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LAND AND ENVIRONMENT COURT

(22-012) Antonino Gaudioso v Transport for New South Wales [2022] NSWLEC 4

Duggan J – 6 January 2022

Statutory interest under the *Land Acquisition (Just Terms Compensation) Act 1991* - compulsory acquisition of land – application for the cancellation or reduction of interest – no power to vary final order

By Notice of Motion, the Respondent sought orders that the interest accrued on the compensation payable to the Applicants under the Just Terms Act be cancelled or reduced under s 66(4) of the Just Terms Act.

The statutory offer made by the Respondent to the Applicants in accordance with the Just Terms Act was $10,392,626. In the substantive proceedings, Duggan J determined compensation payable was $10,781,707.60 plus statutory interest. This represented an approximate 3.74% increase from the statutory offer.

Section 66(4) of the Just Terms Act provides that if the Court decides that the amount of compensation payable (without the addition of interest) does not exceed the amount of compensation offered by the authority of the State by more than 10%, the Court may cancel or reduce the amount of interest that has accrued.

The Respondent contended that there is direct legislative encouragement to an applicant not to pursue claims that are or turn out to be marginal. In all the circumstances, if compensation to the Applicants included an amount for interest that accrued during the proceedings, that would constitute an unjustified windfall to the Applicants.

The Applicants contended that the Court had exercised the discretion to award interest when making orders in the substantive proceedings. The Court has no power to vary the final orders as the circumstances in UCPR rr 36.15, 36.16(1)-(3A) and 36.17 did not apply. Even if the Court did have power, the discretion should not be exercised to cancel or reduce interest given it was conceded the Applicants did not act unreasonably in the proceedings.

HELD:

1. There was no power to make the orders sought in the Notice of Motion.

2. If there was a power, it would not be exercised in the circumstances of the case.

Notice of Motion dismissed with costs.

Reporter: Tom White

(22-013) Sharma v Liverpool City Council [2022] NSWLEC 10

Robson J – 16 February 2022

Keywords: Appeal – fail to comply with development control order - procedural fairness – deficiency cannot be cured on appeal

Mr Sharma (**Appellant**) pleaded not guilty in the Local Court to the offence of non-compliance with the terms of a development control order (**Order**) issued by Liverpool City Council (**Council**) pursuant to s 9.37 of the EPA Act.

The Order followed an inspection of the property by a Development Compliance Officer of the Council (**Officer**). Three actions of non-compliance argued by Council included: continued use of the detached garage for habitable purposes; failure to restore a shed to the condition it was in prior to unauthorised works; and failure to demolish or remove a carport. The Appellant had been granted several extensions of time to comply with the Order. On each action the Magistrate found against the Appellant, who was convicted and fined $4000 and ordered to pay the Council's costs in the sum of $200.

The Appellant argued on appeal that: first, there was insufficient time to comply with the terms of the action to demolish or remove the carport; second, the Order to restore the shed was invalid because the structure had consent by way of a 1964 building permit; and third, that he was denied procedural fairness when not given the opportunity to cross-examine the Council's witnesses.

The Council conceded to the appeal and consented to an order for the conviction of the Local Court to be set

aside. The concession was made on the grounds that the Officer did not provide a signed statement of evidence in the Local Court proceedings and was not available to give evidence at the hearing of the appeal.

HELD:

1. The Appellant was provided adequate time to comply with the Order.

2. The Appellant's reliance on the 1964 building permit was rejected.

3. The Council's acceptance that the Appellant was denied procedural fairness was accepted.

4. The deficiency in procedural fairness could not be rectified on appeal because the Officer and other Council employees were unable to give oral evidence or be cross-examined at the hearing of the appeal.

Appeal upheld. Conviction of the Appellant and orders of the Local Court set aside.
No order as to costs.

Reporter: Taylor Finnegan

(22-014) Anastasios Prilis v Valuer-General [2022] NSWLEC 11

Duggan J – 18 February 2022

Keywords: Appeal – valuation of land – heritage restricted land – determination of highest and best value – comparable sales and adjustments

325 King Street, Newtown (**Site**) comprised three ground floor retail shops and a first-floor commercial office. The Valuer-General (**Respondent**) determined that the land was heritage restricted under the *Valuation of Land Act 1916* (**Valuation Act**) and the land value for the Site for the relevant years was: $3,910,000 (2017); $3,910,000 (2018); and $3,160,000 (2019).

