In the Planning and Environment Court No. BD313 of 2010
Held at: Brisbane

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

APPELLANTS' OUTLINE OF CLOSING SUBMISSIONS

INTRODUCTION

1. The basis upon which the Court should allow this appeal and refuse the application to demolish the rear of 84 Fitzroy Street can be summarised as follows:

   (a) The evidence of Michael Scott, heritage architect, displays far more extensive research and consideration than the other heritage experts, Mr Davies and Mr Ross-Watt. Mr Scott gives a careful and logical analysis of the heritage significance of the rear section of the building that is proposed to be demolished. His analysis is based on and consistent with the available evidence, such as the reference to "stables" and "coach-house" in the 1882 newspaper advertisement and the 1899 photograph of 84 Fitzroy Street. Consequently, Mr Scott's evidence should be preferred and the Court should find that the rear service wing of 84 Fitzroy Street has considerable heritage value and that its demolition would substantially reduce the cultural heritage significance of the place.[1] If the Court makes this finding or a finding that the rear section has some heritage value as a component of the whole building, the outcome of the appeal is largely decided because the *Queensland Heritage Act 1992* and the planning scheme both provide strong protection to such cultural heritage values.

   (b) In the alternative, if the Court is not satisfied that the rear section has considerable heritage significance, the Court should still refuse to allow the demolition because it compromises the ongoing viability and upkeep (and therefore the conservation of the cultural heritage significance) of the front section of 84 Fitzroy Street. The rear service section adds approximately 8% to the gross floor area of the building as a whole.[2] Finding an equivalent area on the ground floor of the main building would

[1] Exhibit 8 (Mr Michael Scott's heritage report), particularly paras 4.01-4.06 and 5.03-5.17.
[2] Exhibit 15 (Building GFA plan).

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use approximately 15% of this area.[3] The rear section of the building is structurally sound[4] and in reasonably good condition. As such, there is no structural impediment to its future re-use for a commercial purpose, while its demolition would remove this opportunity.[5] The rear section can be used for toilets or storage and, thereby, contribute to the function and commercial viability of the front section of the building. Retaining it promotes ongoing, active re-use of the heritage building as a whole in the future and, thereby, contributes significantly to protecting the building's heritage values as a whole.

(c) There is a lack of grounds to justify approving the demolition despite conflict with the planning scheme. There is no real public benefit in approving the application on the basis of "horse trading" the restoration of the front of the building in exchange for allowing the demolition of the rear of the building. The benefit of demolishing the rear section is a private benefit only, not a public one. Demolishing the rear of the building will reduce the ongoing commercial viability of the building as a whole, as set out in paragraph (b), thereby damaging the public interest in conserving the front of the building in the future. In addition, the conditions already imposed on the demolition of the adjoining building, 82 Fitzroy Street, already require the restoration of the front of 84 Fitzroy Street prior to demolition of the adjoining building. Those conditions are not challenge in this appeal. Further removing any perceive public benefit of the application, there is an unchallenged offer to purchase the building and restore it without demolishing the rear section.[6] That course is a prudent and feasible alternative to demolishing the rear section.

(d) In addition, there is an important matter of public interest that lies against approving the demolition. There is a public interest in discouraging landholders whose properties are subject to heritage listings from neglecting the properties and using their state of disrepair as a reason for demolition. The proponent in this case is clearly deliberately neglecting the property and allowing it to deteriorate to the point where it can remove what it sees as an obstacle to a more commercial use of the property. This strategy is an anathema to protecting the public interest in preserving the cultural heritage of the State and should not be tacitly condoned by the Court.

BACKGROUND

2. The facts of this appeal have been summarised in the preliminary decisions of the Court in the appeal[7] and need not be repeated in detail here.

