In the Planning and Environment Court
Held at: Brisbane

No BD 313 of 2010

Between:	**JOHN EDWARD MYTTON BARNES and GEOFFREY FREDERICK COOK**	Appellants
And:	**SOUTHERN DOWNS REGIONAL COUNCIL**	Respondent
And:	**THE CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT**	First Co-Respondent
And:	**McCONAGHY GROUP PTY LTD ACN 108 353 199**	Second Co-Respondent

FIRST CO-RESPONDENT'S OUTLINE OF SUBMISSIONS

A SUMMARY OF THE DERM'S POSITION IN THIS APPEAL

1. The First Co-Respondent ("the DERM") neither argues for or against approval of the development application that is the subject of this appeal.

2. With respect to the heritage aspect of the development application only, the DERM came to the view that the development application was capable of being approved, subject to the conditions that were set out in it's Amended Concurrence Agency Response dated 17 September 2009[1].

3. That is also the DERM's position in this appeal.

4. The DERM takes no view about the town planning aspect of this appeal.

RELEVANT BACKGROUND

5. Both 82 Fitzroy Street and 84 Fitzroy Street are listed in the Queensland Heritage Register, together, together under the name 'Plumb's Chambers'.

6. On 14 September 2007, the Second Co-Respondent ("McConaghy") submitted a development application to the Respondent ("the Council") seeking authorisation to

[1] Exhibit 1, tab 1, page 218

demolish the building standing on 82 Fitzroy Street and the rear wing/ service wing of the building standing on 84 Fitzroy Street.

7. The DERM was a concurrence agency for that development application, with a referral jurisdiction relating to heritage matters.

8. The DERM ultimately advised the Council that, having considering the heritage aspect of the development application, the DERM considered that the development application was capable of being approved subject to specified conditions[2].

9. On 26 November 2009, the Council approved the development application[3].

10. The Appellants, who had made properly made submissions during the public notification of the development application, instituted this appeal, asking the Court to refuse the development application.

11. His Honour Judge Rackemann delivered three preliminary decisions clarifying and limiting the scope of this appeal. Those decisions are:

    (a) *Barnes v Southern Downs Regional Council* [2010] QPEC 111
    (b) *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131
    (c) *Barnes & Anor v Southern Downs Regional Council & Ors* [2011] QPEC 75

HOW THE DERM CAME TO HAVE CONCURRENCE AGENCY JURISDICTION

12. On the date that McConaghy submitted the development application to the Council, the *Integrated Planning Act 1997* (Reprint 8E) ("IPA") and the *Integrated Planning Regulation 1998* (Reprint 6C) ("IPR") applied.

13. Section 3.1.8 of the IPA then provided that a "referral agency has, for assessing and responding to the part of a development application giving rise to the referral, the jurisdiction or jurisdictions prescribed under a regulation".

14. Section 5 of the IPR, under the heading 'Referral agencies and their jurisdictions – Act s 3.1.8 (schedule 2)' then provided that:

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[2] Amended Concurrence Agency Response dated 17 September 2009 Exhibit 1, tab 1, page 219
[3] Exhibit 1, tab 1, page 256

"For section 3.1.8 of the Act and schedule 10 of the Act, definitions ***advice agency*** *and* ***concurrence agency*** *–*

(a) schedule 2, column 2 states the referral agency, and whether it is an advice agency or a concurrence agency, for the development application mentioned in column 1; and

(b) schedule 2, column 3 states the jurisdiction of the referral agency mentioned in column 2."