Mr and Ms Prilis (the Applicants) objected to the values and the Respondent disallowed the objections. The Applicants appealed against the Respondent's determination of the objections on the grounds that the values were too high.

HELD:

1. The Valuation Act required a value for heritage restricted land to be established on the assumptions derived from a combination of sections 6A(1) and 14G. *Valuer-General of New South Wales v Oriental Bar Pty Ltd* (2016) 217 LGERA 1 applied.

2. The market for the land being valued assumed that the value of the land would be determined according to the potential for the land to be used for a form of development that would generate the highest return on investment (**ROI**). The highest and best use of the Site was for ground floor retail and first floor commercial. There was no evidence that the highest and best use would be achieved by the demolition of existing improvements and rebuilding for retail and residential uses or conversion of uses within the Site.

3. There were no comparable sales that were unimproved land for the purpose of section 6A(1). The most comparable sale was 241 King Street (with a -20% adjustment), although 246-250 King Street (with a 7.5% adjustment) and 315 King Street (with a 15% adjustment) were also useful comparators.

4. Net lettable area (NLA) was the more appropriate measurement index to determine value. NLA avoided the inefficiencies of considering the elements of a heritage restricted property and identified a direct relationship between the Site and the ROI. An adjustment of 5% was made for the inability to alter the Site's internal layout.

5. There had been a slight increase in the land value in the locality: 5% per annum movement in the market during the relevant valuation years.

Appeal in respect to 2017 and 2018 valuations upheld. Value of the Site set at $2,970,000 (2017 valuing year) and $3,090,000(2018). Appeal in respect of the valuation for the 2019 valuing year dismissed.

Reporter: Nicholas Andrews

(22-015) Chu v Inner West Council [2022] NSWLEC 14

Pain J – 24 February 2022

Keywords: Appeal – lapse of complying development certificate – *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* – whether complying development certificate physically commenced

Mr Chu and Ms Attard (**Applicants**) owned a residential premise in Nelson Street, Annandale (**Site**). On 8 July 2015 the Applicants obtained a complying development certificate (**CDC**) for the "demolition of all existing structures including single story dwelling, rear garage, perimeter fencing and retaining walls". On 30 June 2021 the Inner West Council (**Council**) issued a development control order (**DCO**) under s 9.34 of the EPA Act stopping demolition work being carried out at the Site on the basis that the CDC had expired.

The Applicants appealed against the DCO. The parties agreed that the CDC expired on 8 July 2020 unless the Applicants succeeded on one of two questions of law: (1) did s 4.53 of the EPA Act extend the lapsing period of a CDC due to the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* (**COVID-19 Act**), which extended the lapsing period for consents by two years if they had commenced before and not lapsed by 25 March 2020; and (2) if not, was the CDC physically commenced for the purposes of s 4.29(3) of the EPA Act?

HELD:

1. Section 4.53 of the EPA Act as amended by the COVID-19 Act did not extend the lapsing period of the CDC. The COVID-19 Act was designed to ameliorate the disruptive impact of the pandemic. Extending the lapsing period for development consents promoted that purpose. Sections 4.29 and 4.53 of the EPA Act had been drafted to provide different controls for the period of lapsing as between development consents and CDCs. The EPA Act continued to maintain this difference after the COVID-19 Act had been passed.

2. The CDC had not commenced because development had not physically commenced within five years of the CDC's issue. The asbestos inspection, which occurred as at 8 July 2020 involved visual inspection in person, including the tapping of walls, and the preparation of a report off-site, amounted to a trivial degree of physical activity on the Site with no manifest effect such that it was not physical commencement of the development to which the CDC related.

3. The limited pruning of trees in April 2020 did not establish that the CDC had been physically commenced.

Parties to consider consequences of the findings.

Reporter: Nicholas Andrews

(22-016) Azizi v Council of the City of Ryde; Alnox Pty Ltd v Council of the City of Ryde (No 3) [2022] NSWLEC 37

Moore J – 21 April 2022

COSTS - compulsory acquisition of land – mixed overall outcome of the proceedings – no unreasonable conduct by dispossessed owners – Council to pay Applicants' costs of the proceedings

In the substantive proceedings, the Applicants achieved more compensation than the Valuer General's determination and much more than the Respondent contended, but not as much as the Applicants contended. Moore J ordered the Respondent to pay the Applicants' costs of the proceedings unless it wished to contend for some alternative costs order.