3. One fact that is important to recall is the conditions imposed by the Second Co-respondent, DERM, on the development application for the demolition of both the whole

[3] Exhibit 15 (Building GFA plan) and Transcript, p 3-19, lines 10-30.
[4] See the joint structural engineers' reports of Mr Farr and Mr Hoskins (Exhibit 1, vol 3).
[5] Associate Professor Searle makes this point in the joint town planning report (Exhibit 1, vol 3), paras 7.4.2.3 and 7.4.6.3. His concessions in cross-examination that he had forgotten which documents he had been given in assessing the application was unedifying and the Court may give less weight to his views because of this but his reasoning at paras 7.4.2.3 and 7.4.6.3 of the joint report is perfectly logical. In contrast, the views of Mr Gill and Ms Doherty to the contrary, are illogical.
[6] Exhibit 9 (witness statement of John Barnes).
[7] *Barnes v Southern Downs Regional Council* [2010] QPEC 111 (Rackemann DCJ); *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 (Rackemann DCJ); *Barnes v Southern Downs Regional Council* [2011] QPEC 075 (Rackemann DCJ).

of 82 Fitzroy Street and the rear of 84 Fitzroy Street were as follows:[8]

> 1. Prior to commencement of demolition works within the registered place (82 and 84 Fitzroy Street), the applicant must comply with conditions 1.1 to 1.6.
>
> 1.1 Prepare an archival record of the registered place, including all existing buildings, structures and established vegetation in accordance with *EPA Guideline: Archival recording of heritage registered places (Draft January 2009)*
>
> 1.2 Engage a suitably qualified heritage architect to document conservation works to the building at no. 84 Fitzroy Street (including work associated with the structural stabilization of building fabric and reconstruction of damaged and missing elements), generally in accordance with Conservation Assessment Report, Plumb's Chambers, prepared by Watson Architects, July 2008.
>
> 1.3 Prepare documentation of proposed methods to structurally stabilize the building at 84 Fitzroy Street, and engage an engineer experienced in the conservation of heritage buildings whose appointment is approved by the Manager, Regional and Heritage Council Support, Environmental Protection Agency, to review proposed methods of structural stabilization of no. 84 Fitzroy Street.
>
> 1.4 The conservation works documentation referred to in 1.2 and the proposed methods of structural stabilization referred to in 1.3 are to be submitted to the Manager, Regional and Heritage Council Support, Environmental Protection Agency for approval.
>
> 1.5 Conservation works to the building at 84 Fitzroy Street are to be carried out after the approvals in 1.4 is obtained. The conservation works are to include the conservation works referred to in 1.2 and the structural stabilization referred to in 1.3.
>
> 1.6 On completion of the conservation works referred to in 1.4, the applicant must obtain written confirmation from the Manager, Regional and Heritage Council Support, Environmental Protection Agency that the conservation works to no 84 referred to in 1.4 have been satisfactorily carried out.

4. The Appellants submit that it is clear from the conditions that the restoration of the front section of 84 Fitzroy must occur *before* any demolition occurs (either to 82 Fitzroy Street or the rear of 84 Fitzroy Street) and is linked to the approval of *both* the demolition of 82 Fitzroy Street and the rear of 84 Fitzroy Street.

5. The Appellants' submit that the effect of the Court's judgment in *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131, in the context of the facts of the proposed development and the conditions already imposed on the demolition of 82 Fitzroy Street, is that:

   (a) The Appellants cannot appeal the part of the Respondent's decision relating to the demolition of 82 Fitzroy Street because it was code assessable.

   (b) The conditions relating to the demolition of 82 Fitzroy Street are not part of the appeal and are not in dispute.

[8] Extracted from p 214 of the affidavit of MJC.

(c) A consequence of points (a) and (b) is that the requirement to restore the front part of 84 Fitzroy Street is already a legal requirement of the approval of 82 Fitzroy Street. It is a pre-requisite for demolition of 82 Fitzroy Street.

(d) The issue in the appeal is therefore not whether the front of 84 Fitzroy Street should be protected in exchange for allowing the demolition of the rear section.

(e) Consequently:

(i) The front section of 84 Fitzroy Street is already required to be restored as a pre-requisite for demolishing 82 Fitzroy Street.

(ii) The only part of the development application remaining to be decided in the appeal is whether the rear section of 84 Fitzroy Street should be demolished.

6. The grounds advanced by the proponent and the council to justify approving the application despite any inconsistency rely upon the alleged benefit to the public interest of conserving the front of the building. This "exchange" is not normal "horse trading" – it is an attempt to trade the same horse twice.