15. Schedule 2 of the IPR was then entitled 'Referral agencies and their jurisdiction' and provided at Table 2, Item 18 as follows:

Application involving	**Referral agency and type**	**Referral jurisdiction**
Heritage registered place		
18 Development on a registered place as defined under the *Queensland Heritage Act 1992* – (a) made assessable under the Act, schedule 8, part 1, table 5, item 2; and (b) for which the Queensland Heritage Council is not the assessment manager	Queensland Heritage Council – as a concurrence agency	The purposes of the *Queensland Heritage Act 1992*

16. McConaghy's development application involved development that was made assessable under Schedule 8, part 1, table 5, item 2 of the IPA, which provided:

Development on a heritage registered place	
2	All aspects of development carried out on a registered place as defined under the *Queensland Heritage Act 1992*, other than development – (a) for which an exemption certificate under that Act has been issued; or (b) that is emergency work; or (c) carried out by the State.

17. Upon the commencement of the *Queensland Heritage and Other Legislation Amendment Act 2007*, a new section 190 was added to the *Queensland Heritage Act 1992* ("QHA").

18. That new section 190 provided:

> *"**Dealing with particular development applications under Planning Act***
>
> *(1) This section applies to a development application under the Planning Act if, immediately before the commencement –*
>
> *(a) the council is the assessment manager or a referral agency under that Act for the application; and*
>
> *(b) the council has not given the council's decision or referral agency's response under that Act for the application.*
>
> *(2) On the commencement, the chief executive is taken to be the assessment manager or referral agency under the Planning Act for the development application.*
>
> *(3) The chief executive must deal with the application under section 44 of the post-amended Act."*

19. The references in that section to the "chief executive" and "the council" are to the Chief Executive of the Environmental Protection Agency and the Queensland Heritage Council respectively.

THE REFERRAL JURISDICTION

20. As noted in paragraph [15] above, the referral jurisdiction exercised by the DERM was "the purposes of the *Queensland Heritage Act 1992*".

21. At the date that the development application was submitted, the objects of the QHA (Reprint 3) were set out in section 2, as follows:

> *"**Objects of this Act***
>
> *(1) The object of this Act is to make provision for the conservation of Queensland's cultural heritage and, for that purpose –*
>
> *(a) to provide for the establishment of the Queensland Heritage Council; and*
>
> *(b) to provide for the maintenance of a register of places of significance to Queensland's cultural heritage; and*
>
> *(c) to regulate development of registered places; and*
>
> *(d) to provide for heritage agreements to encourage the conservation of*

registered places; and

(e) to provide for the protection and conservation of submerged objects of significance to Queensland's cultural heritage; and

(f) to regulate the excavation of sites that contain, or may contain, objects of significance to Queensland's cultural heritage; and

(g) to provide appropriate powers of protection and enforcement.

(2) In exercising powers conferred by this Act, the Minister, the council and other bodies and persons concerned in its administration must seek to achieve –

(a) the retention of the cultural heritage significance of the places and objects to which it applies; and

(b) the greatest sustainable benefit to the community from those places and objects consistent with the conservation of their cultural heritage significance."

22. In addition to that referral agency jurisdiction, section 44 of the QHA (Reprint 3)[4] was relevant. That provision provided as follows:

"Criteria for assessing development applications under the Integrated Planning Act 1997

(1) If, under the Integrated Planning Act 1997, the council is the assessment manager or a referral agency for a development application, the council must assess the application against the objects of this Act.

(2) *If the council is satisfied the effect of approving the development would be to destroy or substantially reduce the cultural heritage significance of a registered place, the council must, if it is satisfied there is a prudent and feasible alternative to carrying out the development –*

(a) if the council is the assessment manager for the application – refuse the application; or

(b) *if the council is a concurrence agency for the application – tell the assessment manager to refuse the application.*

(3) *In deciding if there is a prudent and feasible alternative to carrying out the development, the council must have regard to –*

(a) safety, health and economic considerations; and

(b) *any other matters the council considers relevant."*

[4] Since amended and re-numbered as section 68 of the QHA (Reprint 5A).

(emphasis added)

23. The term 'cultural heritage significance' was defined[5] in the Schedule to the QHA as:

> *"**cultural heritage significance,** of a place or object, includes its aesthetic, architectural, historical, scientific, social or technological significance to the present generation or past or future generations."*

24. The terms 'registered place' and 'aesthetic significance' were also defined in the QHA (Reprint 3) and are defined in the QHA (Reprint 5A)[6].

