

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Caloundra City Council v Pelican Links Pty Ltd & Anor* [2004] QPEC 052

PARTIES: **CALOUNDRA CITY COUNCIL** (Applicant)
AND
PELICAN LINKS PTY LTD (First Respondent)
AND
TITANIUM ENTERPRISES PTY LTD (Second Respondent)

FILE NO/S: 252 of 2004

DIVISION: Planning and Environment

PROCEEDING: Application

ORIGINATING COURT: Planning & Environment Court of Queensland, Maroochydore

DELIVERED ON: 24 September 2004

DELIVERED AT: Maroochydore

HEARING DATE: 6 & 7 September 2004

JUDGE: Judge J.M. Robertson

ORDER:

[1] Declare that the land clearing carried out by the respondents on 21 July 2004 in the undeveloped western part of Lot 65 on SP 166661 was unlawful and amounted to a development offence within the meaning of s4.33 of the *Integrated Planning Act 1997*;

[2] I invite further submissions as to the other orders to be made as a consequence of the order made in paragraph 1;

CATCHWORDS: Application for declarations and injunctive relief – large area of native vegetation cleared without consent of Council – whether land clearing was unlawful and constituted a development offence – whether Council acted lawfully in imposing condition – where condition imposed in 1996 on large tract of land – where condition attaches to the land – whether condition prevented uses permitted by Plan of Development over subject site – whether Council’s imposition of condition contrary to finality principle.

Cases cited:

Proctor v Brisbane City Council (1993) 81 LGERA 398
Cardwell Shire Council v King Ranch Australia Ltd (1984) 53 ALR 632
Felix Stowe Pty Ltd v Gladstone City Council (1994) 85 LGERA 234
Corporation of the City of Unley v Claude Neon Ltd & Anor (1983) 32 SASR 329
Mison and Ors v Randwick Municipal Council (1991) NSWLR 734
Randwick Municipal Council v Pacific-Seven Pty Ltd (1989) 69 LGRA 13
Jungar Holdings Pty Ltd v Eurobodalla Shire Council & Anor (1990) 70 LGRA 79
Malcolm v Newcastle City Council (1991) 73 LGRA 356
Leichhardt Municipal Council v Minister Administering the Environmental Planning and Assessment Act 1979 (1992) 77 LGRA 64
McBain v Clifton Shire Council [1996] 2 Qd. R. 493
Association for Berowra Creek Inc v Minister for Planning and Anor [2003] 124 LGERA 99
Transcontinental Development Pty Ltd v Pine Rivers Shire Council (1969) 25 LGRA 7
Craig v The State of South Australia [1994-1995] 184 CLR 163
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 76 ALJR 598
Concore Pty Ltd v Mulgrave Shire Council [1988] 2 Qd. R. 395
Kwicksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council [1994] 1 Qd. R. 291
Makucha v Albert Shire Council [1996] 1 Qd. R. 53
Russell v Brisbane City Council [1975] 31 LGRA 337
Sci-Fleet Motors Pty Ltd v Brisbane City Council [1982] Q.P.L.R. 231

Statutes cited:

Integrated Planning Act 1997, s. 4.3.3
Local Government (Planning & Environment) Act 1990

COUNSEL: R. Myers (for the applicant)
D. Gore QC with T. Trotter (for the respondent)

SOLICITORS: Heiner & Doyle (for the applicant)
Connor O'Meara (for the respondent)

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INTRODUCTION

- [1] The applicant Council seeks declarations and injunctive relief as a consequence of some tree clearing that took place on the respondent's land at Caloundra on 21 July 2004. The Council says that the extensive felling of Melaleuca forest (4.71-4.8 hectares) that took place on 21st July was in breach of a condition of a development approval and as such, alleges that the respondents have committed a development offence and should be restrained from further tree clearing except with Council's written approval.
- [2] The second respondent trades as Titanium Enterprises Pty Ltd, and it is the joint venture partner of the first respondent Pelican Links Pty Ltd with the HSP Group. I will refer to the respondents for convenience as "Titanium".
- [3] The cleared trees were on the western undeveloped part of land described as Lot 65 SP 166661. Lot 65 was purchased by Titanium in May 2004. It comprises 157.4 hectares. The land was originally part of a much larger block which was developed by Q View Pty Ltd. This larger parcel of land was rezoned on 5 December 1996 to "Special Residential, Comprehensive Development (now Special Development), Special Facilities (Service Station Shop and Carwash) and Special Facilities (Golf Course, Licensed Club, Meeting Rooms, Reception Rooms, Restaurant, Night Practice Range, Gymnasium, Tennis Courts and Practice Range)".
- [4] The present dispute focuses on General Condition A12 which is in these terms:

"no clearing of native vegetation is to occur on the subject development site without the prior written approval of Council's Environment Branch. It will be necessary for the applicant and any subsequent owners to make a formal application (including plan) outlining reasons for clearing and identifying the impacts of such clearing;"
- [5] It is common ground that condition A12, as a matter of law, carries through to the successors in title of the original applicant as a condition of the original rezoning approval.
- [6] The original much larger parcel has been substantially developed in the years following the 1996 approval.
- [7] Lot 65 is covered by Plan of Development No. 63 and is zoned special facilities, namely "Golf Course, Licensed Club, Meeting Rooms, Reception Rooms, Restaurant, Night Practice Range, Gymnasium, Tennis Courts and Practice Range", and has been substantially developed as an 18 hole Golf Course with facilities. The western part of Lot 65 remains largely undeveloped and still contains stands of native vegetation including mature trees.
- [8] Prior to 1996, parts of the land had been cleared for fairways for a nine hole golf course and, in 1999, a large amount of fill was placed on these fairway areas to raise them. I infer that there was at some stage a plan to develop these fairways into an additional 9 holes to supplement the 18 hole Pelican Waters course, but that this did not proceed. This area became known as the "back nine land". After the filling, there was no further development in this area and the fairway areas became overgrown with regrowth.

- [9] It is common ground that Titanium knew of the existence of condition A12 by late May. Only one of the directors of Titanium, Jacqueline Connolly, gave evidence. She told me that when she became aware of A12 in late May or early June “it was unclear (to her) whether condition 12 applied to the undeveloped western portion of the land”.¹
- [10] When Council originally made written application to this court on 22 July 2004 for interim injunctions to halt the tree clearing that had commenced on 21 July, its allegations included the doing of serious environmental harm, and the breach of a Local Law. Its amended application filed on 12 August 2004 did not persist with these claims, and focussed on what it alleges is a breach of condition A12 by the respondents.
- [11] There is very little dispute about the facts upon which the Council application is based. Only (2) Council witnesses, Mr Borthwick and Mr Birbeck were cross-examined, and they were not really challenged about their recollection of events leading up to the application being filed on the 22 July. There are some minor areas of factual dispute and it is necessary for me to make factual findings. Titanium argues that, for various reasons condition A12 is invalid and/or not lawfully imposed.

