposal of effluent.

[3] The Appellant contended that these restrictive covenants would enhance the environmental amenity of the area, particularly by protecting native bushland and wildlife. Greening Australia wrote a letter in support of the Development expressing the view that the net effect, with the protective covenants, would be of significant benefit to the environmental amenity of the Knuckey Lagoons locale.

Decisions by the Tribunal

[4] On 15 August 2006 the DCA refused to consent to the Development. The Appellant appealed to the Lands Planning and Mining Tribunal ("the Tribunal"). On 10 January 2007 the Tribunal, constituted by the then

Chairman, Mr Loadman SM, dismissed that appeal. On 12 September 2007, by consent, an appeal from that decision of the Tribunal was allowed and the matter was remitted to the Tribunal for rehearing.

[5] In the meantime, on 1 February 2007 the NT Planning Scheme ("NTPS") came into effect.

[6] On 5 December 2008, the Tribunal, constituted by the current Chairman, Dr Lowndes SM, dismissed the appeal.

This Appeal

[7] The Appellant now appeals to the Supreme Court against that decision of the Tribunal. Pursuant to section 133 of the *Planning Act*, an appeal lies to the Supreme Court from the Tribunal on questions of law only.

[8] It was accepted before the Tribunal that the proceedings before the Tribunal were in the nature of a rehearing and that, accordingly, the law to be applied was the law in force at the time of the hearing, namely the NTPS, rather than the old plan.

[9] Under section 53 of the *Planning Act*, the Tribunal was obliged to determine the Appellant's application in accordance with the provisions of the NTPS as though the Tribunal were the Consent Authority.

[10] The relevant provisions of the NTPS are as follows:

[10.1] The land is zoned R (for Rural).

[10.2] The minimum lot size in Zone R is 8 hectares [NTPS Part 5 Clause 11.1.1].

[10.3] The Consent Authority may consent to the development of land that does not meet the standards set out in Parts 4 or 5[1] only if it is satisfied that special circumstances justify the giving of consent [NTPS Clause 2.5.3].

[11] At paragraph [185] of the Reasons for Decision, the Tribunal held:

> "In my opinion, the Tribunal should not issue a permit unless there are "special circumstances" warranting a departure from the standards set out in Parts 4 and 5 of the NTPS. To issue a permit in the absence of "special circumstances" and then to attach conditions to the consent which, in effect, fill the void and retroactively satisfy the requirement for "special circumstances" would, in my opinion, constitute a misuse of the power conferred on the Tribunal by s. 130(4)(c) of the *Planning Act*. That would be tantamount to "putting the cart before the horse"."

[12] At paragraphs [187] and [188] the Tribunal expressed doubt as to the extent to which a condition of consent requiring the creation of a restrictive covenant could be made effective. At paragraph [189] the Tribunal held:

> "In the event that I have erred in finding that the Appellant's undertaking to impose restrictive covenants does not give rise to "special circumstances", and should have found to the contrary, then, in my view, such "special circumstances" would not justify giving consent to the proposed development in light of the serious doubts as to the effectiveness of making the creation of restrictive covenants a condition of planning permission."

[1] This includes the minimum lot size of 8 hectares.

[13] The Appellant contends that in these paragraphs the Tribunal fell into error.

[14] First, it is contended that the Tribunal erred in law in determining (at [185]) that the proposal by the Appellant to register restrictive covenants over the land could not amount to "special circumstances" for the purpose of clause 2.5.3. This was effectively conceded by the Respondent.

[15] Secondly, the Appellant contends that the Tribunal was simply wrong in its view that there was doubt about the enforceability of the proposed restrictive covenants. Section 168 of the *Law of Property Act* provides that "covenants in gross" may be created "without dominant land in favour of the Territory, a local government body, a statutory corporation, or a prescribed person". This would permit the registration of enforceable restrictive covenants over the Land in favour of the DCA, the Territory or the local council. This too was effectively conceded by the Respondent. As a consequence, the Tribunal took into account something that was not relevant (i.e. the supposed doubtful enforceability of the proposed restrictive covenants) and so made an error of law.

[16] The essential feature of the Development proposal, which the Appellant says, in context, amounted to "special circumstances" justifying giving consent to a subdivision creating lots of significantly less than 8 hectares, is the proposal to impose conditions on the use of the subdivided lots by way of restrictive covenants registered over the land.

[17] The Appellant contends that because of the errors in law above the Tribunal failed to take the proposed restrictive covenants into account and thereby failed to consider the Development proposal on its merits.

