As CITATION:	*Application by Darren Charles On; Attorney-General for the Northern Territory, Intervenor* [2019] NTSC 93
PARTIES:	ON, Darren Charles v ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	39 of 2019 (21916790)
DELIVERED ON:	31 December 2019
DELIVERED AT:	Darwin
HEARING DATE:	16 August 2019
JUDGMENT OF:	Barr J

CATCHWORDS:

TOWN PLANNING – Existing use rights – Land in Darwin Rural Area – RL (Rural Living) zone – Plaintiff contends that the use of the land for hire of plant and equipment is protected as an existing use – Land currently used for storage, hiring out and sale of demountable buildings or 'transportable modules' – Plaintiff contends that current use has derivative existing use rights – Land used for sand and gravel business at date of commencement of relevant planning scheme – Land not used for hire of plant and equipment – Plant and equipment on site used to load and deliver sand and gravel – Any hiring of plant and equipment was incidental or subordinate only – Sand and gravel business did not include the hiring out and sale of demountable buildings or 'transportable modules' – Held current use of land "really and substantially" a use for a different purpose to the use of the land for a sand

and gravel business – Current use does not have existing use rights – Plaintiff's claim dismissed

Planning Act 1979 (NT) s 68
Northern Territory Planning Scheme cl 2.2
Darwin Rural Area Plan 1980

Shire of Perth v O'Keefe and Anor (1964) 110 CLR 529; *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157; *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305, referred to

REPRESENTATION:

Counsel:

Plaintiff:	G Phelps
Intervenor:	S Henry QC, L Peattie

Solicitors:

Plaintiff:	Darwin NT Lawyers (T Cheliah)
Intervenor:	Office of the Solicitor-General for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Bar1916
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Application by Darren Charles On; Attorney-General for the Northern Territory, Intervenor [2019] NTSC 93

No. 39 of 2019 (21916790)

DARREN CHARLES ON
Plaintiff/Applicant

AND:

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
Intervenor

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 31 December 2019)

Introduction

[1] The plaintiff is an owner and registered proprietor as tenant in common with his mother and siblings of a parcel of land situated at 75 Henning Road, Virginia, identified as Lot 1, Hundred of Strangways, on LTO Plan 69/011 "the Land"). The land area is 21.23 hectares.

[2] By the amended originating motion, the plaintiff seeks a declaration that (1) "The use of the Land for hire of plant and equipment is protected as an existing use right" and (2) "The hire of transportable modules conforms to the use of hiring plant and equipment".

[3] The plaintiff states that he is authorised to bring the proceedings.[1] There is no issue as to the non-joinder of his co-owners.

[4] The Land is presently used by Kambl Hire Pty Ltd ("Kambl") and associated trading entities[2] for the business of storage, hiring out and sale of demountable buildings or, as they are characterised by the plaintiff, 'transportable modules'. The plaintiff describes the use of the Land in these terms:[3]

> Transportable modules are kept on the Land for the purpose of mainly hire, and sale, and are continually being dispatched from and received back to the Land as part of the business of mainly hiring, and selling, transportable modules as equipment to the public and other businesses.

[5] Further details of the current use of the Land, provided by the plaintiff, are as follows:[4]

> The parties … using the land are Kambl Hire Pty Ltd [and] Top End Crane Trucks Pty Ltd, which are related parties, and both these related companies are in the business of hiring out plant and equipment sited on the Land, from the Land. Most of the plant and equipment of Kambl Hire Pty Ltd is sited on and dispatched for hire from the Land.
>
> Under an arrangement between Kambl Hire Pty Ltd and NT Link Pty Ltd, NT Link also uses and conducts its business of hire and sale of transportable modules from the Land, and maintenance of transportable modules on the Land. For NT Link, the land is a point of physical inspection, point of hire or sale (and includes, as applicable, point of finalisation of transaction) and point of despatch and where hire [and] point of return as part of NT Link's commercial

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1. Affidavit Darren Charles On, affirmed 29 April 2019, par 3.

2 It would appear that the Kambl is the sole lessee: see annexure 'DCO 14' to the affidavit of Darren Charles On, affirmed 29 April 2019.

3 Affidavit Darren Charles On, affirmed 29 April 2019, par 6.

4 Affidavit Darren Charles On, affirmed 29 April 2019, pars 20 and 21. The punctuation has been altered from the original so that it makes better sense.

> operations [takes place]. Kambl Hire are involved in facilitating NT Link's commercial operations for its own commercial gain. Top End Crane Trucks is the legal entity that, on a needs basis, transports the transportable modules sold or hired out to third parties for NT Link.