FINDINGS OF FACT

- [12] Mr Milne is an environment officer with Council. His statement is Exhibit 10. He was not cross examined. In May 2004, he was contacted by Peter Hickey of Sevens Hickey Surveyors. I am satisfied that Mr Hickey was a consultant retained by Titanium, and, at all relevant times, was acting with its knowledge. Mr Hickey told Mr Milne that “he wanted the Council’s opinion on some minor clearing associated with survey work on the back nine”²
- [13] On 21 May 2004 Mr Milne and Mr Birbeck, a senior environmental officer, met with Mr Hickey and Ms Connolly at the golf club and they went together to the back nine land. I am satisfied that on site Ms Connolly showed Mr Milne a plan marked with the location of the fairways which had been cleared in the past. I accept Mr Milne’s evidence that:

*“Titanium wanted to clear regrowth from the edges of the previously-defined fairways, so that the fairways themselves could be re-surveyed. I told Hickey and Connolly that we would need to see a plan of the proposed works presented as a written request, in accordance with the procedure laid down in the 1996 approval. This was reiterated by John Birbeck who told Hickey and Connolly that written requests ought to be directed to me, as it was to be my responsibility to process them”*³

- [14] In accordance with that request Mr Hickey wrote to Mr Milne on 25 May 2004 which he received the next day. The letters are part of Annexure “A” to Mr Milne’s statement. The map forwarded by Mr Hickey is also part of Annexure “A” and shows roughly the areas to be cleared as coinciding with the old cleared fairways. The land cleared of trees on 21 July 2004 by Titanium is marked as “no clearing” in

¹ Affidavit of Jacqueline Maree Connolly filed on 26 August 2004, at paragraph 9.

² Statement of Cameron Alexander Milne filed on 6 August 2004, at paragraph 7.

³ At paragraph 8.

that map. I accept Mr Milne's evidence that he was concerned that this proposal went beyond what was discussed on 21 May. Accordingly, he e-mailed Mr Hickey on 26 May 2004 in these terms:

"Thankyou for your information. As discussed at our site meeting of 21/05/-4, Council requires that formal advice be forwarded from NRM&E in relation to the clearing of regrowth pursuant to the Vegetation Management Act 1999 – before any approval is granted by Council. This will expedite Council's assessment for the vegetation clearing as required by condition 12 of the rezoning permit for the golf course site.

Further, as indicated at our site meeting, once an assessment and approval has been granted by NRM&E, the clearing would be required to be undertaken under the supervision of Council Environment Officers, in accordance with the following conditions:

- *This clearing may only occur on areas of previously filled land, in accordance with existing approvals for the site, on areas above HAT;*
- *The method of vegetation removal is a "Broad Acre Mulcher" or rubber tracked excavator with a vegetation "maserator head" only. This is to minimise soil disturbance, and subsequent weed recruitment and will leave a layer of mulched plant material on the site;*

Be advised however, that any areas that are proposed to be cleared for "preliminary survey work" may be required to be revegetated, should a subsequent approval alter the use of this site."

- [15] He followed up with a letter of 27 May 2004 which is in similar terms, but expands on the email:

"I refer to your letter submitted by email dated 25 May 2004, requesting permission to clear regrowth vegetation on the areas proposed on drawing number 534-1.

As discussed at our site meeting on 21/05/04, Council requires that formal advice be forwarded from NRM&E in relation to the clearing of regrowth pursuant to the Vegetation Management Act 1999 – before any assessment is undertaken by Council. This will expedite Council's assessment for the vegetation clearing as required by condition 12 of the Combined Rezoning and Subdivision permit for the golf course site.

Further, as indicated at our site meeting, once determination has been made by NRM&E, any Council approval for clearing surveying purposes would be required to be undertaken under the supervision of Council Environment Officers, in accordance with the following conditions:

- *This clearing may only occur on areas of previously filled land, in accordance with existing approvals for the site, on areas above HAT;*
- *The method of vegetation removal is a "Broad Acre Mulcher" or rubber tracked excavator with a vegetation "maserator head" only. This is to*

minimise soil disturbance, and subsequent weed recruitment and will leave a layer of mulched plant material on the site;

Be advised however, that any areas that are proposed to be cleared for “preliminary survey work” may be required to be revegetated, should a subsequent approval alter the use of this site.

Be advised that no approval to clear has been granted at this time. Any clearing work that is undertaken without the written consent of Council would be considered a breach of Condition 12 of the Combined Rezoning and Subdivision permit for the site.”

- [16] There was a subsequent unrelated request for some minor clearing on the developed part of Lot 65 which was approved by Mr Milne on 31 May 2004. The relevance of this is only to demonstrate that at this point Titanium seemed to be content to seek Council’s permission to remove vegetation; consistently with A12, although in relation to this particular request A12 was not mentioned.
- [17] On 4 June 2004 Mr Hickey wrote to Mr Milne in response to Mr Milne’s letter of 27 May 2004, and attached a letter from Natural Resources, Mines & Energy as requested. The letter states (we) “will contact you when we have a firm date of expected clearing”.
- [18] On 10 June 2004, Mr Hickey e-mailed Mr Milne who was not in his office on that day, suggesting that some clearing might take place on 11th June.
- [19] Mr Borthwick, a senior planner, and other Council officers became aware of Mr Hickey’s e-mail and consequently went to the site and met Ms Connolly and Messrs O’Connor and Price. Mr O’Connor is a director of Titanium and Mr Price is the managing director of the Golf Club. The group drove to the back nine land in a procession of 3 vehicles and all the vegetation was in tact. I accept Mr Borthwick’s unchallenged evidence that he was assured by Mr Price and Mr O’Connor that no clearing was taking place and that Titanium wanted to work closely with Council. I also accept his evidence⁴ that Council officers were assured by Mr Price and Mr O’Connor that ‘no clearing would take place without Council approval’. These assurances were consistent with the approach then being taken by Titanium, and that was to seek the Council’s consent to any clearing of native vegetation.
- [20] On 21 June 2004, Titanium representatives (including Ms Connolly) met with Council officers, when the glossy brochure Annexure C to Mr Borthwick’s affidavit was presented. The brochure sets out Titanium’s “vision” for the back nine land. The vision is for a large community residential development and other facilities. I am satisfied that at that meeting, Council officers explained to Titanium that it (the Council) did not envisage residential development on the back nine land. Ms Connolly accepts that this was said. I am also satisfied that Council officers said that residential development was inconsistent with the current and proposed planning schemes, and that there were several constraints upon the development of the land including vegetation that council wanted preserved. Ms Connolly says she does not recall that being said. I accept Mr Borthwick’s sworn unchallenged evidence on this point.⁵

⁴ At paragraph 13.

⁵ Affidavit of John Baillie Borthwick filed on 22 July 2004, at paragraph 1.

