

CLASS 1

Sertari Pty Ltd v Quakers Hill SPV Pty Ltd [2014] NSWCA 340

McColl JA; Barrett JA; Tobias AJA

ENVIRONMENT AND PLANNING - appeal against approval of a pedestrian management plan - whether approved pedestrian management plan satisfied a deferred commencement condition - whether underlying development consent only approved vehicular and not pedestrian use of a right of carriageway - development consent not ambiguous - whether reasons given by Land and Environment Court in granting development consent form part of consent - whether development application incorporated into consent expressly or by necessary implication

Community Association DP270253 v Woollahra Municipal Council [2015] NSWCA 80; 207 LGERA 268

Barrett JA; Emmett JA; Leeming JA

PROCEDURE – costs – Class 1 proceedings in the Land and Environment Court of New South Wales – appeal by leave from a decision on costs – the appellant successfully contended for revocation by the primary judge of an order issued by the Council requiring the appellant to carry out certain work – the primary judge declined to order that the Council pay the appellant’s costs – rules of court preclude any costs order unless the court considers that the making of such an order “is fair and reasonable in the circumstances” – whether findings of unreasonableness in relation to the challenged order of the Council are relevant to the costs discretion – held that unreasonableness warranting a costs order is confined to unreasonableness in relation to the proceedings – no such unreasonableness shown – no error of law in the making of the evaluative decision on costs

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248

Meagher JA; Leeming JA

APPEALS – application for leave to appeal – appeal confined to question of law – whether leave should be granted in respect of point not pressed below – whether error of law demonstrated in decision below – leave refused

CLASS 2

Monhem v Shields [2015] NSWCA 24

Basten JA; Ward JA; Leeming JA

APPEAL – application for leave to appeal – failure of applicants to attend hearing before Land and Environment Court – refusal of judge to reopen final orders – appeal limited to errors of law – arguable error of approach – case presented before primary judge not shown to justify reopening PRACTICE AND PROCEDURE – application to reopen final orders – party served with originating process failed to attend hearing – no satisfactory explanation for non-attendance – whether material supported different outcome – orders partly effected – prejudice to other party

CLASS 3

Health Administration Corporation v George D Angus Pty Ltd [2014] NSWCA 352

Emmett JA; Leeming JA; Tobias AJA

COMPULSORY ACQUISITION - compensation for loss attributable to disturbance - application of Div 4 of Pt 3 of the Land Acquisition (Just Terms Compensation) Act 1991 - whether the primary judge erred in awarding compensation under s 59(f) for financial losses - whether "financial costs" referred to in s 59(f) includes "financial losses" COMPULSORY ACQUISITION - compensation for loss attributable to disturbance - compulsory acquisition of a statutory tenancy at will - whether the nature of the interest compulsorily acquired is relevant to assessment of loss attributable to disturbance

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim) [2014] NSWCA 377; 88 NSWLR 125

Beazley P; Basten JA; Preston JA of LEC

ABORIGINAL LAND RIGHTS - claim to Crown lands - claim precluded by opinion of the Minister that land needed or likely to be needed as residential lands - whether opinion required to be held by the Minister personally at the time of the claim - application of the Carltona principle - whether sufficient that the relevant opinion was held by departmental officers at the time of the claim - Aboriginal Land Rights Act 1983 (NSW), s 36(1)(b1) ADMINISTRATIVE LAW - delegation of statutory powers - implied delegation of power to form opinion - application of Carltona principle - question of statutory interpretation

Tempe Recreation (D.500215 and D.1000502) Reserve Trust v Sydney Water Corporation [2014] NSWCA 437; 88 NSWLR 449

Basten JA; Emmett JA; Leeming JA

EASEMENTS - construction - whether permissible to have regard to the terms of other easements in same registered memorandum - relevance of structure of definitions - relevance of textual similarities - relevance of defined term itself RESUMPTION AND ACQUISITION OF PROPERTY - easement acquired over land managed by reserve trust - determination of compensation - Crown Lands Act 1989 (NSW), s 106A COSTS - offer of compromise - operation of rules and discretion in proceedings where "costs follow the event" is not the starting point