7. A further point (which has already been noted in oral submissions to the Court) is that the use that the proponent may wish to make of the space that will be created if the rear of 84 Fitzroy Street is not to be considered. The Court ruled in *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [27]:

> *"... it is inappropriate to seek to justify the proposed demolition by reference to an asserted need for a shopping centre extension which is not approved nor the subject of this or any live development application. Having been applied for on a 'stand alone' basis, the proposed demolition will, as things stand, need to be assessed on its own merits."*

LEGAL CONTEXT OF APPEAL

Statutory criteria to be applied

8. As the development application the subject of this appeal was made prior to the commencement of *Sustainable Planning Act 2009* (SPA), the provisions of the *Integrated Planning Act 1997* (IPA) continue to apply to it.[9]

9. As the application is impact assessable, the main statutory criterion that the Court must assess the application against is the test stated in s 3.5.14(2)(b) of the IPA (as in force at the time the application was lodged), namely that the Court's decision must not "conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict." Grounds are defined in Schedule 10 of IPA as:

> ***grounds***, for sections 3.5.13 and 3.5.14—
> 1 *Grounds* means matters of public interest.
> 2 *Grounds* does not include the personal circumstances of an applicant, owner or interested party.

10. In addition to the test in s 3.5.14(2)(b) of the IPA, for the reasons given by Rackemann

[9] Section 802 of SPA.

DCJ in the third preliminary decision in these proceedings, the Court must have regard to the provisions of the *Queensland Heritage Act 1992*.[10] The provisions of that Act that are material to these proceedings are ss 2 and 68.

The section 3.5.14(2)(b) test

11. The decisions of the Court of Appeal in *Grosser v Gold Coast City Council* [2001] QCA 423; (2001) 117 LGERA 153 and *Weightman v Gold Coast City Council* [2002] QCA 234; (2002) 121 LGERA 161 continue to provide important statements of principle in the application of s 3.5.14(2)(b) of the IPA. Atkinson J (with whom McMurdo P agreed) stated in *Weightman* at [35] in relation to the previous formulation of the section in the *Local Government (Planning and Environment) Act 1990*, which referred to "planning grounds" rather than "grounds":

> The proposal must be refused [where it conflicts with the strategic plan] if there are not sufficient planning grounds to justify the approval *despite the conflict*. The discretion, as White J observed in *Grosser v Council of the City of the Gold Coast* (at [50]), is couched in negative terms, that is, the application must be dismissed unless there are sufficient grounds. This is a mandatory requirement. If there is a conflict, then the application must be rejected unless there are sufficient planning grounds to justify its approval despite the conflict. …
>
> In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s 4.4(5A)(b) of the P&E Act, the decision-maker should:
>
> (1) examine the nature and extent of the conflict;
>
> (2) determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme, and if the conflict can be justified on those planning grounds; and
>
> (3) determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application despite the conflict

12. Fryberg J (with whom McMurdo P and Holmes J agreed) stated in *Woolworths Ltd v Maryborough City Council* [2006] 1 Qd R 273; [2005] QCA 262 at [25]:[11]

> If s 3.5.14(2)(b) is dealt with in the sequence suggested by its form the identity of any conflicts between the decision and the scheme will have been established by the time the question of justification comes to be considered. That question will require the identification of planning grounds which might justify the decision and the determination of their sufficiency to do so. In making that determination regard will doubtless be had to the nature and extent of the conflict. That is substantially the process approved by this Court in *Weightman v Gold Coast City Council* in relation to a previous section. It would, however, be a mistake to treat the relevant passage in that judgment as if it were a code for the determination of justification. Some of the submissions in the present case smacked of that error. Notwithstanding some differences in terminology, I think the same approach now has to be taken to s 3.5.14(2) of the IPA, and that the authorities require the Court to identify with some precision the extent of the conflict with planning scheme provisions that will, in the end result, be excused.

13. The importance of having careful regard to the conflicts with the planning scheme in determining whether there are sufficient grounds to justify an inconsistency were reiterated by the Court of Appeal in *Australian Capital Holdings P/L & Ors v Mackay City Council; Australian Capital Holdings P/L v Mackay City Council & Ors* [2008]

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[10] *Barnes v Southern Downs Regional Council* [2011] QPEC 075 (Rackemann DCJ).

[11] Footnotes omitted. The approach in *Weightman* has been used by the Planning and Environment Court in applying s 3.5.14(2) of the IPA: *Mantle Pty Ltd v Maroochy SC* [2003] QPELR 122 at [52] per Robin DCJ; and *Luke v Maroochy SC* [2003] QPELR 447 at 467, [103]-[104] per Wilson DCJ.