- [21] There was no further correspondence between Titanium and Council concerning clearing on the back nine land prior to the events of 21 July 2004.
- [22] I am satisfied that at around the time that Mr Hickey was negotiating with Mr Milne on behalf of Titanium, Titanium was seeking legal advice about its right to clear vegetation from Lot 65. This became apparent with the filing of Ms Connolly's affidavit on 26 August 2004.
- [23] To properly understand this aspect of the evidence, and my assessment of it, it is necessary to set out in full the relevant paragraphs in Ms Connolly's affidavit dealing with this issue:

- "9. *We were subsequently given some additional information, including a copy of the 1996 rezoning approval in approximately late May to early June 2004. It was at that time that Titanium became aware of condition 12. However, given the nature of the rezoning approval, it was unclear, to me and to other representatives of Titanium, whether condition 12 applied to the undeveloped western portion of the land.*
10. *By that time, Titanium had retained a number of consultants to assist in the preparation of a development application for the residential development. Some of the consultants who were retained were asked to consider whether the vegetation on the land could be cleared. We were provided with a range of views. It was noted that the existing vegetation was not identified as remnant vegetation on the Regional Ecosystem Maps.*
11. *It was at that time that Titanium approached solicitors, Connor O'Meara, to obtain advice about whether Titanium would be acting unlawfully if it cleared some of the undeveloped part of Lot 65.*
12. *On 20 July 2004, advice from Connor O'Meara was obtained to the effect that clearing could be lawfully undertaken on the land."*

- [24] The legal advice was not annexed to her affidavit however, at the hearing there was a limited waiver of privilege and the advice of Mr Connor dated 20 July 2004 was tendered as Exhibit 17 in the proceedings. Despite what Ms Connolly says in paragraph 9, there is no reference at all to condition A12 in Mr Connor's letter. She said in cross examination that she read the advice, particularly at pages 4 and 5, as relating to A12 and therefore saw no impediment, as far as A12 was concerned, to clearing. Ms Connolly is obviously an intelligent person with extensive knowledge of the processes and procedures necessary to develop land. Her evidence on this point was disingenuous and I do not accept it. Mr Gore attempted to rescue her credibility on this issue by saying she is not a lawyer, and she relied on experts. How any person, with a modicum of intelligence and commonsense, let alone someone of Ms Connolly's obvious talents, could read into that letter what she says she did concerning A12 is beyond me. By way of explanation; there was a limited tender of the "brief" to Mr Connor which formed the basis of his opinion. The whole brief was placed in Ms Connolly's hands by Mr Gore for a limited purpose, but was not tendered. Mr Meyers did not argue that the partial waiver of privilege opened up the whole document, so I take it no further. However, Ms Connolly swore that when she later reviewed the "brief" ie. after the trees had been cleared, she realised that due to a photocopying error, only the odd pages of the development

approval of 11 December 1996 was sent to Mr Connor, and unfortunately condition A12 appeared on an even page. It defies common sense and experience, that an experienced planning lawyer like Mr Connor, if he was asked to advise on an issue such as the impact of a particular condition or development conditions generally, on land clearing, would not attend to the conditions of approval in considering the matter; and if he did, it is beyond belief that he would not have noticed that the conditions were incomplete. There was no evidence, beyond that of Ms Connolly, on this point. Mr Meyers again did not pursue it, and I can take it no further. I think he is right when he submits that when one reads the introductory paragraph of Mr Connor's advice, he was being asked to advise on the relevant statutory provisions, and not on the impact of any conditions on land clearing. That would explain why, in Mr Connor's mind, the development conditions would not have much relevance.

- [25] I have referred to the meeting on 21 June, when the glossy brochure showing Titanium's vision for the back nine block was handed to Council officers. Ms Connolly said in evidence that the elaborate residential subdivision for the Pelican Links Development on the back nine land which appears on the last page of that brochure, has since been modified. Indeed, it is said to be option 4, and she said that they are now considering option 12. I infer that their plan is to have a substantial residential development on the back nine land. It is certainly not their plan to develop another 9 holes of the golf course. Mr Buckley town planner, who is advising Titanium told me that his client had recently filed an application for material change of use of the back nine land.

THE EVENTS OF 21 JULY 2004

- [26] On 21 July, Mr Dineen an environment compliance officer with Council received a notification from a member of the public of suspected unlawful tree clearing occurring to the west of Pelican Waters Golf Club. He went to the Golf Club at around 10:30am. When he arrived, he was approached by a Naskam security officer. He told that person who he was and that he was investigating a complaint of tree clearing. The security officer refused him permission to enter the site and he had to leave. I infer that from where he first saw the security office in the Golf Club area, it was not possible to see the back nine land.
- [27] Mr Dineen returned to the Club at about 11:00am with (2) officers from Council's regulatory services unit. Again, a Naskam security officer denied them permission to enter. He then went to the Club House and spoke to Tony Price. Mr Price says Mr Dineen said nothing. Mr Dineen says he asked "has there been any clearing going on?" to which Mr Price did not respond. He says that Mr Price denied them permission to enter. Mr Price gave limited evidence on behalf of Titanium. Mr Price was cross-examined about what steps he took, if any, to contact the directors of Titanium as a result of Council's visit. Mr Connolly says that she did not become aware of the Council visit until 6pm that night when Mr Price made contact. Mr Price was very evasive when being questioned on this issue. It is difficult to understand why it took so long to contact the directors. Where the evidence of Mr Price conflicts with that of Mr Dineen, I prefer Mr Dineen's evidence.
- [28] Ms Connolly says that she and Mr O'Connor were in fact at Council Chambers to see Councillor Greg Singh at 10:30am on that day. She was not challenged on this

evidence, so I will accept it. She and Mr O'Connor were clearly aware that the bulldozers were moving in on 21 July 2004. They must have been aware that at some point Council would find out and be concerned; particularly in light of the assurances given on 11 June that there would be no clearing without Council permission, and the conduct of Mr Hickey on behalf of Titanium which clearly evinced an intention to seek Council permission before any clearing. Despite this, there seems to have been no contact with her, and I infer Mr O'Connor, during the day. She says in her affidavit that at 10:15am "Titanium's records show that a representative from the Council telephoned our office, asking to speak to the owners". Again, she was not cross examined about this; and as to why the owners were apparently so difficult to contact on 21 July, so I can take it not further.