Sydney Water Corporation v Marrickville Council [2014] NSWCA 438

Basten JA; Emmett JA; Leeming JA

RESUMPTION AND ACQUISITION OF PROPERTY - easement acquired over land used for open space - determination of compensation - whether error of law in determining comparable sales - whether error of law in making adjustments to comparable sales - no error of law shown

Valuer-General v Fivex Pty Ltd [2015] NSWCA 53; 206 LGERA 450

Basten JA; Gleeson JA; Leeming JA

APPEALS - appeal confined to question of law - scope of appeal - no error of law in failing to address GST treatment of comparable sales where point not taken at trial STATUTORY CONSTRUCTION - primacy of legislative text - relevance of principles of planning law VALUATION - land value - unimproved value of fee-simple - highest and best use - s 6A(2) of Valuation of Land Act 1916 (NSW) - mandatory assumption as to existing uses and improvements - building exceeded maximum floor space ratio permitted under local environmental plan - actual use was highest and best use - whether s 6A(2) required regard to be had to maximum floor space permitted under local environmental plan or to actual floor space in building

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2015] NSWCA 100; 319 ALR 151

Macfarlan JA; Emmett JA; Gleeson JA

CORPORATIONS – winding up – deregistration and reinstatement – vesting of a deregistered company’s property in the Australian Securities and Investments Commission – whether, during the period of a mortgagor company’s deregistration, the mortgagee continues to owe relevant duties to it – Corporations Act 2001 (Cth), s 601AD EQUITY – general principles – equitable estates and interests – interest of a purchaser under an uncompleted contract for the sale of land – whether specific performance would have been ordered – whether other equitable remedies would have been available EQUITY – general principles – priority and notice – competition between a mortgagor’s equity of redemption and the interest of a purchaser under an uncompleted contract for the sale of land – whether the equity of redemption is subject to a properly exercised power of sale by the mortgagee MORTGAGES – mortgages and charges generally – remedies of the mortgagor – improper exercise of the power of sale – whether the mortgagee failed to take reasonable care in relation to obtaining market value for land sold in the exercise of the power of sale – Corporations Act 2001 (Cth), s 420A REAL PROPERTY – compulsory acquisition of land – compensation – whether the first respondent has an “interest” in the relevant land – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 4

Rafailidis v Roads and Maritime Services [2015] NSWCA 143

Beazley P; Basten JA; Ward JA

COMPULSORY ACQUISITION – Land Acquisition (Just Terms) Act 1991 (NSW), s 66 – jurisdiction of the Land and Environment Court – no question of law

Roads and Maritime Services v Allandale Blue Metal Pty Ltd [2015] NSWCA 167

Beazley P

APPLICATION FOR STAY – whether risk respondent will be unable to repay monies without difficulty or delay – whether risk respondent will dissipate assets – balance of convenience – interests of justice

Kessly v Hasapaki [2015] NSWCA 292

Macfarlan JA

Kessly v Hasapaki [2015] NSWCA 316

Basten JA; Macfarlan JA; Sackville AJA

CONTEMPT OF COURT – non-compliance with Land and Environment Court order to grant easement – contemnor application for adjournment for medical reasons refused – whether denial of procedural fairness CONTEMPT OF COURT – non-compliance with Land and Environment Court order to grant easement – contemnor represented but absent – indication by trial judge that practical orders leading to execution of easement preferred to contempt findings – finding of contempt made – whether denial of procedural fairness

CLASS 8

Gold & Copper Resources Pty Limited v The Hon Chris Hartcher, Minister for Resources & Energy, Special Minister [2015] NSWCA 57