The Respondent sought an order that it pay 25% of the Applicants' costs of the proceedings reflecting what the Respondent considered was the appropriate balancing of the degrees of success of the parties. The Applicants sought an order that the Respondent pay the Applicants' costs of the proceedings as agreed or assessed plus the costs of the argument on costs.

HELD:

1. The quite dramatic difference between what the Applicants actually achieved as the overall outcome of the proceedings when compared to the position advanced by the Respondent means that it is appropriate that the Respondent pay the Applicants' costs in the substantive proceedings.

2. The costs of costs' contests are paid by the party whose position has not prevailed in the costs' contest.

There is no reason, in this instance, why that position was held not to apply.

Respondent to pay the Applicants' costs of the proceedings and the costs of the motion.

Reporter: Tom White

(22-017) Bondi Beachside Pty Ltd v Waverley Council [2022] NSWLEC 1355

Dickson C - 6 July 2022

Keywords: Development application – principle in *Landcorp* - conversion of use of existing development - applicability of development standard - no change to existing exceedance of development standard

Development consent had been originally granted for a mixed-use development comprising a mix of residential apartments, hotel apartments, and retail space on the first and ground floors. Since the original consent, several consents had been granted which increased the residential use of the building and number of residential units.

The Applicant appealed the Council's refusal of its development application for the conversion of the use of the first floor, currently all retail, to a mix of 3 residential units and 2 retail premises, and the addition of 1 retail premise on the ground floor

A key issue was whether the floor space ratio (**FSR**) control in clause 4.4 of the *Waverley Local Environmental Plan 2012* (**LEP**) applied to this development. The originally approved development exceeded the FSR control.

The Applicant relied on the decision in *Landcorp Australia Pty Ltd v The Council of the City of Sydney* [2020] NSWLEC 174 (***Landcorp***) where the Court had determined that the building height development standard was not applicable to a development application relating to an existing building which already breached the height control and where there was no proposal to increase the height of the building.

The Applicant argued that ***Landcorp*** applied. Firstly, the development was not for a building that exceeded the FSR standard as that exceedance already existed. Secondly, no additional FSR was proposed. This fact was agreed by the experts. Thirdly, what the development proposed was the use of the approved building and floor space within it differently.

The Respondent argued that the principle in ***Landcorp*** did not apply. Instead, the development proposed the creation of gross floor area (**GFA**) in part of the building which did not previously exist and therefore the development application proposed to alter the building's GFA which was in breach of the FSR standard.

HELD:

1. Clause 4.4 of the LEP did not apply, confirming the principle in *Landcorp*.

2. Alternatively, if clause 4.4 did apply, the clause 4.6 variation submitted to vary the FSR standard was acceptable.

3. The development was acceptable on grounds of design excellence and merits considerations.

Appeal upheld. Development consent granted subject to conditions.

Reporter: Grace Huang

(22-018) North Lismore Plateau Association Inc v Lismore City Council [2022] NSWLEC 85

Duggan J – 12 July 2022

Application for summary dismissal – objector sought judicial review of development consent – alleged breach of procedural fairness for failure to notify of amendment to DA – alleged failure to consider mandatory considerations – notification not required by Act – pleadings not supported by the evidence – questions of merit not law – pleadings disclosed no reasonable cause of action – summary dismissal granted – costs reserved.

Lismore City Council (First Respondent) granted development consent to Winten (No 12) Pty Ltd on behalf of Glorbill Pty Ltd (Second Respondent) (Winten) for the development and residential subdivision of land located on the North Lismore Plateau.

The North Lismore Plateau Association Inc sought orders, as an objector, restraining Winten from carrying out works under the development consent and declarations that the development consent was invalid. Seven grounds were pleaded, including on the basis of procedural fairness and failure to take into account mandatory considerations relating to notification, the content of an ecological report, adequate consideration of flood risk, and existing unlawful development.

The respondents brought a notice of motion that the application be either summarily dismissed pursuant to UCPR r 13.4, or struck out pursuant to UCPR r 14.28.

HELD:

1. There was no breach of procedural fairness because no statutory notification requirement was triggered.

2. Council had considered all relevant mandatory considerations and the applicant's pleadings to the contrary were either not supported by an interpretation of the law, the evidence, or were arguments as to merit.