- [29] Mr Price gave evidence that he received instructions from Titanium directors to engage security officers "to provide security at the golf course land because clearing of land was to be undertaken and the safety of the public and staff need to be protected. Mark Harris (Manager of Club Pelican Golf) engaged the services of Naskam Protective Services for 21 July 2004 and for a period after that to prevent access to the land for safety and occupational health and safety reasons".
- [30] Mr Dineen then ordered a helicopter charter and he and other Council officers overflew the site at about 2:15pm. He took photographs of what he saw. He saw (2) bulldozers working clearing trees, and several work-men on the ground and (3) other vehicles. He saw trees marked with pink tape and a large tract of trees on the ground. He returned to the Golf Club at 7:30pm and observed that Naskan Security officers were still on duty.
- [31] Late on 21 July 2004 Council urgently applied for and obtained from this Court an interim injunction to prevent further clearing, and clearing stopped. Ms Connolly said in cross examination that bulldozers were nevertheless retained on site for another 9 days at considerable cost. The injunction was confirmed on 22 July 2004 and later varied by consent because it's terms were so wide as to potentially affect routine clearing on the golf course itself.
- [32] There is largely common ground as to what had occurred. The parties vary slightly as to how much of the land was cleared. On any measure, a large parcel of land of approximately 4.71 hectares had been clear felled. The areas cleared were clearly marked as being subject to no-clearing in the map forwarded to Mr Milne by Mr Hickey on 25 May 2004.
- [33] Mr Birbeck has had a long association with the land and was with Dr Olsen when he reviewed the vegetation on this site in 1993 as part of his Citywide classification of vegetation. Dr Olsen classified this vegetation as Priority 1. What was cleared was an extensive stand of trees, including numerous old-growth trees such as mature tea trees, swamp box, blue gum, bloodwood and ironbark. Mr Birbeck regarded the area declared as being largely comprised of "undisturbed forest".
- [34] Mr Warren, environmental scientist, gave evidence for Titanium. He did not see the land prior to 21 July. He first went to the site on 2 August according to his report, but on 22 July in his oral evidence. In his report of 17 August 2004⁶ behind page 6 is a map of the back nine land which conveniently shows the old cleared fairways,

⁶ Affidavit of James Victor Warren filed on 26 August 2004, at Exhibit JVW-2.

and the area cleared on 21 July 2004. His findings are largely based on his assessment of the remaining vegetation on the site. His report does appear on its face to be a preliminary report which may be updated in support of Titanium's application for material change of use, but nevertheless he concludes that because of previous development and other man made inroads into the area (tracks, the old fairway clearing etc), while the land has some ecological value, there is "no compelling reason why this land should not be cleared". I presume he is referring to the remaining uncleared area because otherwise he should have said "no compelling reason why this land should not have been cleared", given that his involvement was after 21 July 2004. As he points out, the land is not mapped by the Department of Natural Resources & Mining as containing any remnant vegetation.

- [35] In cross examination, he somewhat reluctantly acknowledged that the area cleared, prior to clearing, had ecological value. He relied heavily on the failure of DNR to map the land, to refute the evidence of Mr Birbeck that the area cleared was largely undisturbed forest. His opinion is that all the vegetation on the site, that is even the mature trees is likely to be regrowth. In my view, the dispute between the environmental experts does not matter for the purposes of these proceedings. It is common ground that what was cleared was substantially "native vegetation", and eventually, in accordance with the case advanced by both parties, it all comes back to the lawfulness or validity of A12. It follows therefore that it is unnecessary for me to reach any final conclusions about the ecological value of the land.

THE LEGAL QUESTIONS

- [36] Mr Gore frankly conceded that if I was against him on the legal arguments he advanced, then the Council was entitled to succeed on its primary application. Before dealing with his arguments, I will set out briefly the history of the development of the large parcel of land, including Lot 65 which will provide some context for the points made by Mr Gore.

THE DEVELOPMENT HISTORY IN BRIEF

- [37] The original approval of December 1996 covered the whole of the land which included the future Lot 65. Since then there have been at least 14 development and/or operational works approvals associated with the overall site. One of the largest projects occurred in 1998-1999 when there was an approval given for bulk earth works which involved the creation of the entire golf course precinct including reclaiming the fairways on the present 18 hole course and the since developed residential areas that can be seen in aerial maps and photographs tendered. Because of the scale of the earthworks, the unusual course of seeking operational works approval before specific approvals for subdivisional layouts was agreed between the developer and Council. The evidence in these proceedings is scant on this point, but I think I can safely conclude that some native vegetation was removed during this process. The aerial maps for 1997 and 2003 tendered by Mr Trotter support this proposition, particularly in regards to an area on the northern side of the site where now stands a lake and residential development. In the absence of specific evidence, it is impossible for me to compare the 1997 native vegetation with the native vegetation on the back nine land. There certainly appears to be a lot more tracks or roads through the earlier site, but I am satisfied that native vegetation was necessarily removed as part of the massive earthworks undertaken in 1998-1999.

- [38] Council rely on a statement of Graham Tamblyn. He is a director of Cardono MBK, consulting engineers, and his firm was involved as consultants to the development from 1996, and was directly involved in the 1998-1999 project. He was not cross examined. It turned out that he was in New Zealand at the time of the hearing but was available to give evidence by telephone. Ultimately, Mr Gore decided not to cross examine him, so his evidence is unchallenged. He says that the bulk earthworks project “involved an acceptance by the Council that some vegetation would have to be removed”. He does not suggest, nor is there any other evidence to suggest, that at any time formal permission was sought to remove native vegetation in accordance with condition A12. Plan of Development No. 63 relates to the now described Lot 65 and it will be necessary for me to return to its contents later in the context of some of Titanium’s legal arguments.

THE 6.1 POINT

- [39] Ultimately Mr Gore did not actively pursue this as a separate argument. It was subsumed into the argument about the validity of Council’s power to impose such a condition and the associated issue of the lawfulness or otherwise of the condition.

- [40] At the time the condition was imposed, Council could not (impose)

“... a condition that is not relevant or reasonably required in respect of the proposal to which the application relates, notwithstanding the provisions of the planning scheme;”⁷

- [41] In accordance with *Proctor v Brisbane City Council* (1993) 81 LGERA 398 it is now well established that relevance means “falling within the proper limits of a local government’s function under the Act, as imposed to maintain proper standards in local development or in some other legitimate sense”,⁸ and the alternative test of “reasonably required” is confirmed by *Proctor* to be in accordance with the judgment of Gibbs CJ in *Cardwell Shire Council v King Ranch Australia Ltd* (1984) 53 ALR 632 at 635:

“This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take in to account the fact of the subdivision and the changes that the subdivision is likely to produce – for example, in a case such as the present, the increased use of the road and of the bridge, and to impose such conditions as appear to be reasonably required in these circumstances.”

- [42] When the alternate tests are articulated in this way, it can be seen that similar considerations arise in the other arguments articulated by Mr Gore, and that the 6.1 point can be disposed of at the time I deal with those other points. If a Council does impose a condition that does not satisfy either of the alternate tests in 6.1(1)(c) then the imposition itself is unlawful.

- [43] An example of a condition held to be unlawful in accordance with the “reasonably required” test is identified in *Felix Stowe Pty Ltd v Gladstone City Council* (1994) 85 LGERA 234. Mr Gore relied on this authority to support his argument that his clients were entitled to argue the unlawfulness of a condition even though some 8

⁷ *Local Government (Planning and Environment) Act 1980*, s6.1(1)(c).