Beazley P; Macfarlan JA; Gleeson JA

ADMINISTRATIVE LAW – renewal of exploration licence under the Mining Act 1992 – where application for renewal was submitted on time – where new front page of application was submitted out of time ADMINISTRATIVE LAW – whether sending of new first page constitutes withdrawal or final disposal of original application under the Mining Act 1992 – whether new first page constitutes new application STATUTORY CONSTRUCTION – meaning of “finally disposed of” in ss 117 and 131 of the Mining Act 1992 – whether application may be withdrawn otherwise than pursuant to s 130 of the Mining Act 1992 – overall scheme of the Mining Act 1992

Minister for Resources and Energy v Gold and Copper Resources Pty Ltd [2015] NSWCA 113; 208 LGERA 228

Ward JA; Bergin CJ in Eq; Sackville AJA

ADMINISTRATIVE LAW – judicial review sought by the Minister of an order made by the Land and Environment Court under UCPR r 59.9(4) requiring the Minister provide reasons for a decision – the order was made despite the Court striking out the sole ground of review of the Minister’s decision – effect of striking out a ground as an abuse of process – whether the Land and Environment Court had power to order the Minister to provide reasons – whether, assuming power, the Court’s discretion miscarried – whether the proceedings in the Land and Environment Court should have been dismissed

Minister for Resources and Energy v Gold and Copper Resources Pty Ltd (No 2) [2015] NSWCA 188

Ward JA; Bergin CJ in Eq; Sackville AJA

Variation to costs orders.

CLASS 4

Davis v Gosford City Council [2014] NSWCA 343; 87 NSWLR 699

Beazley P; Ward JA; Preston CJ of LEC

APPEAL - decision of judge of Land and Environment Court (LEC) dismissing appeal against decision of commissioners of LEC on questions of law - leave to appeal limited to two matters - whether judge and commissioners erred in their assessment of the degree of effect on threatened species required for refusal of development application - whether judge and commissioners failed to consider any concurrence of Director-General - relevant matters to consider in determining development application and grounds of refusal are not limited to an effect on threatened species that is likely to be a significant effect - no actual or assumed concurrence of Director-General to be considered - development not on critical habitat and not likely to significantly affect threatened species - consent to be refused not granted - no concurrence of Director-General required or able to be granted in these circumstances - commissioners and judge did not err on questions of law - appeal dismissed with costs

[2015] HCASL 74 – special leave refused

Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379

Basten JA; Macfarlan JA; Leeming JA

ENVIRONMENT AND PLANNING - use of building - temporary accommodation for backpackers - use of contempt proceedings to enforce prohibition on use the subject of consent orders PROCEDURE - Land and Environment Court - civil contempt - consent orders made restraining use of premises for "backpackers accommodation" - whether evidence established the premises were being used for "backpackers accommodation" as defined by local environmental plan - whether trial court could rely on failure of defendants to give evidence STATUTORY INTERPRETATION - definition in statute - use of defined term to inform definition - whether such use permissible - whether definition to be construed separately from its operative provision WORDS AND PHRASES - "backpackers accommodation" - "temporary accommodation" - Waverley Local Environmental Plan 1996

Arnold v Minister Administering the Water Management Act 2000 [2014] NSWCA 386

Meagher JA; Barrett JA; Tobias AJA

JUDICIAL REVIEW - whether Minister failed to comply with a mandatory requirement - whether decision manifestly unreasonable - misleading information provided to Minister - consequences of failure to adopt a particular method of establishing socio-economic impact of a decision - Water Management Act 2000 (NSW), s 50 LAND & ENVIRONMENT - where water sharing plan reduces water extraction entitlements - whether water sharing plan valid - where plan based on flawed groundwater management model - whether Minister obliged to consider recharge and sustainable yield - whether sound and reliable numerical groundwater model required to determine recharge and sustainable yield - whether adoption of flawed groundwater model manifestly unreasonable or irrational - whether misleading information invalidates Minister's decision - whether obligation to consider socio-economic impacts of proposals considered for inclusion in plan requires formal socio-economic study - Water Management Act 2000 (NSW), ss 3, 5, 9, 18, 50