[18] The Respondent has effectively rightly conceded that the Tribunal made these errors of law. However, the Respondent contends that the appeal should nevertheless not be allowed since those errors did not in fact affect the decision of the Tribunal. Mr Barr QC submits that the Tribunal did take the proposed conditions into account and did consider the merits of the Development proposal.

[19] The question is whether the Tribunal did in fact take the proposed restrictive covenants into account and consider the Development proposal on its merits, notwithstanding falling into error by holding that the proposed conditions could not amount to "special circumstances" and were of doubtful enforceability.

Relevant Section of Tribunal's Reasons

[20] The Tribunal analysed the law relating to "special circumstances" in paragraphs [149] to [156] of the Reasons.

[21] The Tribunal correctly identified that the concept of "special circumstances" requires circumstances that are "unusual, exceptional, out of the ordinary and not to be expected":[2] Reasons [151].

[2] *Baker v R* (2004) 223 CLR 513 at 556.

[22] The Tribunal correctly identified the need to adopt a "holistic approach", to consider each case on its merits, and to "be alert to the fact that circumstances which by themselves might not be 'special' can, in combination with other circumstances, create a situation which overall gives rise to 'special circumstances'":[3] Reasons [155].

[23] The Tribunal also correctly identified the need to determine, in an ordinary commonsense manner, whether there are circumstances which either individually or collectively can be considered to be "special circumstances" justifying consent: Reasons [156].

[24] At paragraphs [157] to [159] the Tribunal discussed the onus of proof. No error has been claimed or is apparent in those paragraphs.

[25] The Tribunal then went on to outline submissions of the Appellant and Respondent to the appeal before the Tribunal: Reasons [160] to [169].

[26] In paragraph [170] the Tribunal correctly identified that there must not only be "special circumstances" but that such "special circumstances" must be sufficient to justify a departure from the minimum standards imposed by the NTPS.

[27] At paragraph [171] the Tribunal correctly stated that the question of "special circumstances" must be considered in the context of the *Planning Act* and the NTPS.

[3] *Secretary DSS v Hales* (1998) 153 ALR 259.

[28] At paragraph [172] the Tribunal identified that the primary purpose of Zone R was "to provide for a range of activities including residential, agricultural and other rural activities" [NTPS clause 5.20]; and that the purpose of the minimum lot sizes in Zone R is to ensure that Zone R lots are of a size capable of accommodating potential future uses [NTPS clause 11.1.1].

[29] At paragraphs [174] to [177] the Tribunal noted that a trivial departure from the prescribed standard might, by itself, amount to a "special circumstance" justifying consent, but that in the instant case there was a significant departure from the minimum standards.

[30] In paragraphs [178] to [186] the Tribunal held, incorrectly, that the proposed restrictive covenants could not amount to "special circumstances" and in paragraphs [187] to [188] incorrectly expressed doubts about the enforceability of the proposed restrictive covenant.

[31] At paragraph [189] the learned Magistrate went on to consider whether the proposed restrictive covenants would in fact amount to "special circumstances" justifying consent if he was wrong in his view that they could not do so. The Tribunal held that "such "special circumstances" would not justify giving consent to the proposed development in light of the serious doubts as to the effectiveness of making the creation of restrictive covenants a condition of planning permission".

[32] Although this paragraph “cures” the first error of law complained of, the reasoning in this paragraph is “infected” by the second error of law, namely the finding that there was doubt about the effectiveness or enforceability of the proposed restrictive covenants.

[33] In paragraphs [190] to [204] the Tribunal determined that the existence of a large number of lots in the locale that were less than 8 hectares, including a significant number that were less than 3 hectares, did not, of itself, amount to “special circumstances” and, at paragraphs [205] to [211], held that if they did, such “special circumstances” would not justify consent.

[34] The Tribunal went on in paragraphs [212] to [220] to deal with the Appellant’s submission that “special circumstances” exist by reason of the proposed Development meeting or exceeding the objects and purposes of Part 5 of the NTPS (which deals with subdivision) and relevant planning requirements.

[35] The Tribunal determined that a subdivision that would result in lots of half and less than half of the minimum standard is inconsistent with the primary purpose of Zone R to ensure lots will be of a size capable of accommodating potential future uses [clause 11.1.1] including residential, agricultural and other rural activities: Reasons [213].

[36] The Tribunal determined that the proposed Development would also be inconsistent with the secondary purpose of Zone R, i.e. “to facilitate

separation between potentially incompatible uses and restrict closer settlement" [clause 5.20]: Reasons [214].

[37] At paragraph [215] the Tribunal repeated the error of stating that restrictive covenants would be of dubious effectiveness.

[38] At paragraph [216] the Tribunal said that the fact that Lot B would be used for residential purposes, like the current use of surrounding lots, "contributes little if nothing to the cogency of the Appellant's argument".