⁸ At page 404

years of development has passed since the imposition of condition A12. In that case, the appellant had applied to Council to rezone the land, and Council agreed to request the Minister to rezone the land upon the parties entering into a deed which included a condition that if (on certain conditions) the Council applied successfully for a further rezoning of the land, the appellant would not seek compensation. The appeal proceeded on the basis that this clause was a condition imposed by the Council on its approval of the applicant's original application to rezone. In 1991, a new planning scheme was gazetted for the whole area; and the appellant's land was in fact rezoned such that it was "injuriously affected" which entitled the appellant to compensation. It argued that clause 9 was unlawful in that it was not reasonably required by the rezoning, and was successful on that point in the Planning and Environment Court. In applying the test enunciated by Gibbs CJ in the *King Ranch* case, the Court of Appeal held that the condition was unlawful in that it was "not reasonably required by the rezoning" and therefore Council could not rely on it to deny the appellant lawful compensation.

- [44] The case is marginally authoritative for Mr Gore's argument that, notwithstanding the effluxion of time, his client is still entitled to argue that condition A12 was unlawfully imposed. He obviously anticipated some argument from Council to this effect which did not materialise. Given that the proceedings although civil, have a "quasi-criminal" flavour it would be surprising if Titanium could not now rely on a valid legal argument touching on the lawfulness of condition 12, simply because there has been apparently no previous challenge to A12. I am satisfied that it can.

THE FINALITY PRINCIPLE POINT

- [45] Mr Gore argues that condition A12 offends the finality principle as enunciated in the authorities and is therefore invalid. It is important to stress that his challenge is directed at only condition A12. All of the authorities relied upon involved conditions appeals, and differing planning regimes exist in New South Wales and Queensland. In each case, the court was considering various development conditions imposed before any development had taken place. In some of the cases, conditions were struck down as offending the finality principle, which lead to the collapse of the approval in total. In others, the flawed condition was able to be severed from the overall approval. I mention this, because Mr Meyers seemed to initially regard a striking down of condition 12 as a striking down of the whole of the December 1996 approval.

- [46] **THE TEST enunciated**

Given the heavy reliance on this point by Mr Gore, it is necessary for me to carefully trace the development of the modern rule.

- [47] The starting point is the judgment of Wells J in *Corporation of the City of Unley v Claude Neon Ltd* (1983) 32 SASR 329 at 332:

"...For this purpose, it is essential to bear in mind that the granting of a consent is an act in law that is final in the disposition of the application; the consent must be either refused, or granted unconditionally, or granted subject to conditions. A condition which imparts to consent a quality in virtue of which it ceases to be final is not one, in my judgment, that falls within the structure of the Act. A condition so annexed ought to be directed, and directed only, to circumscribing, with reasonable

particularity, the acts of land use to which the authority ... has given its consent ...”.

- [48] This passage was quoted with approval by Clarke J.A. in *Mison and Ors v Randwick Municipal Council* (1991) NSWLR 734 at 739. In that case, a development application to erect a building had been approved subject to a condition that the overall height of the dwelling house be “reduced to the satisfaction of Council’s chief town planner”. Clarke J.A. said (at 740):

“That this aspect of the development was of critical importance was beyond question. The height, and positioning of the building on site were, arguable, the two most critical features of the development ...”

and, (at 740):

“Where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect it is difficult to see how that consent could be regarded as final.”

- [49] Priestly J.A. said of the test (at 737):

“in my opinion, if the fulfilment of a condition imposed upon a consent will significantly alter the development in respect of which the application was made, there has been no consent to the application. Further however, if the effect of an imposed condition is to leave open the possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which the application was made, then again, it seems to me that the Council has not granted consent to the application made”.

- [50] It is common ground that the tests enunciated in *Mison* represent the present state of the law in Queensland: *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd. R. 347 at 354 per McPherson J.A. and Ambrose J; and *McBain v Clifton Shire Council* [1996] 2 Qd. R. 493 at 496.

- [51] It seems to me therefore that there are, as it were, 2 aspects to the “test”, and if the condition infringes either or both it is invalid. These can be stated relevantly to the facts here in the following way. Firstly, if a condition imposed (on an approval) by Council has the effect of significantly altering the development in respect of which the development application is made, then the proposed approval is no approval at all. Secondly, where a condition leaves for later decision an important aspect of the development, and the decision on that aspect could alter the proposed development in a fundamental way, then the approval with that condition cannot be regarded as final.

THE COMPETING ARGUMENTS

- [52] Mr Gore submits that condition A12 offends against both of these (2) aspects. He submits that the condition has the effect of significantly altering the development in respect of which the approval has been given. This will involve an examination of that point in the context of (a) the 1996 approval and (b) the Plan of Development No. 63 which relates specifically to the development of Lot 65. He then submits that the delegation of a power to approve, or impliedly reject, the clearing of native

vegetation to Council's Environment Branch, leaves open for later decision an important aspect of the development which decision could alter the development in a fundamental way.

- [53] In support of his argument he relied upon a number of authorities in which these tests, or variations thereof, have been applied to conditions of either consent development (in New South Wales), or rezoning approvals (in at least one of the Queensland cases). In his submission, these cases demonstrate the way in which the principles operate in practice.
- [54] Mr Meyers for the Council submits that condition A12 is merely an ancillary condition, as part of a larger number of conditions attaching to an approval for a rezoning and development of massive proportions. He submits that in considering the possibility of a decision by the Council's Environment Branch altering the development in a fundamental way, I am entitled to take into account the 8 year history of the development which demonstrates, beyond doubt that condition A12 has not operated in the way submitted by the respondents. Mr Gore seemed to submit that the development history was irrelevant to the question, but he was hard to nail down on this issue. Ultimately, I think his submission was that there is insufficient evidence for me to decide what has occurred.

THE TEST APPLIED

- [55] I will deal with each of the authorities upon which he relies:

- [56] *Randwick Municipal Council v Pacific-Seven Pty Ltd* (1989) 69 LGRA 13

In this case, Stein J. struck down a condition as being void for lack of finality on the basis of authorities such as the *Claude Neon* case. Council had given its consent for a convenience food store with self service facilities, open 24 hours a day, with a condition that "Council reserves the right to restrict the hours of operation should any nuisance occur". His Honour went on to consider the question of severability to which I have earlier referred and said (in refusing to sever):

"... the issue of hours of operation of the development and whether they should be restricted was fundamental and went to the very root of the consent. The issue cannot be seen as unimportant or incidental."

- [57] *Jungar Holdings Pty Ltd v Eurobodalla Shire Council & Anor* (1990) 70 LGRA 79

In that case, Council had granted a development consent for a by-products treatment / recovery plant subject to a number of conditions that reserved the right to Council to restrict the operating hours of the plant should noise complaints be received; it also reserved to various stated experts decisions about other important matters to do with the operation of the plant. Hemmings J. set aside the consent. He said (at 89):

"With respect to many matters essential for the proper determination of the application it merely deferred to the expertise of others."

"... In my judgment, each of the conditions in the subject approval postpones determination of an essential matter for the assessment of impact. Condition (d) also purports to reserve the right to make a further assessment, and is clearly ultra vires."