[2015] HCASL 115 – special leave refused

Burwood Council v Ralan Burwood Pty Ltd (No 3) [2014] NSWCA 404

Beazley P; Barrett JA; Sackville AJA

ENVIRONMENT AND PLANNING - validity of construction certificates - primary judge erred in finding that construction certificates were not inconsistent with development consent - whether finding of inconsistency would render construction certificates invalid - scope and purpose of statutory regime construed as a whole does not require a finding of invalidity where construction certificates found to be inconsistent with development consent ENVIRONMENT AND PLANNING - where construction certificates found to be inconsistent with development consent - whether development was carried out otherwise than in accordance with the development consent - application of s 80(12) of the Environmental Planning and Assessment Act - construction certificates deemed to form part of development consent ENVIRONMENT AND PLANNING - responsibility for carrying out development - whether respondent could be held responsible for any failure to carry out the development in accordance with the Environmental Planning and Assessment Act ENVIRONMENT AND PLANNING - exercising a function under the Environmental Planning and Assessment Act - respondent developer was not exercising a power, authority or duty directly conferred or imposed by the Act APPEAL - where primary judge in the Land and Environment Court erred in finding construction certificates were inconsistent with development consent - whether Court of Appeal can make findings to resolve the factual question - whether Court of Appeal can proceed assuming that factual finding to resolve question of law as to validity of challenged construction certificates

[2015] HCATrans 157 – special leave refused

Rumble v Liverpool Plains Shire Council [2015] NSWCA 125

Beazley P; McColl JA; Basten JA

APPEAL – extension of time to appeal – applicants convicted of contempt seek to appeal from orders disobeyed – whether proposed grounds arguable and material – effect of successful appeal on contempt convictions PLANNING AND ENVIRONMENT – order that applicants remove cars unlawfully stored on property – only one applicant owned property, both were owners of business which owned the cars – whether judge erred in stating both applicants “owned and occupied” the property – whether error material – *Ross v Lane Cove Council* [2014] NSWCA 50 applied CONSTITUTIONAL LAW – whether laws establishing local councils invalid – *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 applied JUDGMENTS AND ORDERS – effect of orders of superior court of record – contempt of court – whether variation of substantive order on appeal affects contempt of court – *State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118 applied LOCAL GOVERNMENT – powers of councils – whether council has power to constrain unlawful use of land

Jojeni Investments Pty Ltd v Mosman Municipal Council [2015] NSWCA 147; 208 LGERA 54

Macfarlan JA; Gleeson JA; Leeming JA

PLANNING LAW - existing use - appropriate level of generality or particularity - Council approved conversion of residence into two flats in 1933 - building used continuously for two flats thereafter - development application for construction of building containing three flats - whether Council empowered to consent - original approval unable to be found - inferences drawn from contemporaneous documents and legislative regime - approval only required for building works, not change of use - use as residential flat building prohibited from 1937 - relevance of subsequent alterations to planning regime - whether principles in *Shire of Perth v O'Keefe* (1964) 110 CLR 529 applicable - aspects of reasoning in *Botany Bay City Council v Workmate Abrasives Pty Ltd* (2004) 138 LGERA 120

considered and explained - Environmental Planning and Assessment Act 1979 (NSW), ss 106, 107, 109 and 109B considered STATUTORY CONSTRUCTION - whether retrospective amendment inserting s 109B into Division 10 of Part 4 of Environmental Planning and Assessment Act 1979 (NSW) displaced operation of ss 107 and 109 where existing development consent - Council's literal construction contrary to purpose and led to anomalous results - literal construction rejected - necessity to identify leading and subordinate provisions within Division - Currency Corporation Pty Ltd v Wyong Shire Council [2006] NSWLEC 692; 155 LGERA 230 approved - Caltex Australia Petroleum Pty Ltd v Manly Council [2007] NSWLEC 105; 155 LGERA 255 disapproved

Jojeni Investments Pty Ltd v Mosman Municipal Council (No 2) [2015] NSWCA 208

Macfarlan JA; Gleeson JA; Leeming JA

COSTS - offer of compromise - whether offer to consent to declaratory relief with each party paying its own costs compliant with rules - offer compliant - discretion to order otherwise even where orders ultimately made were no less favourable than the offer - applicant sought declaratory relief, in an area of public law, where Council was only appropriate contradictor - Calderbank offer - not unreasonable for respondent to refuse - application for special costs orders refused