[6] I will refer to the use described in [4] and [5] as "the current use".

[7] The Land is zoned RL (Rural Living) under the Northern Territory Planning Scheme 2007 ("the Planning Scheme"). The Planning Scheme requires that land within a zone be used or developed only in accordance with the *Planning Act 1999* and the Planning Scheme.[5] The stated primary purpose of the zone is "to provide for low-density rural living and a range of rural land uses including agriculture and horticulture". Consistent with that purpose, only residential and low impact rural land uses are permitted. The use of the Land for general industry, light industry, showroom sales, transport terminal, vehicle sales and hire is prohibited.

[8] It is unclear whether the current use is a prohibited use, or whether it is a use which requires consent on the basis that it is not shown in the relevant zoning table for the RL zone. However, I proceed on the basis that the current use is unlawful (in that it is, at least, a use which is not permitted without the consent of the Development Consent Authority), subject only to such existing use rights as the plaintiff is able to establish.

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5 Clause 2.2.1.

[9] The plaintiff contends that existing use rights attach to the current use of the Land and that, as a consequence, Kambl may continue that use without contravening the Planning Scheme.

[10] The intervenor contends, and the plaintiff accepts, that whether or not the current use is protected as an 'existing use' requires consideration of the use of the Land at the date on which the Land first became subject to a planning instrument, namely on 9 January 1981, the date of commencement of the Darwin Rural Area Plan 1980.[6] As a result, I do not need to examine the succession of planning instruments which applied to the Land,[7] nor analyse the differing provisions in relation to existing use rights in planning legislation from time to time. If the plaintiff is unable to establish existing use rights for the present use as at 9 January 1981, his application for the declarations referred to in [2] must fail.

[11] Under the Darwin Rural Area Plan 1980, the Land was zoned "RL1". The only specified 'purposes' for which a person might use or develop land within that zone without consent were 'Agriculture', 'Detached Dwelling', 'Flora & Fauna Sanctuary', 'Forestry', 'Nurseries', 'Retail Agricultural Stall' and 'Sports & Recreation'.[8]

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6 The Darwin Rural Area Plan 1980 was a planning instrument made by the Minister on 23 December 1980 pursuant to s 61(1) *Planning Act 1979*. It came into operation on 9 January 1981, pursuant to s 61(2) of the Act, as a result of notification in the Northern Territory Government Gazette No. G1 on 9 January 1981.

7 The Litchfield Area Plan 1992; the Litchfield Area Plan 2004; and the Northern Territory Planning Scheme 2007.

8 Darwin Rural Area Plan 1980, sub-clause 5(1) and zoning table for 'Rural Living 1' zone.

[12] The *Planning Act 1979*, which was in force as at 9 January 1981,[9] defined the existing use of any land as "the use of the land … for the purpose for which it was used immediately before the date of commencement of the planning instrument",[10] and made provision in relation to existing uses as follows:

> 68. Existing uses protected
>
> (1) Subject to subsection 2, a person shall not be held to contravene the provisions of a planning instrument by reason only that he continues to use any land … after the date of commencement of the planning instrument for its existing use.

The plaintiff's case

[13] It follows from the definition of "the existing use of any land" in s 67 (2)(b) *Planning Act 1979* that whether or not the current use is protected as an existing use depends on the *purpose* for which the Land was used immediately before 9 January 1981. The plaintiff's case is that the purpose was the hire of plant and equipment, and that the hire of transportable modules "conform[s] to the use of hiring plant and equipment". Thus, there are two propositions in the plaintiff's case: (1) that the purpose for which the Land was used at the relevant date was for the hire of plant and equipment, and (2) that the current use for the purpose of hire and sale of transportable modules is a use of the Land for the hire of plant and equipment, the same use as at 9 January 1981.

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9 The *Planning Act 1979* (Act 48 of 1979), was assented to on 14 May 1979 and commenced on 3 August 1979.
10 *Planning Act 1979*, s 67 (2)(b).

[14] The plaintiff's case must be rejected, for reasons which I now state.

Purpose for which the Land was used as at 9 January 1981

[15] Given the way in which the issues have been narrowed by the amended originating motion, I propose to focus on the evidence, such as it is, relating to the hire of plant and equipment prior to 9 January 1981.

[16] The plaintiff's affidavit evidence refers to and annexes a letter written by his late father to the Darwin Reconstruction Commission, dated 18 December 1976.[11] The relevant assertions in the letter were as follows:

> I hereby request that Lot 1 … be converted to 'Industry 1' as this land has been operated as an industrial block for quite a time now. At present it has a brick factory on it with washed sand as a sideline.