- [58] *Malcolm v Newcastle City Council* (1991) 73 LGRA 356

Council had consented to its own application for a waste management facility. The development was subject to a number of conditions which deferred essential topics of environmental considerations to a later determination by a committee. The applicant, on behalf of a local residents group, sought declarations, including one that the consent was void for lack of finality. Stein J. relied upon the various judgments in *Mison*. He held that the impugned conditions, left open for later decision “*fundamental, important and significant aspects of the development*” and “*the deferral or abdication to the committee shown by some of the critical conditions of consent reveals the possibility of significant changes being later made to the development*” (at p365). He set aside the consent.

- [59] *Leichhardt Municipal Council v Minister Administering the Environmental Planning and Assessment Act 1979* (1992) 77 LGRA 64

The consent here was made by the Minister and related to a development proposal over sites on which were erected a number of heritage buildings. The consent was for the erection of a reception centre and associated car-park, and for restoration and addition to one of the building to accommodate officers. One of the critical aspects considered by the Minister related to noise impacts. The consent was given subject to a condition that required the applicant to engage a qualified acoustic consultant to report and make recommendations on measures to minimise noise impacts.

It was conceded that the question of noise impact was a critical issue for the determination of the development applications. Talbot J. examined the conditions, and set them aside because they were of “important significance” and “there is a distinct possibility that as a consequence of the application of the conditions the development will be significantly altered” and “they leave the noise measures to be determined by a noise consultant appointed by the applicant, subject to the approval of a third party,” (at p76).

- [60] *McBain v Clifton Shire Council* [1996] 2 Qd. R. 493

Council had approved an application to develop land as a piggery subject to conditions. The objector appellant challenged the validity of some of the conditions on the grounds that they meant that the approval lacked finality. The approval applied to a piggery of initially 20,000 pigs but allowed up to 80,000 pigs subject to the decisions of a monitoring committee with respect to environmental sustainability. By application of the principles enunciated in *Mison*, and some of the other decisions discussed in these reasons, the Court found that these conditions did offend the finality principle. The Court said (at p503)

“Future decisions which are required by the conditions to the approval concerning whether the “current and proposed” operation of the piggery is then “environmentally sustainable” will therefore alter the development of the piggery in a “fundamental respect”, each decision will in turn decide the permissible size of the piggery. In our opinion the postponement of such decisions from the issue of the conditional approval until the specified future dates clearly offends the finality principle”.

- [61] *Association for Berowra Creek Inc v Minister for Planning and Anor* [2003] 124 LGERA 99

Consent was given by the Minister for extensions to a marina and car parking, subject to a number of conditions, one of which deferred decisions about the size and location of car parking spaces. Car parking was an essential aspect of the development consent. Lloyd J. held that the impugned condition left for later decision an important aspect of the development and a decision on that aspect could alter the development in a fundamental respect, and was therefore invalid.

- [62] Mr Gore’s submission upon the facts here in the light of these authorities is:

“While on the one hand,, approval was granted (by way of rezoning) that the land be used for the purpose of (amongst other thing) a golf course, condition 12 left open the possibility that it may not be capable of any use at all. Indeed, it is the Council’s case here that no approval would be granted for this very large parcel of land. That obviously means that the approval is illusory and not an approval at all”⁹.

- [63] In my opinion, his submission completely overlooks an essential feature of all of the impugned conditions in the authorities, and that is that the conditions were of important significance to the whole approval, or to use the words from some of the cases “fundamental” and “going to the root” of the approval; “essential” “fundamental, important and significant” and “critical”.

- [64] In my opinion, condition A12 is classically an ancillary condition. It did not, and could not, go to the core of the development approval in December 1996, and it did not, and could not go to the core of the approval for the development of Lot 65 evidence by Plan of Development No. 63.

- [65] Mr Gore tried to argue that a decision by the Environment Branch could alter significantly the development as approved for Lot 65 by referring to the “as of right use” (to use the old terminology) for the owner of Lot 65 to build, for example another club house. When I pointed out that Plan of Development No. 63 referred to only one licensed club; he used the example of tennis courts. Given that Plan of Development No. 63 contemplates a use under the special facilities zone as “Golf course, licensed clubs, meeting rooms, function rooms, restaurant, night practice range, gymnasium, tennis courts and practice range”, his example demonstrates that any decision made under A12, for example to refuse clearing of native vegetation on part of a block covering 157.4 hectare on which the 18 hole Pelican Golf Course and clubhouse are already constructed, could not possibly lead to any significant alteration to the development. In applying the possibility test referred to in the authorities; in my opinion it is permissible for me to take into account what development has taken place both since 1996 and since Plan of Development No. 63 on Lot 65 to consider whether condition A12 could lead to such a result.

- [66] In reply Mr Gore asked me to keep in mind when applying the finality principle to the case here that the New South Wales cases must be read in light of the different planning regime that pertains there as compared with Queensland. If he was saying that the adoption of the principle from the New South Wales cases into Queensland

⁹ Respondent’s Outline of Argument at paragraph 6.

in cases such as *McBain* and *Mt Marrow* in some way means that the principle is different, then I do not accept that proposition. In his written submission and his oral argument he did not suggest any such reservation. He seemed to accept as trite that *Mison* and the other cases had been followed in Queensland. If he is suggesting that the principle is different, or should be applied differently because of the different Queensland Planning regime, then that is a matter which should be determined in the Court of Appeal on proper argument.

- [67] In so far as it is necessary, I reject any submission that condition A12 should fail because it offends against the requirements of s6.1(1)(c) of the repealed Act. In my opinion, the condition satisfies both the relevant and reasonably required tests as articulated in *Proctor*.

THE “AS OF RIGHT” POINT

- [68] Although this terminology is not used in *Integrated Planning Act* applications, the submission relies on long established authority to the effect that it is unlawful for a local authority to impose a condition upon a rezoning which has the effect of restricting in the proposed zone a use of land that may be conducted without the consent of the local authority: per Mylne DCJ in *Transcontinental Development Pty Ltd v Pine Rivers Shire Council* (1969) 25 LGRA 7 at p12. Mr Gore said of condition 12:

“It has the potential (and, as the Council would have it, the reality) of denying any use of this very large parcel of land”.

- [69] In my opinion, that submission greatly overstates the effect of condition 12, and, to some extent, I have dealt with it above under the finality principle argument. Exhibit 20 is a relevant extract from the planning scheme setting out the various zones, including 18 which is special facilities. A permitted development for the special facilities zone is (relevantly) a Column 3 use which is for “purposes specified in an approved Plan of Development relating to the site”. Plan of Development No. 63 (Exhibit 5) nominates the purposes for which the premises may be used without the consent of the council as “Golf Course, Licensed Clubs, Meeting Rooms, Function Rooms, Restaurant, Night Practice Range, Gymnasium, Tennis Courts and Practice Range”. It then sets out development parameters:

“1. *An esplanade not less than 30.0 metres in width (as measured from the top of the bank of Bells Creek) shall be dedicated prior to any of the following events, whichever occurs first:-*

- *any development creating the golf course;*
- *use of the golf course;*
- *lodgement of a subdivision application which creates the area of the golf course.*

The esplanade shall be retained in natural condition for environmental protection purposes.