[39] At paragraph [217] the Tribunal went on to consider the fact that the proposed Development might meet the purpose set out in NTPS clause 6.9(1)(a) (i.e. minimise the detrimental effect of aircraft noise on people who reside or work in the vicinity of an airport) and exceed the purposes set out in various other clauses.

[40] The purposes which it is said the proposed Development would exceed were:

(a) Clause 6.9(1)(c) (i.e. "retain the non-urban character of the land");

(b) Clause 10.2(1) ("The purpose of this clause is to ensure that the cleaning of native vegetation does not unreasonably contribute to environmental degradation of the locality.");

(c) Clause 10.2(5) ("… the clearing of native vegetation on more than 1 hectare in aggregate of land (including any area already cleared of native vegetation … in Zone … R … requires consent.");

(d) Clause 11.4.1(2)(b) (“rural subdivision design should: … retain and protect significant natural and cultural features”);

(e) Clause 11.4.1(4) (“an application … must demonstrate that the proposed subdivision design does not adversely affect the environmental values as identified in the evaluation”); and

(f) Clause 11.4.3(1)(c) (“The purpose of this clause is to ensure rural subdivisions … do not impose unsustainable demands on ground water or unreasonably degrade the environment.”).

[41] The feature of the proposed Development which would lead these particular purposes to be exceeded is the offer to accept as a condition of consent the registration of restrictive covenants over the two lots restricting further clearing of native bush land, restricting the use to residential and restricting methods of waste disposal.

[42] The Tribunal said at [217] “The fact that the proposed subdivision might … meet and exceed [these purposes] is not sufficient to establish ‘special circumstances’”.

[43] The Tribunal went on at [218] and [219] to explain why. Essentially the learned Magistrate said there was nothing unusual or unexpected about applications meeting or exceeding some planning requirements often, as in this case, while not meeting others.

[44] The Tribunal went on to say, at [220]:

> "Again, in the event I have erred in failing to regard compliance or over compliance with some planning requirements as giving rise to or creating "special circumstances", and should have found "special circumstances" exist, then, in my opinion, those circumstances would not justify giving consent to a development, which is fundamentally at odds with the primary purposes of Zone R and its zoning requirements."

[45] Effectively, in paragraph [220], the learned Magistrate has indicated that, assuming the proposed restrictive covenants would in fact result in the various listed planning requirements being exceeded (which would only be the case if those covenants were effective and enforceable), and assuming that fact did amount to "special circumstances", then, considering the application on its merits, he did not consider that those "special circumstances" were sufficient to justify giving consent to the Development.

[46] Mr Barr QC for the Respondent has argued that in paragraph [220] the Tribunal has effectively "cured" the errors of law referred to above because in this paragraph the learned Magistrate has considered the proposal on its merits on the assumption that the proposal to make the registration of restrictive covenants over the land a condition of consent did amount to "special circumstances" and the further assumption that the restrictive covenants would be enforceable and therefore cause the Development to exceed the planning objectives referred to above. That does seem to be the effect of that paragraph.

[47] In the following paragraphs, paragraphs [221] to [224], the Tribunal considered the letter from "Greening Australia", the owner of the adjoining block, expressing the view that "the net effect, with the protective covenant, would be of significant benefit to the environmental amenity of the Knuckey Lagoons locale". The Tribunal determined that the contents of this letter did not give rise to "special circumstances" or, alternatively, did not give rise to "special circumstances" justifying consent being given to the proposed Development: Reasons [224]. This opinion was at least partly influenced by the erroneous opinion that the restrictive covenants would be ineffective: Reasons [223]. However, the Tribunal had already considered whether the protections afforded by the restrictive covenants (assuming them to be effective) would amount to "special circumstances" justifying consent to the subdivision and had determined that they did not: Reasons [220].

[48] It is reasonably clear that the first error of law complained of, namely the finding that the proposed condition requiring registration of restrictive covenants could not amount to "special circumstances", did not affect the Tribunal's final decision. At paragraphs [189] and [220] the Tribunal considered that this proposed condition would not in fact amount to "special circumstances" which would justify the giving of consent assuming that his finding that the proposed condition could not amount to "special circumstances" was wrong.

[49] It is less clear that the second error of law complained of, that is the finding that the proposed restrictive covenants may be unenforceable, did not affect the decision. At paragraph [220] the Tribunal considered the Development proposal on its merits on the assumption that the restrictive covenants would have the intended effect and could amount to "special circumstances", those "special circumstances" would nevertheless not justify giving consent to the proposed Development because it was fundamentally at odds with the primary purposes of Zone R and its zoning requirements. However, that was in the context of the Tribunal's consideration of the Appellant's submission that the proposed restrictive covenants would cause the Development to exceed certain planning objectives. That is to say, in paragraph [220] the Tribunal was considering the effect of the restrictive covenants in isolation.