SOME PRINCIPLES FOR THE CONSTRUCTION OF THE QHA

25. Unfortunately, there is no case authority to assist the Court as to the meaning or operation of section 44 of the QHA (or the more recent iteration of that provision, section 68 (Reprint 5A)).

26. Some relevant principles can, however, be found in decisions concerning challenges to a place being entered into the Heritage Register, as follows:

(a) the decision of *Advance Bank Australia Ltd v The Queensland Heritage Council* [1994] QPLR 229 has been the leading authority on the construction of the term 'cultural heritage significance'. That is so, even though the QHA was amended after that decision was given (apparently in response to the Court's decision);

(b) whether a building satisfies "any or all of the relevant criteria, is to be assessed by the Court from the perspective of 'the average person walking the street and looking about, with a perception which falls somewhere between that of a PhD in architectural history on the one hand and that of a philistine on the other'" (*Lonie v Brisbane City Council & Ors* [1998] QPELR 206 at 212, referred to in *JR Smallcombe v Queensland Heritage Council* [2010] QPELR 68 at 70); and

(c) in *Green v Brisbane City Council* [2005] QPELR 121 at 126, his Honour

[5] The term has been amended so that in the current reprint of the QHA (Reprint 5A) so that it now reads, "***cultural heritage significance**, of a place or feature of a place, means its aesthetic, architectural, historical, scientific, social or other significance, to the present generation or past or future generations."*

[6] The term 'registered place' that appeared in Reprint 3 has been replaced by the term 'place' in Reprint 5.

Senior Judge Skoien accepted on the evidence in that case that "both the Burra Charter and good conservation practice require that judgments be made on which parts of a culturally significant object are more and which are less significant and that there can be areas of greater and lesser importance".

27. There is no helpful authority on the meaning of the phrase "substantially reduce" either as it appears in the QHA or elsewhere. The word "substantial" has however received consideration in the authorities.

28. In *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, the Full Court of the Federal Court (Bowen CJ, Evatt J and Deane J) considered a provision of the *Trade Practices Act 1974* (Cth) requiring "substantial loss or damage". Bowen CJ (with whom Evatt J agreed) said (at 374):

"The word 'substantial' would certainly seem to require loss or damage that is more than trivial or minimal. According to one meaning of the word the loss or damage would have to be considerable (see Palser v Grinling [1948] AC 291 at 316-7). However, the word is quantitatively imprecise; it cannot be said that it requires any specific level of loss or damage. No doubt in the context in which it is appears the word imports a notion of relatively, that is to say, one needs to know something of the circumstances of the business affected before one can arrive at a conclusion whether the loss or damage in question should be regarded as substantial in relation to that business."

29. Agreeing as to the outcome with Bowen CJ and Evatt J, Deane J said (at 382):

"The word 'substantial' is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase 'substantial loss or damage', it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in Palser v Grinling ... where, after holding that, in the context there under consideration, the meaning of the word was equivalent to 'considerable, solid or big', he said: 'Applying the word in this sense it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case... '."

30. In this case, used in a relative sense, the word 'substantial' should be construed to mean a considerable or large component of the heritage place – considerable or large in terms of the contribution it makes to the cultural heritage significance or considerable or large in terms of size.

THE EVIDENCE OF MR ROSS-WATT

31. Before dealing with the evidence, something can be said about Mr Ross-Watt's involvement as an expert witness in the appeal.

32. None of the parties to the appeal has taken any issue with Mr Ross-Watt's ability to give expert evidence. He has, since 2006, been employed as an officer of the DERM[7].

33. Mr Ross-Watt is unquestionably an expert in the field of heritage matters. His experience in the field is both lengthy and substantial[8]. In giving his evidence in Court, Mr Ross-Watt presented an impartial and considered position on the issues.