2. *Any buildings associated with the golf course facility shall be no greater than three storeys in height and shall be so located on site and designed so*

that activities contained therein do not have any adverse impact upon adjoining residents in terms of noise, lighting odour and visual amenity.

3. *Ingress and egress shall be located and designed to the satisfaction of council.*
4. *Carparking shall be provided to the satisfaction of Council.*
5. *The golf course shall be designed, constructed and managed so as to minimise any adverse environmental impacts upon the water quality and ecology of Bells Creek.”*

[70] It is common ground that the esplanade has been dedicated, which obviously occurred in conjunction with the development of the 18 hole Pelican Waters Golf Course which is now operating on the site. At the very least, the evidence establishes that the licensed club house has been built. Mr Buckley said in his affidavit “... a major part of Lot 65 has been developed for a golf course and ancillary facilities.” Although not particularly relevant to this point, if at all, Mr Gore’s clients own glossy brochure with its vision for the development for the balance of Lot 65 does not appear to contemplate any of the uses covered by the present zoning. There is a proposal for a substantial community residential development, a Country Club and a Day Care Centre which do not seem to be “as of right” uses under the present zone. That may explain why Mr Buckley gave evidence that Titanium has lodged with Council an application for material change of use in relation to this part of Lot 65.

[71] I reject the respondent’s submission based on the “as of right” uses in the present zoning.

[72] **THE LEGISLATIVE POWER POINT**

Mr Gore’s argument on this point is summarised neatly in paragraph 10 of his written submission:

“It is impermissible for an administrative power to be used to effect a legislative purpose. A provision of general application which prohibits the clearing of vegetation unless a requisite prior approval is obtained is a subject matter for the legislature, not for an administrative power. If the Council wished to introduce such a regime it ought to have amended its planning scheme or introduced a local law.”

[73] There was some evidence touching on this issue from Mr Buckley although, as always, he was careful not to give a legal opinion. He described condition A12 as ‘odd’ and to apply that description in town planning terms he said it was odd because:

“(a) in the planning scheme in place at the time (and now for that matter) there is no provision which restricts the clearing of vegetation on land within any zone;

(b) *whilst the Council has a local law regulating tree clearing, neither the previous local law or the current local law would have prevented tree clearing on this land in its former zone in this zone.*"¹⁰

[74] He was cross examined about this evidence. At page 59-60 he said this:

"Now, Mr Buckley you'd agree with me although there are, as you would say, any number of ways to easily preserve the native vegetation on this site. Condition A12 is a very simple way of preserving it. That is to say, to prohibit clearing of native vegetation on the subject development site without the prior written approval of council's environment branch? – That's one way of doing it.

And as you say, assuming the provisions of condition 12 apply to Lot 65, its provisions need to be respected? – Yes. But the other side of that, of course, is just from my experience, there are probably two things I'd like to say. One is that the conditions and the approval sort of have to be read as a whole and it's a general condition. Like, many planning approvals have a number of general conditions which are, perhaps, catch-alls. It's in those specific directions or those specific conditions where a planning authority will herald or announce the fact that there is something particular that they want addressed and it's in that that I would put some substance to, the fact that general condition 12, in fact general and not specific to an area which I understand is of now, considered to be of some substance, so that, I think, is of some weight in that determination. But the other thing about conditions is, I suppose, those other principles which is the second thing I wanted to raise about how final and complete they are such that someone actually has an approval but that, I understand, is a matter of law."

[75] Mr Gore took up the issue in re-examination and at page 69, Mr Buckley said:

"The question I really want to ask you is: in saying it's one way of doing it, to what extent are you accepting that condition A12 was, in its very terms, an appropriate condition in the circumstances of this matter? – No, well, I don't – I don't think it was complete enough nor direct enough for something of – that I'm now told is of some substance to the council's view about the environmental qualities of that area. That's all – all I was going to go on to say, is that the – the conditions – all the conditions need to be read with the approval and the actions that occurred after the approval, and in particular the preparation of the plan of development. So, when you look at the complete picture, one has – in my view, a clear understanding of what was intended. Condition A12 on its own really is so vague that it doesn't give you that finality."

[76] I interpret this evidence, when taken in its entirety as a concession by Mr Buckley that this condition was one town planning way of prohibiting clearing of native vegetation on the site without Council approval, but that it was not the best way or the way he would expect as a town planner. I don't think his evidence as such supports or detracts from Mr Gore's submission on this point.

[77] Mr Gore seeks to support his argument by what he submits are analogous cases in which it has been held that local authorities have used the wrong legislative means of imposing a control. He also relies on the authorities which deal with

¹⁰ Affidavit of Christopher Gerard Buckley filed on 26 August 2004, at paragraph 7.

jurisdictional error committed by administrative bodies such as *Craig v The State of South Australia* [1994-1995] 184 CLR 163 and *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598.

- [78] In *Concore Pty Ltd v Mulgrave Shire Council* [1988] 2 Qd. R. 395, a by-law introduced by the local authority to limit building height was held to be invalid as the planning scheme in place did not limit height and the proper course to achieve this was to amend the planning scheme. In *Kwicksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd. R. 291, by analysis of various provisions of the *Local Government Act 1936*, Thomas J held that a by-law passed by the local authority to license mobile vending stalls, was not passed in accordance with the law and was therefore invalid. *Makucha v Albert Shire Council* [1996] 1 Qd. R. 53 involved the consideration of an order in council amending a planning scheme so that a use was permitted only with the consent of local authority. By majority, the Court of Appeal set aside the order-in-council on the basis that the Act defined exhaustively how the consent of a local authority was to be secured to a use of land pursuant to its town planning scheme; and an amendment to the scheme by this means was not permitted.
- [79] I do not think any of these cases assist the respondents in the circumstances of this case. There is no doubt that Council had the power to impose conditions such as A12 on the 1996 development approval. To adapt the words used in those cases, in my opinion the imposition of condition A12 was not such as to go to the “core” or “substance” of the planning scheme, rather it squarely related to the proper “administration” of the scheme. As such, it was a proper exercise of Council’s power albeit one of a number of choices open to it to achieve the purpose of protecting native vegetation on the land.