Trives v Hornsby Shire Council [2015] NSWCA 158; 208 LGERA 361

Basten JA; Macfarlan JA; Meagher JA

ADMINISTRATIVE LAW – judicial review – grounds – jurisdictional fact – whether fact extrinsic to the power conferred on the decision-maker or part of the function conferred – whether validity of certificate depends on certifier’s satisfaction that proposed development is a “complying development” – relevance of inconvenience and uncertainty as factors APPEAL – interlocutory decision – determination of separate question – whether complying development certificates issued by accredited certifier invalid – whether characterisation of development as “complying development” a jurisdictional fact – issue clearly arguable – case of public importance – whether leave should be granted CONSTITUTIONAL LAW – privative clause – State legislation limiting time for review of decision – whether limitation effective – whether limitation removes defining characteristic of Supreme Court – Environmental Planning and Assessment Act 1979 (NSW), s 101 – Kirk v Industrial Court of New South Wales [2010] HCA 1; 228 CLR 651 referred to ENVIRONMENT AND PLANNING – development control – complying development – certificate issued by accredited certifier – Council challenged validity of certificate – Council alleged development not “complying development” under relevant planning instruments – Environmental Planning and Assessment Act 1979 (NSW), ss 76A, 85A – Woolworths Ltd v Pallas Newco Pty Ltd [2004] NSWCA 422; 61 NSWLR 707 distinguished STATUTORY INTERPRETATION – whether characterisation of proposed development as “complying development” is a jurisdictional fact – whether “complying development” a generic label or an operative precondition to exercise of power – whether reasoning by analogy from development consent procedure permissible WORDS AND PHRASES – “complying development” – Environmental Planning and Assessment Act 1979 (NSW), s 76A – “jurisdictional fact”

Rafailidis v Camden Council [2015] NSWCA 185

McColl JA; Gleeson JA; Bergin CJ in Eq

PROCEDURE – Contempt of court – construction of court orders – first court order requiring land owners to “within ninety days to...obtain development consent” to allow a building to remain on certain land – where land owners obtained such development consent in 2012 but did not carry out the works

that consent required within ninety days – where “ninety days” subsequently varied by second order to “4 July 2013” – where land owners did not carry out the works by that date – where land owners charged with contempt of court – whether on proper construction of first order 2012 development consent constituted compliance – whether contempt charge ambiguous

Arinson Pty Limited v City of Canada Bay Council [2015] NSWCA 199; 208 LGERA 418

Basten JA; Meagher JA; JC Campbell AJA

EASEMENTS – grant of easement under s 88K of the Conveyancing Act 1919 (NSW) – payment of compensation – what are “special circumstances” for the purpose of determining whether compensation is not payable – onus of identifying the “special circumstances”

Bobolas v Waverley Council [2015] NSWCA 204

Basten JA

APPEAL – stay pending appeal – respondent council seeking to enforce only orders with respect to removal of waste – public interest in health and safety – limited prejudice to applicants in enforcement – no manifest excess of power in making orders

Bobolas v Waverley Council [2015] NSWCA 216

Beazley P

APPLICATION TO SET ASIDE ORDERS – where appeal against application for stay and other orders dismissed – UCPR, r 36.16(3a) – UCPR, r 12.11