[50] The Appellant argues that the Tribunal committed a further error of law in that the learned Magistrate considered each factor urged by the Appellant as constituting or contributing to the existence of "special circumstances" in isolation, one after the other, and did not consider whether, taken all together, these factors amounted to "special circumstances" justifying giving consent to the proposed subdivision. If that is indeed what the Tribunal did, it would amount to an error of law and one that would necessitate the appeal being allowed.

[51] I do not consider that this is what the Tribunal did.

[52] At paragraphs [155] and [156] the Tribunal set out the correct test for considering whether there are "special circumstances"[4] and then proceeded to apply that test. The learned Magistrate said that all relevant circumstances must be considered in combination and identified the need to consider whether there are circumstances which either individually or collectively constituted special circumstances justifying consent.

[53] At paragraphs [178] to [224] the Tribunal considered each of the factors put forward by the Appellant as "special circumstances" in turn and determined that individually none of them amounted to "special circumstances" which would justify the granting of consent.

[54] The Tribunal then considered the collective effect of all of these circumstances acting together and determined at [225] that "there are no circumstances either individually or collectively that can be considered to be 'special circumstances' justifying consent to the proposed Development".

[55] Mr Wyvill for the Appellant submits that it was not permissible for the Tribunal to consider the factors individually before considering them collectively. I do not accept that submission. It seems to me that it is a normal and perfectly acceptable part of the reasoning process, when several factors are put forward as amounting to "special circumstances", to consider the effect of each one separately before going on to consider their

[4] See paragraphs [21] to [23] above.

combined impact. That is not to say that the exercise must necessarily be approached in that way, merely that, depending on the circumstances under consideration, that is one legitimate way of considering whether all of the relevant facts, together, amount to "special circumstances" justifying consent.

[56] As stated above, I consider that Mr Barr QC is correct in his contention that the first error of law complained of (that the proposal to register restrictive covenants over the Land as a condition of consent could not amount to "special circumstances") did not affect the Tribunal's decision.

[57] I also consider that Mr Barr QC is correct in contending that in paragraph [220] the Tribunal did consider whether, considered in isolation, the proposed restrictive covenants in fact amounted to "special circumstances" justifying consent on the assumption that they would have been effective to achieve their stated purpose.

[58] However, the second admitted error (i.e. that the restrictive covenants may be unenforceable) is repeated and forms part of the Tribunal's reasoning process a number of times, in particular in paragraphs [189], [215] and [223]. It is far from clear that this error did not affect the Tribunal's final decision. It may well have formed part of the Tribunal's reasons for coming to the conclusion in paragraph [225] that there are no circumstances, either individually or collectively, that can be considered to be "special circumstances" justifying consent to the proposed

Development. Accordingly I consider that the appeal must be allowed on this ground.

[59] The Appellant also complains that the Tribunal fell into error in paragraph [227] as that paragraph indicates that a refusal by the Tribunal to consider the application on its merits and in light of the (mandatory) considerations set out in section 51 of the *Planning Act*. I do not read paragraph [227] that way.

[60] NTPS clause 2.5.3 provides:

> "The Consent Authority may consent to the development of land that does not meet the standards set out in parts 4 or 5 only if it is satisfied that special circumstances justify the giving of consent."

That includes the minimum lot size of 8 hectares for Zone R.

[61] It seems to me that what the Tribunal is saying in paragraph [227] is that, having determined that there are no "special circumstances" that would justify giving consent to a subdivision which creates lot sizes of less than the specified standard of 8 hectares, the Tribunal is precluded from consenting to the Development. There is therefore no point in considering the rest of the matters in section 51. In that I consider the Tribunal was quite correct.

[62] However, I have concluded that the appeal must be allowed on the basis that there is an error of law by the Tribunal which may have affected the Tribunal's decision that there were no special circumstances which alone

or collectively justified the granting of consent. Therefore the appeal must be allowed.

[63] The matter will be remitted to the Tribunal for reconsideration on its merits on the basis that:

(a) the proposed restrictive covenants are capable (either alone or in combination with the other factors agreed by the Appellant) of amounting to “special circumstances”; and

(b) the proposed restrictive covenants, once registered, would be valid and enforceable.

Whether those proposed restrictive covenants, in all the circumstances, in fact amount to “special circumstances” justifying the granting of consent to the proposed subdivision is a matter for the Tribunal.