34. In *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 8)* [2011] FCA 175, Logan J considered evidence of two expert witnesses, each of whom had played either a role in the conceptual development of, or assessment of, the proposal that was being considered by the Court. At paragraph [106] of the reasons for judgment, Logan J said of one of those two expert witnesses:

> *"[106] Dr Kind was very well placed to give evidence on the suitability of the fishway at the Paradise Dam for the lungfish. I have no hesitation in accepting his evidence, which I thought was candid, careful and independent. As to the latter, though he is an employee of the State of Queensland, I have no doubt that his evidence was not influenced by whatever burden or benefit it might offer Burnett Water, as opposed to being the genuinely held views of a man who has devoted a good portion of his adult life to our better understanding, and the continued survival, of the lungfish."*

35. Mr Ross-Watt, like Dr Kind in the *Wide Bay Conservation Council case*, has no personal interest in the outcome of the McConaghy development application and has

[7] Exhibit 6, Individual report of Duncan Ross-Watt, appendix 1, curriculum vitae
[8] Exhibit 6, Individual report of Duncan Ross-Watt, appendix 1, curriculum vitae

not been troubled by 'whatever burden or benefit' it might provide them.

THE WAY THE COURT SHOULD APPROACH THE TEST IN SECTION 44[9]

36. The three heritage experts agreed in their Second Joint Report[10] that removing the rear wing would not "destroy" the cultural heritage significance of the place. That leaves only the question of whether the removal of the rear wing would "substantially reduce" the cultural heritage significance of the place.

37. It is submitted that for the Court to consider whether the removal of the rear wing of 84 Fitzroy Street would "substantially reduce" the cultural heritage significance of the place, two alternative approaches might be taken:

    (a) **first,** to look at the recognised cultural heritage significance of the place, as identified in the Entry in the Heritage Register, and to ask whether that recognised cultural heritage significance would suffer if the rear wing was removed; or

    (b) **second,** to look at the cultural heritage significance of the rear wing in isolation and to ask, what cultural heritage significance is being lost if it was to be removed.

38. The evidence before the Court supports a conclusion on either of those approaches that the rear wing can be removed without substantially reducing the cultural heritage significance of the place.

CONCLUSIONS ABOUT THE EVIDENCE REGARDING HERITAGE

39. It is submitted that the Court should draw the following conclusions from the evidence:

    (a) While the whole of 84 Fitzroy Street unquestionably has cultural heritage significance, that significance would not be substantially reduced by the removal of the rear wing because:

        (i) The entry of the place in the Queensland Heritage Register contained

[9] of Reprint 3
[10] Exhibit 1, tab 13

there can be conjecture about the functions performed by the rear wing, there is no conclusive evidence that demonstrates how that area was used. That is significant only to the extent that it means that the rear wing does not need to be preserved so that it can continue to exemplify some particular use or function;

(iii) Regarding the underground water tank, Mr Davies and Mr Ross-Watt separately agree that it is not clear that the development application before the Court poses a threat to that tank[16]. While Mr Scott expressed doubt about that, the view of Mr Davies and Mr Ross-Watt should be preferred.

OUTCOME

40. The DERM submits that the demolition of the rear wing of 84 Fitzroy Street would not substantially reduce the cultural heritage significance of the registered place, and that from a heritage perspective, the development application is capable of being approved subject to the conditions set out in the DERM's Amended Concurrence Agency Response dated 17 September 2009.

41. If the appeal was to be dismissed, the DERM will contend that the conditions set out in its Amended Concurrence Agency Response dated 17 September 2009, be maintained and imposed on the approval issued by the Court.

Mr N Loos

Counsel for the First Co-Respondent

5 August 2011

[16] Exhibit 6, individual report of Duncan Ross-Watt, page 7, paragraph (2); Exhibit 3, individual report of Stephen Davies, page 15, paragraph [32]