Brown Brothers v Pittwater Council [2015] NSWCA 215

McColl JA; Macfarlan JA; Tobias AJA

COURTS – Judges – bias – whether reasonable apprehension of bias or prejudgment – where judge made findings on relevant matters in previous proceedings involving one party – whether fair-minded lay observer might reasonably apprehend judge might not bring impartial and unprejudiced mind to resolution of the question judge s required to decide COURTS – Judges – where litigant aware of ground for objection on basis of reasonable apprehension of bias or prejudgment during trial but did not object – whether failure to object constitutes waiver PROCEDURAL FAIRNESS – contempt of court – application to withdraw guilty plea – where basis of application contention that guilty plea based on incorrect legal advice concerning proper construction of consent orders – where applicants contended it was arguable on proper construction of consent orders they were permitted to engage in conduct on which contempt charges based – whether primary judge denied appellants procedural fairness in finally determining construction of consent orders rather than determining whether case advanced as defence was arguable CONTEMPT – disobedience of court orders – construction of – whether order ambiguous – whether surrounding circumstances to be taken into account PROCEDURE – contempt of court – guilty plea – whether withdrawal of guilty pleas should be permitted – reliance on alleged incorrect legal advice – whether guilty pleas made with genuine consciousness of guilt PROCEDURE – contempt of court – guilty plea – whether withdrawal of guilty pleas should be permitted – whether

principles of finality of litigation or avoidance of conflicting decisions should be invoked where their application would have the effect of perpetuating a miscarriage of justice

De Angelis v Pepping [2015] NSWCA 236

Macfarlan JA; Gleeson JA; Sackville AJA

ENVIRONMENT AND PLANNING – validity of amendments to Local Environmental Plan (LEP) – gateway determination issued by delegate of Minister – whether community consultation requirements under the Environmental Planning and Assessment Act 1979 (NSW) have been complied with – whether failure to comply with requirements leads to invalidity of amending LEP – whether appellant had notice of the planning proposal - whether council officer had power to make LEP as agent of the council - whether appellant denied procedural fairness

Rossi v Living Choice Australia Ltd [2015] NSWCA 244

Basten JA; Ward JA; Emmett JA

ENVIRONMENT AND PLANNING – development applications – functions of local councils and regional panels – nature of the “assessment” function of a council – whether the assessment of a development application by a council is amenable to judicial review where the application is later determined by a regional panel – State Environmental Planning Policy (Major Development) 2005, cl 13F ENVIRONMENT AND PLANNING – development applications – assessment function of local council – whether the primary judge erred in finding that the council had assessed fill material intended to be placed along the boundary of the appellant’s land ENVIRONMENT AND PLANNING – development applications – mandatory considerations in s 79C of the Environmental Planning and Assessment Act 1979 (NSW) and cl 33-36 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 – whether the primary judge erred in finding that the council and the regional panel had breached those provisions ENVIRONMENT AND PLANNING – development applications – notification of determination of applications – requirements of a valid notice – whether defects in such a notice should result in a declaration of invalidity – consequences of defects ENVIRONMENT AND PLANNING – development applications – relief – orders under s 25B of the Land and Environment Court Act 1979 (NSW) – whether s 25B orders should be made in respect of the impugned development consent instead of a declaration of invalidity – form of ameliorative orders

Rossi v Living Choice Australia Ltd (No 2) [2015] NSWCA 301

Basten JA; Ward JA; Emmett JA

JUDGMENTS AND ORDERS – finding that planning consent for development partly invalid – determination of appropriate orders for ameliorative relief to protect privacy and amenity of land adjacent to development – disagreement between experts – matter remitted to Land and Environment Court for determination JUDGMENTS AND ORDERS – finding that planning consent for development partly invalid – whether order should be made suspending the operation of the consent – terms of termination of suspension – relief where terms substantially complied with – whether developer can seek lifting of suspension – Land and Environment Court Act 1979 (NSW), s 25B, s 25C COSTS – order for costs of trial varied to allow for result of appeal – whether to apportion costs by issue in complex litigation – whether global apportionment appropriate to settle disputation – whether liability of respondents to be joint and several – order for costs of appeal – appellant partly successful – assessment of overall degree of success

Stankovic v The Hills Shire Council [2015] NSWCA 279

Basten JA; Ward JA

PRACTICE and PROCEDURE – application for leave to appeal – extension of time – application 10 years out of time – challenge to costs order – proceedings earlier dismissed but reinstated – ground of proposed appeal unarguable – absence of justification for delay