QCA 157 at [54]-[70] (Muir JA with whom Holmes JA and White J agreed).

14. Wilson SC DCJ (as he then was) pointed out in *Palyaris v Gold Coast City Council* [2003] QPEC 56; [2004] QPELR 162 at [37] that sufficient planning grounds require "a positive betterment in terms of planning outcomes that would justify departure from the planning scheme".

15. One issue that has not been considered in detail previously by this Court or the Court of Appeal in the context of IPA is the meaning of "public interest". The expression, "the public interest", is widely used in Australian legislation and by Australian courts; however, no clear definition of what it means exists in legislation or case law. Tamberlin J provided a useful summary of the concept in *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at 75-76 [8]-[12]:

> The reference to "the public interest" appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.
>
> The expression "in the public interest" directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. …
>
> The expression "the public interest" is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination. By way of example, town planning legislation frequently lists a number of factors that a local council or planning body is required to take into account when making a determination, with a concluding consideration being a generalised reference to the public interest and the circumstances of the case. …
>
> The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. …

16. Hayne J also noted in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55]-[56]:

> It may readily be accepted that most questions about what is in "the public interest" will require consideration of a number of competing arguments about, or features or "facets" of, the public interest. As was pointed out in *O'Sullivan v Farrer*[12]:
>
> > "[T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'[13]."

17. The weighing up of competing public interests is consistent with what the Court of Appeal referred to in *Australian Capital Holdings P/L & Ors v Mackay City Council; Australian Capital Holdings P/L v Mackay City Council & Ors* [2008] QCA 157 at [54]-

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[12] (1989) 168 CLR 210 at 216.

[13] *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

[70] as "In the striking of the overall balance in a planning scheme, there will be 'winners and losers' so far as individual interests are concerned."[14]

Construction of the planning schemes

18. The principles by which planning schemes are to be interpreted are well known. The planning scheme should be read broadly as a whole and applying common sense as Skoien SJDC stated in *Sinnamon v Miriam Vale SC* [2002] QPEC 051 at [47]:[15]

> His Honour Judge Wilson SC recently observed in *Stariha v Redland Shire Council & Anor* [2002] QPEC 039 at para [18] that the correct approach to the interpretation of planning documents including strategic plans is that summarised in *Harburg Investments Pty Ltd* [2000] QPELR 313 at 318 in these terms:
>
> > *"(a) it is seldom appropriate in matters such as these to rely on any specific statement of intent or of aims or objectives in the planning documents as determinative. It is rare that an express imprimatur or injunction can be found in them for a particular proposal. Almost invariably a diligent search of the planning documents can unearth in such statements passages which appear to argue for or against the proposal but generally speaking it would be unwise to place too much weight on such a passage. The planning documents, while they are given the force of law ... are not drawn with the precision of Acts of Parliament and the statements of intent or of aims or of objectives are intended to provide guidance in the difficult task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular proposal should be approved or rejected. So such statements should be read broadly. Degee v Brisbane City Council [1998] QPELR 287 at 289.*
> >
> > *(b) A Strategic Plan only sets out broad desired objectives and not every objective in the plan has to be met before the proposal of an applicant may be accepted (see Lewiac Pty Ltd v Gold Coast City Council (1994) 83 LGERA 224 at 230. The interpretation of the strategic plan ought to involve a 'common sense approach' (see ZW Pty Ltd v Hughes & Partners Pty Ltd [1992] 1 Qd. R. 352 at 360); in interpreting a strategic plan the document should not be read too narrowly; it should be read broadly rather than pedantically; and one should adopt a sensible practical approach (see Yu Feng Pty Ltd v Maroochy Shire Council (1996) 96 LGERA 4 at 73, 75 and 78; ... a conflict must be plainly identified and, in any event, such a conflict alone may not have the result of ruling out a particular proposal (see Fitzgibbons Hotel Pty Ltd v Logan City Council [1997] QPELR 208 at 212)."*

19. It is submitted that this is not a case where there is a hierarchy within the planning scheme that bears on its construction. The planning scheme here should merely be interpreted as a whole and applying common sense and a practical approach.

The proposal is impact assessable

20. The point raised in submissions on behalf of the Council at trial, that the proposal is only code assessable, is not correct.