[17] The plaintiff next refers to the use of the Land by an entity Darwin Washed Sands. He deposes as follows:

> To the best of my knowledge, prior to the registered lessee Maugeri Transport Pty Ltd commencing its operations on the land on or around 1 December 1980, there was another lessee on the land operating under the name Darwin Washed Sands.

[18] Further information in relation to the use of the Land by Darwin Washed Sands was contained in exhibit P-1, which contained some notes made by the plaintiff as to his recollections as a young lad. I set out the content of the notes, with disallowed parts italicized and in brackets:

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11 Affidavit Darren Charles On, affirmed 29 July 2019, annexure 'DCO 1'.

Darwin Washed Sands

Sand and Gravel Processing Screens there on property and also taken out to site for processing at quarry

Seen 6 to 8 trucks every time out there buying and delivering soils sand stone, equipment pick up.

Between 8-10 numbers Rear Tipper Trailers going in and out with product or without product and without product.

Between at least two and three Caterpillar Front End Bucket Loader seen at least two on site. Also have seen Front End Loaders being taken out on Machinery Float.

One Machinery Float pulled by prime mover. Seen Machinery Float with and without equipment eg with equipment bulldozer and Front End Loaders on Float going in and out.

At Least six prime mowers – Older Mack Style cabins to pull rear tipper trailers and machinery float.

At least one Bulldozer – Don't know Model.

At least 2 Transportable ATCO modules used as site offices

At least one Excavator (pale yellow colour don't know make) basically cuts into ground and digs up dirt [*and definitely used off site as only Front End Loader needed to push up sand*].

The On Family (owners) referred work to lessees of Land including Darwin Washed Sands when the persons needed equipment for their properties.

[19] The evidence does not establish when Darwin Washed Sands ceased operations on the Land. That deficiency is not significant because evidence suggesting the use of the Land by Darwin Washed Sands for the hire of plant and equipment is slight, if non-existent. I could not be satisfied on the balance of probabilities that Darwin Washed Sands used the Land for the purpose of hire of plant and equipment. In any event, Darwin Washed Sands was not in occupation of the Land as at 9 January 1981.

[20] As at 9 January 1981, the occupier of the Land was Maugeri Transport Pty Ltd ("Maugeri"), pursuant to a lease entered into on 9 December 1980. The

plaintiff's late father was the lessor. The lease term was from 1 December 1980 to 1 December 1985.

[21] The Maugeri lease stated the lease purpose in very general terms: "any commercial use permitted by law". However, an indication as to the actual use of the Land was contained in clause 9, in which the lessor acknowledged that the lessee would use parts of the Land for "the removal washing and dressing and making merchantable any and all stone, gravel, sand and other materials of like nature".[12]

[22] The plaintiff deposes that Maugeri had large trucks, plant and equipment; that it sold washed sand and gravel on site; and that it used its trucks to deliver sand and gravel and other products to its customers.[13] The plaintiff also states (again from memory) that Maugeri hired out its plant and equipment. In order to bolster the latter assertion, the plaintiff refers to the following entries in exhibit P-1 (disallowed parts are italicized and in brackets):

> **Maugeri Transport Pty Ltd.**
>
> At least 20 numbers Rear Tipper Trailers going in and out with product or without product and without product [*indicative that used by a third party*].
>
> At least three Caterpillar Front End Bucket Loader seen at least two on site. Also have seen Front End Loaders being taken out on Machinery Float.

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12 Clause 9 both acknowledged the use and imposed an obligation to make good: "to restore the demised land to a reasonable condition".

13 Affidavit Darren Charles On, affirmed 29 July 2019, par 18.

> One Machinery Float pulled by prime mover. Seen Machinery Float with and without equipment on float (equipment on Float bulldozer and Front End Loaders) going in and out.
>
> At least 10 prime movers – Older Mack Style cabins to pull rear tipper trailers and machinery float. Maugeri generally had two tipper trailers attached to a prime mover.
>
> At least one Bulldozer – Allis Chalmer Model. Darren Family had similar Allis Chalmer Dozer.
>
> At least one Excavator (pale yellow colour don't know make) basically cuts into ground and digs up dirt [*and definitely used off site as only Front End Loader needed to push up sand*].
>
> Rear Tipper Trucks going in and out with product or without product and without product.
>
> Caterpillar Front End Bucket Loader seen at least three on site. Also have seen Front End Loaders being taken out on Machinery Float.
>
> At least 2 ATCO Transportable modules.
>
> Plant and equipment [*used for construction*].
>
> The On Family (owners) referred work to Maugeri when the persons needed that plant or equipment for their properties.