3. The applicant's pleadings disclosed no reasonable cause of action.

Proceedings summarily dismissed.
Costs reserved subject to the negotiation of the parties.

Reporter: Rainer Gaunt

(22-019) Sydney Fish Market Pty Ltd v Valuer-General of New South Wales [2022] NSWLEC 71

Pepper J – 10 June 2022

Keywords: valuation of land – meaning of "Crown lease restricted" – whether lease is a "holding" – meaning of "Crown land" – effect of repeal of Crown Lands Act 1989 – operation of savings and transitional provisions in Crown Lands Management Act 2016

FACTS:

The parties sought determination of a separate question: is certain land at Pyrmont 'Crown lease restricted' within the meaning of s 14I(2) of the ***Valuation of Land Act 1919*** **(VL Act)**?

The land was transferred, vested, or otherwise dealt with on various occasions between 1994 until 2020.
The Fish Market submitted that the separate question be answered in the affirmative because the land is "Crown lease restricted" by reason of s 14I(2)(a) of the VL Act. The Valuer-General contended that the question be answered in the negative because the land is not "Crown lease restricted" within the meaning of s 14(2)(a) because the lease was not a "holding", having regard to the definition in s 1.5 of the *Crown Land Management Act 2016* **(CLM Act)**.

The separate question gave rise to four principal issues for determination. First, whether a lease signed in 1994 was a lease granted under the predecessor to the CLM Act, the *Crown Lands Act 1989* **(CL Act)**. Second, whether, notwithstanding a transfer of the land to the State Property Authority (now Property NSW), the land remained subject to the lease. Third, whether from the date of transfer to the SP Authority up to the repeal of the CL Act in 2016, the lease remained a lease under the CL Act. Fourth, whether the lease continued as a lease under the CLM Act because of the savings and transitional provisions.

HELD:

1. The land remained subject to the lease granted under the CL Act up to the date of repeal of the CL Act.

2. Upon the repeal of the CL Act, the lease became a holding under the CLM Act.

3. The lease is a "holding" within the meaning of the CLM Act and therefore the land is Crown lease restricted within the meaning of s 14I(2)(a) of the VL Act.

4. Separate question determined in the affirmative.

Separate question determined in affirmative. Valuer-General to pay Fish Market's costs.

Report: Caitlin Polo, Associate, Norton Rose Fulbright

COURT OF APPEAL

(22-020) Coffs Harbour City Council v Noubia Pty Limited [2022] NSWCA 32

Leeming JA and Simpson AJA; Preston CJ of LEC – 2 March 2022

Keywords: Remitter – fresh hearing in remitted proceedings – discretion of judge on matter of procedure and practice – no issue of principle, public importance or injustice – role of Court as judicial valuer

The appellant Council sought to appeal the interlocutory decision of the trial judge's decision to grant leave to the parties to rely upon a joint expert report of flooding engineers at the hearing of a matter that had been remitted for redetermination by the NSWCA.

Whilst the appellant accepted that the primary judge had discretion to allow fresh evidence on remitter, it contended that discretion should be used sparingly in the interests of finality of litigation and only where exceptional circumstances are established.

The respondent to the appeal, opposing the application for leave, submitted that the appellant had not discharged the 'heavy burden' to establish that the matter involved:

1. an issue of principle;
2. a question of general public importance; or
3. a reasonably clear injustice beyond something that is merely arguable.

HELD:

1. There was no error of legal principle which justified the grant of leave to appeal against the primary judge's discretionary decision on a matter of practice and procedure [69]-[70]. The primary judge did not fall into error when considering the principles governing applications to reopen a case after judgment has been delivered [70]. The applicant's analogy regarding the reopening of a case after judgment was not suitable, as the circumstances in this case were more like reopening a case prior to the delivery of judgment [72]-[79]. Similarly, the Court found no error was made in the primary judge failing to consider the principle of finality of litigation, which is only relevant when a judgment that finally disposes of proceedings has been delivered, or the need for the just, quick and cheap resolution of the proceedings, which admission of the joint report permitted in these circumstances [80]-[82].

2. There was no question raised as to public importance [10]. The exercise of the primary judge's discretion to admit further evidence was a discretionary decision relating to practice and procedure and open to her [89].