21. The Table of Development in s 5.3.2 of the planning scheme makes "external building work on buildings listed in Planning Scheme Policy No. 1" code assessable where, relevantly, it "does not have a deleterious effect on the design integrity of the building."

22. The obvious reasons why the trigger for code assessment is not met are that the proposal:

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[14] Citing *Clark & Ors v Cook Shire Council* (2007) 152 LGERA 420 at 431 per Keane JA.

[15] Another useful summary of these principles and relevant case law was given by Wilson DCJ in *Luke v Maroochy Shire Council* [2003] QPELR 447; [2003] QPEC 005 at [45]-[48].

(a) involves removing internal walls[16] and therefore falls outside the definition of "external building work" stated in s 1.5.1 of the planning scheme; and

(b) has the potential to leave a gaping hole in one corner of the building if the rear section of the building is simply demolished. There is no indication in the application of what will replace the rear section if the demolition application is approved. Therefore, whatever interpretation is given to the words, "design integrity of the building", the proposal, on its face, clearly has the potential to have a "deleterious effect" on it.

23. Consequently, the proposal must be assessed as impact assessable under the planning scheme.

Conflict with the planning scheme

24. The amended grounds of appeal set out the conflicts with the planning scheme relied upon by the Appellants, namely:

(a) section 4.2.1 (City Centre – Key Policy Statements);

(b) section 4.2.2 (City Centre – Intent);

(c) section 4.2.4.1 (Impact Assessment Criteria– Material Change of Use–City Centre);

(d) section 4.2.5.2 (Purpose – City Centre Development Code);

(e) section 4.2.5.4 (Development Controls – City Centre Development Code); and

(f) section 5.3.3.1 (Impact Assessment Criteria – Carrying Out Building Work).

25. It is sufficient to set out merely the relevant part of s 5.3.3.1:

> Demolition or Removal
> In assessing an application for a proposal to demolish or remove a building listed in Planning Scheme Policy No.1, consideration will be given to whether a conservation study has demonstrated that:
> • the building is of no significance in terms of its historical, architectural, streetscape and other special value; or
> • where the building is of significance, that conservation actions are not feasible or viable.

26. The Appellants accept that, taking a practical, common sense approach, the reference to "a building" in these sections should be interpreted as including part of a building and the associated significance attached to that part. The part, however, must be assessed in the context of the whole building.

The Queensland Heritage Act

27. As noted above, in addition to the test in s 3.5.14(2)(b) of the IPA, for the reasons given by Rackemann DCJ in the third preliminary decision in these proceedings, the Court must have regard to the provisions of the *Queensland Heritage Act 1992*.[17] The provisions of that Act that are material to these proceedings are ss 2 and 68:

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[16] See Exhibit 15 (GFA plan).
[17] *Barnes v Southern Downs Regional Council* [2011] QPEC 075 (Rackemann DCJ).

2 Object of this Act

(1) The object of this Act is to provide for the conservation of Queensland's cultural heritage for the benefit of the community and future generations. ...

...

(3) In exercising powers conferred by this Act, the Minister, the chief executive, the council and other persons and entities concerned in its administration must seek to achieve—

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

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

68 Assessing development applications under the Planning Act—State heritage places

(1) If, under the Planning Act, the chief executive is the assessment manager or a referral agency for a development application for development on a State heritage place, the chief executive must assess the application against the object of this Act.

(2) If the chief executive is satisfied the effect of approving the development would be to destroy or substantially reduce the cultural heritage significance of a State heritage place, the chief executive must, unless satisfied there is no prudent and feasible alternative to carrying out the development—

(a) if the chief executive is the assessment manager for the application—refuse the application; or

(b) if the chief executive is a concurrence agency for the application—tell the assessment manager to refuse the application.

(3) In considering whether there is no prudent and feasible alternative to carrying out the development, the chief executive must have regard to—

(a) safety, health and economic considerations; and

(b) any other matters the chief executive considers relevant.

28. It is submitted that both the planning scheme and the *Queensland Heritage Act* promote:

(a) Protection of listed buildings of cultural heritage significance; and

(b) Active use of listed buildings to ensure benefit to the community.

29. This approach is consistent with the Burra Charter, an important policy document for the conservation of cultural heritage.[18] This document also points to the importance of conserving both the *fabric* and *use* of buildings that contribute to their cultural heritage significance.