[23] Counsel for the intervenor did not accept the accuracy of the contents of exhibit P-1, but did not seek to cross examine the plaintiff to contradict the evidence. Although not the subject of cross examination, the evidence in my opinion has little weight. It may be, as the plaintiff claims, that he was an apprentice to his father from the age of six, and that he used to go with his father to collect the rent each month. However, I very much doubt the accuracy of his recollection of the specific operations of Maugeri prior to and in January 1981, very shortly after its lease commenced. The plaintiff was born on 19 September 1970, and so was only 10 years old at the time. That is 38 years ago. While it is possible that the plaintiff's recollection is accurate, it is highly improbable.

[24] The difficulty for the plaintiff is not only the accuracy of his recall, but also the inferences which could properly be drawn, even if his memories are correct. The Land was a depot, not a mine. It was not used for the extraction of sand and gravel, which were extracted elsewhere, probably from land over which Maugeri had extractive licences. In the circumstances, there are obvious explanations (other than hire) as to why tipper trailers or tipper trucks may have been entering and leaving the Land without product. Further, it is not known whether Maugeri transported all the sand and gravel obtained from the relevant extraction site(s) back to the Land, or whether it transported such product direct to third-party sites without returning to the Land. The fact that tipper trailers and tipper trucks may have been empty – whether entering or leaving the Land – is still perfectly consistent with the ordinary incidents of a sand and gravel business carried on from the Land. I am not prepared to draw an inference to the effect that tipper trailers leaving the Land without product were being hired out to third parties, as distinct from being involved in Maugeri's own sand and gravel business. For the same reason, the fact that front end loaders were transported from the Land on machinery floats does not of itself indicate that they were the subject of third-party hire.

[25] On the limited and subjective evidence adduced by the plaintiff, I am not satisfied on the balance of probabilities that the Land was used for the hire of plant and equipment as at 9 January 1981, or that it had been used for that purpose prior to 9 January 1981. Even if it were or had been so used, for

example, on the occasions on which the On family (allegedly) referred work to Maugeri to satisfy third party requirements for plant and equipment, such use was incidental or subordinate to the principal use, namely, the sand and gravel business carried on by Maugeri, and would not have been capable of founding an existing use right as a separate use. In this respect, the observations of Glass JA in *Foodbarn Pty Ltd v Solicitor-General*, are relevant: [14]

> … where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that to which the whole is being used. Doubtless the same principle would apply where the dominant and servient purposes both relate to the whole and not to separate parts.

[26] The oft-cited decision of Kitto J in *Shire of Perth v O'Keefe and anor* makes it clear that a use permitted to be continued under an existing use provision (such as that in s 68 (1) *Planning Act 1979*) need not be a use in the precise manner of the pre-existing use. A meticulous examination of the details of processes or activities is not required; rather one should ask "what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date". Once that question is answered, the enquiry becomes whether the use being made of the premises at the later date is "really and substantially a use for the

14 *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157 at 161, per Glass JA; Samuels JA and Hutley JA agreeing at 162.

designated purpose." Kitto J acknowledged that the answer to the further enquiry will often be a question of fact and degree.[15]

[27] The current use which is sought to be protected, namely the storage, hiring out and sale of demountable buildings or transportable modules is not a continuation of any historic use. The current use is "really and substantially" a use for a different purpose to the use of the Land for a sand and gravel business, even allowing for the occasional incidental hiring out of earthmoving equipment, trucks and tippers used in that sand and gravel business. The activities of the current use differ in kind, substantially, from those of the sand and gravel business.[16]

[28] With reference to [2] above, the plaintiff has not established his entitlement to the declaratory relief sought in the first numbered paragraph of the amended originating motion. It is therefore unnecessary to consider the ancillary or consequential relief sought in the second numbered paragraph of the amended originating motion.

[29] The plaintiff's application should be dismissed. I reserve the issue of costs and grant liberty to the plaintiff and the intervenor to apply on giving seven days' notice.

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15 *Shire of Perth v O'Keefe and Anor* (1964) 110 CLR 529 per Kitto J at 535; Owen J agreeing at 537.

16 See *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305, per McHugh J at 310:- " … the test is not so narrow that it requires a characterisation of purpose in terms of the detailed activities, transactions or processes which have taken place. But it is not so general that the characterisation can embrace activities, transactions or processes which differ in kind from the use which the activities etc as a class have made of the land."