3. The appellant failed to demonstrate that it did not suffer a reasonably clear injustice beyond a matter which is merely arguable [11]. The appellant argued that the admission of the joint report would weaken its prospects of success, but the Court determined this was not a relevant injustice in these circumstances, as parties' cases can and often do change on remitter and the applicant suffered no relevant injustice by having to pay just compensation to the owner of the land being transferred to it [90]-[95]. In order to determine the compensation payable in accordance with s 54(1) of the *Land Acquisition (Just Terms Compensation) Act 1991*, the Court is not limited to deciding between either parties' evidence [94]. The task before the Court is evaluative, and the Court may seek additional expert evidence to assist in its determination and to reach its own conclusion if the state of the evidence before it will not assist with its evaluation [93]-[95]. The costs incurred by the applicant in the remitted proceedings, such as further joint conferencing and additional expert reports, can be dealt with by the appellant seeking costs orders [96].

Summons for leave to appeal dismissed.

The appellant is to pay the respondent's costs of the application.

Reporter: Lia Bradley

COMMONWEALTH OF AUSTRALIA

FEDERAL COURT OF AUSTRALIA

(22-021) New Aim Pty Ltd v Leung [2022] FCA 722

McElwaine J – 23 June 2022

Keywords: independent expert's report – duties and responsibilities of expert – duties and responsibilities of instructing solicitors – communications between expert and those engaging them where report was drafted by the solicitor – failure to disclose authorship of the report – disclosure of material information relevant to the independence of the expert – whether opinions expressed are independent – rejection of entirety of the expert evidence

The applicant alleged that three former employees (the first, second and third respondents) had used the applicant's confidential and commercially sensitive information to assist two of the applicant's competitors (the fourth and fifth respondents) to procure, promote and sell copied products in breach of their equitable obligations not to reveal or use confidential information acquired during the course of their employment and their statutory obligations under s 183 of the ***Corporations Act 2001*** **(Cth)**.

The applicant intended to place substantial reliance upon the evidence of an expert witness to establish that the information in question held particular commercial value to the respondents.

The expert witness prepared an expert report dated 8 March 2022 which attached a letter of instruction from the applicant's solicitors dated 7 March 2022. In cross-examination, it was put to the expert that she had not drafted the report within a space of 24 hours. The expert conceded that:

a) she had sent two or three drafts of her expert report to the solicitors for comment;

b) she had received comments from the solicitors during a video conference;

c) the solicitors had put together the second version of the report;

d) she had not written the entirety of the report;

e) she had received emails from the solicitors for the applicant suggesting that she make changes to her draft report.

This resulted in a call for production of all documents sent from the solicitors to the witness, to the effect that alterations be made to, or commentary upon, her draft report. The documents produced revealed that:

a) the expert provided her biography and general information about her company to the solicitors;

b) the solicitors subsequently drafted the expert report and requested further information from the expert;

c) there were multiple virtual meetings to discuss the expert report;

d) the final draft report provided by the solicitors to the expert was not materially different from the version that was filed in the proceeding.

The expert subsequently agreed that her report was 'a collaboration' between her and the applicant's solicitors, a paragraph within the report had been drafted by the solicitors but reflected her opinion and that the drafting selectively reproduced portions of her book that were favourable to the applicant's case.

Prior to the hearing, the solicitors for the respondent made two requests for the provision of all communications between the solicitors for the applicant and the expert. Each request was denied with the express representation that all documents evidencing or disclosing instructions to the expert had already been produced as attachments to the expert report.

HELD:

1. An independent expert has a paramount and overriding duty to assist the court impartially on matters relevant to the area of expertise of the witness [74].

2. In circumstances where the lawyer drafts an expert report based on instructions from the expert, there is a serious risk that the independence of the expert will be compromised, and the value of the opinion will be undermined [69].

3. The requirement of an expert witness to assist the Court impartially was substantially undermined by the failure to disclose the methodology of preparation [72].

4. It may be appropriate for an expert report to be settled by someone else but only if that fact is disclosed in the report [71] and then all correspondence (written and oral) should be documented and disclosed [76].

Expert report rejected in its entirety.

Evidence given by expert in cross-examination rejected in its entirety.

Proceedings against first, third, fourth and fifth respondents dismissed. (Proceedings against second respondent dismissed previously)

Reporter: Joanna Ling

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