THE EVIDENCE

Heritage

30. The evidence of Michael Scott, heritage architect, displays far more extensive research and consideration than the other heritage experts, Mr Davies and Mr Ross-Watt.[19] Mr Scott gives a careful and logical analysis of the heritage significance of the rear section of the building that is proposed to be demolished. His analysis is based on and consistent with the available evidence, such as the reference to "stables" and "coach-house" in the 1882 newspaper advertisement and the 1899 photograph of 84 Fitzroy Street.

31. Consequently, it is submitted that Mr Scott's evidence should be preferred and the Court should find that the rear service wing of 84 Fitzroy Street has considerable heritage value and that its demolition would substantially reduce the cultural heritage significance of the

[18] Exhibit 14.

[19] Exhibits 8, 3 and 6 respectively.

place.[20]

32. If the Court makes this finding or a finding that the rear section has some heritage value as a component of the whole building, the outcome of the appeal is largely decided because the *Queensland Heritage Act 1992* and the planning scheme both provide strong protection to such cultural heritage values. If the Court makes such a finding there is a strong conflict between the proposal and both the planning scheme and *Queensland Heritage Act*.

Streetscape

33. The proposal involves removing 31% of the length of the side of 84 Fitzroy Street facing Haig Avenue and replacing it with vacant space. The streetscape of Haig Avenue will clearly be affected and, to a lesser extent, the streetscape of Fitzroy Street to the extent that the rear of the building is visible from it. The impact on streetscape is far less significant than the impact on cultural heritage, but it adds to the conflict with the planning scheme.

Structural engineering

34. The structural engineers agree that the rear of 84 Fitzroy Street that is proposed to be demolished is structurally sound but that considerable work is required to restore the front section.

Town planning

35. The town planning evidence is of little importance if the Court accepts Mr Scott's evidence that the rear section of the building is significant for the cultural heritage values of the building as a whole.

36. If the Court is not satisfied that the rear section has considerable heritage significance, it is submitted that the Court should still find that allowing its demolition should not be allowed because it compromises the ongoing viability and upkeep (and therefore the conservation of the cultural heritage significance) of the front section of 84 Fitzroy Street. The rear service section adds approximately 8% to the gross floor area of the building as a whole.[21] Finding an equivalent area on the ground floor of the main building would use approximately 15% of this area.[22]

37. The rear section of the building is structurally sound[23] and in reasonably good condition. As such, there is no structural impediment to its future re-use for a commercial purpose, while its demolition would remove this opportunity.[24] The rear section can be used for toilets or storage and, thereby, contribute to the function and commercial viability of the front section of the building. Retaining it promotes ongoing, active re-use of the heritage

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[20] Exhibit 8 (Mr Michael Scott's heritage report), particularly paras 4.01-4.06 and 5.03-5.17.
[21] Exhibit 15 (Building GFA plan).
[22] Exhibit 15 (Building GFA plan) and Transcript, p 3-19, lines 10-30.
[23] See the joint structural engineers' reports of Mr Farr and Mr Hoskins (Exhibit 1, vol 3).
[24] Associate Professor Searle makes this point in the joint town planning report (Exhibit 1, vol 3), paras 7.4.2.3 and 7.4.6.3. His concessions in cross-examination that he had forgotten which documents he had been given in assessing the application was unedifying and the Court may give less weight to his views because of this but his reasoning at paras 7.4.2.3 and 7.4.6.3 of the joint report is perfectly logical. In contrast, the views of Mr Gill and Ms Doherty to the contrary, are illogical.

building as a whole in the future and, thereby, contributes significantly to protecting the building's heritage values as a whole.

38. One might ask in response to the proposal, if your objective (from a planning and cultural heritage policy perspective) is to protect and restore the heritage values of the building at 84 Fitzroy Street, why would you demolish a sizeable portion of it that is structurally sound and can provide extra space for a commercial use of the whole premises?

39. The asserted public benefit of ensuring[25] that the front of the building is restored is based on a fiction by comparing it to a "do nothing" case[26] that suggests a bona fide landholder interested in gaining a commercial return on the property would simply let the building fall apart. The "do nothing" case is not bona fide. There is no evidence beyond unsubstantiated assertion by the town planner for the proponent[27] that a landholder interested in gaining a commercial return on the property would simply restore the front section and thereby obtain an increased capital value for the property and ability to gain rental return from a paying tenant. The "do nothing" option does not make commercial sense unless the building is seen as merely an obstacle to doing something else with the rear of the lot.