OTHER FACTUAL ISSUES

- [80] Mr Meyers positively submits that in all the circumstances I could comfortably infer on the probabilities that Titanium’s motive in clearing land on 21 July without Council’s permission, was to promote its chances of succeeding on its material change of use application over the back nine land. His submission is attractive, as the option 4 in the glossy brochure clearly anticipates a large residential development on the site which presently, is not a permitted use. It is clear that Titanium representatives were well aware of condition A12 at the latest by the end of May, and it is clear that Mr Hickey, on their behalf was purporting to act in accordance with the requirements of the condition. Council was entitled to be comforted by the assurances given on 11 June, by Mr Price and Mr O’Connor that there would be no clearing without Council’s permission. At least by 21 June, after the meeting with Council officers, Titanium would have been in no doubt that the Council officers present at that meeting were not in favour of residential development on the land.
- [81] The actions of Titanium representatives leading up to 21 July also provide support for the argument advanced by Mr Meyers. Ms Connolly would have me believe that she decided to go ahead and authorise the clearing when she received Mr Connor’s advice which, on her evidence, was late on 20 July 2004. Admittedly, she said she had a draft before then. When one reads that letter, it is clear that Mr Connor was recommending some steps before embarking on clearing e.g. on page 5, he advises that an engineer or environmental scientist should prepare a report

“before you commence clearing” to ensure that such clearing will not cause land degradation. Clearly, there was no time to do this and in any event, I comfortably draw the inference that the elaborate steps necessary to prepare for what occurred on 21st July must have taken days not hours to put in place. Organising the bulldozers, drivers, and workers and the security firm could not possibly have been done at the last moment.

- [82] What militates against Mr Meyer’s argument are the authorities which say that an applicant for an approval who has acted unlawfully prior to the application being made, runs a real risk of having its unlawful activities taken into account by the decision maker along with other relevant issues: *Russell v Brisbane City Council* [1975] 31 LGRA 337; *Sci-Fleet Motors Pty Ltd v Brisbane City Council* [1982] Q.P.L.R. 231. While it could be argued that the unlawful uses in those cases were at a much lower scale of seriousness than the conduct here, it defies common sense to conclude that Titanium would flout an important condition of the present approval in the expectation that that would assist in its application for material change of use.
- [83] I am unable to conclude what was the motive of the respondents. I do conclude however that their actions were arrogant and high handed and showed complete contempt for the proper processes contemplated by a condition of the development approval over their land of which they were well aware. Their actions were arrogant because they demonstrate a “crash through or crash” approach which has resulted in the unlawful destruction of a large tract of mature native trees along with wild life habitat which was associated with the vegetation. It is clear that at some point after they had acquired the land and made contact with Council, they decided to ignore the condition and the Council officers who were concerned rightly to uphold it, and go ahead anyway. The obtaining of the legal advice from Mr Connor on 20 July 2004 was, in my opinion, a quite transparent attempt by the respondents to give the flavour of verisimilitude to what is, in fact, unlawful behaviour. I must say that when I read paragraphs 9 to 12 of Ms Connolly’s affidavit filed 26 August 2004, before the start of the hearing, I had the distinct impression that Mr Connor had given his advice in the full knowledge of condition 12. I assumed that the advice referred to some legal basis which undermined condition 12, such as the legal arguments advanced at the hearing. I am satisfied that Mr Connor was not asked to advise about condition 12; and was only asked to advise about relevant statutory provisions. This conclusion is amply supported by the opinion which was tendered only during the hearing. It was not suggested by the respondents that Mr Connor was “briefed” for example, with Mr Milne’s e-mail and letter to Mr Hickey dated respectively 26 and 27 May which specifically refers to condition 12. As I have noted, there was only a partial waiver of privilege in relation to the “brief” to explain the alleged mistake, and given the concentration on this topic during Ms Connolly’s evidence, it could not be seriously suggested that if those documents had, in fact, been briefed to Mr Connor, I would not have been told about it. I infer that they were not.

CONCLUSIONS

- [84] It follows that the Council is entitled to the declarations and orders it seeks. It seeks no order other than the declarations under 4.1.21 so discretionary issues under 4.1.22 do not arise. I invite the parties to make further submissions if they wish as to the terms of the orders to be made.

SUMMARY

- [85] Given the public interest in the case, and given the obvious ignorance of some of the press about the proceedings (one report referred to Mr Meyers as the prosecutor), I have decided to append this summary to assist in understanding my reasons.
- [86] I have found that in clearing a large tract of native trees on their land on 21 July 2004, the respondents (Titanium) have acted unlawfully and in breach of a condition of approval A12 which attached to the land, and which had been imposed as part of a raft of conditions on a development approval given to previous owners in 1996. The condition provided that:
- “no clearing of native vegetation is to occur on the subject development site without the prior written approval of Council’s Environment Branch. It will be necessary for the applicant and any subsequent owners to make a formal application (including plan) outlining reasons for clearing and identifying the impacts of such clearing;”*
- [87] The land upon which the clearing took place is undeveloped land at the western end of a 157.4 hectare lot on which is presently constructed the Pelican Waters Golf Course and facilities. The land was acquired by Titanium in May 2004.
- [88] I have found that Titanium representatives were well aware of condition A12 by the latest late May 2004. I have found that a surveyor acting on behalf of Titanium was, at around this time, negotiating with Council to obtain its permission to clear other parts of the undeveloped land which had, in the past, been cleared and filled as fairways for a 9 hole golf course which had become revegetated.
- [89] I have found that on 11 June 2004, on site at the land, Mr Price and Mr O’Connor of Titanium gave Council officers assurances that no clearing would take place without the consent of Council.
- [90] I have found that Titanium’s plans for the development of this land include a proposal for a community residential development which would necessarily involve extensive land clearing including in the area cleared on 21 July. I have found that at a meeting on 21 June 2004, when Titanium advanced its vision for the development of its land, its representatives were informed by Council officers that they did not favour residential development on the site, in part because of their desire to protect native vegetation.
- [91] I have found that without informing Council, Titanium representatives put in place arrangements for 2 bulldozers and associated workers to be on site on the morning of 21 July 2004 to commence land clearing, and that they also arranged for security officers to be present on the site on that day.
- [92] I have found that when Council officers attempted to investigate an allegation by a member of the public that land clearing was taking place on that morning, they were refused permission to enter the land by security officers and Mr Price.
- [93] I have found that on that day between 4.71 and 4.8 hectares of native vegetation including mature tea trees, swampbox, bluegum, bloodwood, and iron-barks was unlawfully felled at the direction of Titanium. The land clearing was halted when Council obtained an interim restraining order from this Court late on 21 July 2004.

- [94] I have found that Titanium acted in an arrogant and high handed manner, showing complete contempt for the proper processes contemplated by a condition of development designed to protect native vegetation.
- [95] In accordance with the application made by Council, I have decided to grant declarations that the land clearing was unlawful and that it amounted to a development offence within the provisions of s. 4.3.3. of the *Integrated Planning Act 1997*. I have invited further submissions from the parties, as to what further orders should follow. The native vegetation remaining on the land remains protected by the injunction issued by this court on 22 July 2004.
- [96] I have rejected a number of legal arguments advanced on behalf of Titanium at the hearing to the effect that condition A12 was unlawful and/or Council had no power to impose a condition in those terms on the development approval.
- [97] In accordance with the application made by Council, these proceedings are civil not criminal, and there is no power to impose any penalty such as a fine.