Offer to purchase and restore 84 Fitzroy Street

40. Mr Barnes unchallenged offer to purchase the building and restore it without demolishing the rear section[28] simply adds to the evidence that there are prudent and feasible alternatives to the proposed demolition.

Sufficient grounds

41. The grounds advanced by the proponent and the council to justify approval despite any inconsistency do not provide "a positive betterment in terms of planning outcomes that would justify departure from the planning scheme".[29]

42. There is no real public benefit in approving the application on the basis of "horse trading" the restoration of the front of the building in exchange for allowing the demolition of the rear of the building. The benefit of demolishing the rear section is a private benefit only, not a public one. Demolishing the rear of the building will reduce the ongoing commercial viability of the building as a whole, as set out in paragraph (b), thereby damaging the public interest in conserving the front of the building in the future. In addition, the conditions already imposed on the demolition of the adjoining building, 82 Fitzroy Street, already require the restoration of the front of 84 Fitzroy Street prior to demolition of the adjoining building. Those conditions are not challenge in this appeal. Further removing any perceive public benefit of the application, there is an unchallenged offer to purchase the building and restore it without demolishing the rear section.[30] That course is a prudent and feasible alternative to demolishing the rear section.

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[25] Exhibit 5 (Annette Doherty town planning report), para 5.9.2
[26] Exhibit 2 (Peter Gill town planning report), para 2.7.8.
[27] Exhibit 2 (Peter Gill town planning report), paras 2.7.4 and 2.7.8.
[28] Exhibit 9.
[29] *Palyaris v Gold Coast City Council* [2003] QPEC 56; [2004] QPELR 162 at [37].
[30] Exhibit 9 (witness statement of John Barnes).

43. In addition, there is an important matter of public interest that lies against approving the demolition.[31] There is a public interest in discouraging landholders whose properties are subject to heritage listings from neglecting the properties and using their state of disrepair as a reason for demolition. The proponent in this case is clearly deliberately neglecting the property and allowing it to deteriorate to the point where it can remove what it sees as an obstacle to a more commercial use of the property. This strategy is an anathema to protecting the public interest in preserving the cultural heritage of the State and should not be tacitly condoned by the Court.

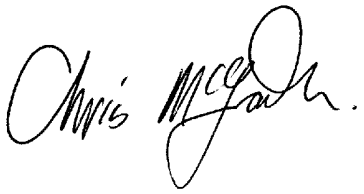
44. The grounds advanced should be rejected.

CONCLUSION

45. The Court should prefer the evidence of Michael Scott because of his far more extensive research and consideration than the other heritage experts. Consequently, the Court should find that the rear service wing of 84 Fitzroy Street has considerable heritage value and that its demolition would substantially reduce the cultural heritage significance of the place. If the Court makes this finding or a finding that the rear section has a not inconsiderable heritage value as a component of the whole building, the outcome of the appeal is largely decided because the *Queensland Heritage Act 1992* and the planning scheme both provide strong protection to such cultural heritage values.

46. The public benefit that the proponent and the council allege allowing the rear of 84 Fitzroy Street to be demolished "will ensure" is a hollow benefit. Demolition of a structurally sound part of a building will cause a significant loss of lettable area for the building damaging its commercial viability as a whole. In addition, the imposition of the conditions on the demolition of 82 Fitzroy Street, means that whether or not the Court approves the demolition of the rear of 84 Fitzroy Street, the requirement to restore the front of that building is already a pre-requisite to the demolition of 82 Fitzroy Street. In such circumstances, there is little if any public benefit in allowing the application.

47. The Court should allow the appeal and dismiss the part of the development application that relates to the demolition of the rear of 84 Fitzroy Street. The Court must approve the code assessable part of the application that relates to the demolition of 82 Fitzroy Street but the conditions imposed (including the approved plan) need to be amended to avoid any confusion regarding the rear of 84 Fitzroy Street not being required or allowed as a condition of the approval.



Dr Chris McGrath
Counsel for the Appellants
Date: 5 August 2011

[31] Determining where the public interest lies also involves weighing up competing interests: *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at 75-76 [8]-[12] (Tamberlin J); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55]-[56] (Hayne J).