// ENVIRONMENTAL LAW REPORTER

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ENVIRONMENTAL LAW REPORTER

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SUPREME COURT

Bathurst Regional Council v Natural Resources Access Regulator [2022] NSWSC 846

Basten AJ – 28 June 2022

Keywords: Water – dam water management approval – interpretation of conditions to maintain outflow equal to lesser of inflow or pipe capacity and release percentage of storage conserved in preceding inflow event

Bathurst Regional Council held the water access licence to the Winburndale Dam and an approval under the ***Water Management Act 2000*** to use the dam and a diversion pipe that carried water from the dam to Bathurst (**Approval**). The Approval included an obligation to release water into the Winburndale Rivulet.

The Natural Resources Access Regulator (**NRAR**) issued a show cause notice (and subsequently a caution) stating that releases from the dam did not comply with condition DK3944 of the Approval (which provided that the dam be operated to maintain an outflow equal to the lesser of inflow or the discharge pipe's capacity).

Council sought to set aside the caution and sought a declaration as to the construction of the Approval on a number of bases: (1) condition DK3752, which specified the volume of water to be released, governed condition DK3944; (2) condition DK3944 applied only when condition DK3752 did not operate, that is, condition DK3944 operated whenever the storage was not below crest level because there was a limited need to release inflows when the dam was overflowing; and (3) if there were a general obligation to release the whole of the inflow the dam would not perform its primary function of water storage.

HELD:

1. Subject to a cap, under condition DK3944 the whole of the inflow had to be released. Once the inflow ceased so did the obligation to release.

2. It would be incoherent if the obligation to release the whole of the inflow in condition DK3752 was engaged only when the water was at or above crest level and there was a spill-over of the inflow.

3. The total inflows to the dam exceeded the capacity of the pipe with the effect that release in accordance with condition DK3944 would severely undermine the storage function of the dam. It was however unclear that there was any reading of the condition which would avoid that result.

4. There was no evidence that the caution was issued on a wrong legal basis. The monthly averages of the releases provided ample grounds for the NRAR to consider there had been non-compliance with condition DK3944.

Declaration made. Amended summons dismissed.

Reporter: Nicholas Andrews

COURT OF CRIMINAL APPEAL

Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator [2022] NSWCCA 9

Preston CJ, Price J, Adamson J – 2 February 2022

Keywords: Criminal law – appeal on sentence – quantum of fine – environmental offence

Budvalt Pty Ltd appealed a fine of $252,000 imposed by Moore J of the LEC for the construction of a water supply channel, 2km in length and 30m wide, without an approval on the basis that the quantum of the fine was manifestly excessive.

The Appellant contended that the sentencing judge erred in not finding the offence to be near the lowest range of conduct due to the potential more harmful offending that could have occurred. The Respondent argued that the sentencing judge adequately considered a range of objective factors, and was not required to deliberate on hypothetical offending.

The Appellant also contended that the sentencing judge did not have proper regard to relevant subjective features of the business and offence. The Appellant submitted it was a business of 17 years, was a first time offender, approval would likely have been granted for the work, and an employee was unaware permission was required.

Further, contrition and remorse was provided in writing and through counsel. The Respondent contended that these matters were specifically addressed by the sentencing judge. The evidence of contrition and remorse was confined to an unsworn letter, and submissions of counsel. It was open for the sentencing judge to afford little weight to the limited evidence of contrition and remorse.

The Appellant alleged that the sentencing judge adopted an impermissible mathematical approach to calculating the quantum of the fine. The Appellant submitted that the primary judge divided the maximum penalty into ranges, and failed to have regard to the subjective features of the offence.

Further, the Appellant alleged that the publication order was not considered when determining the quantum of the fine. The Respondent contended that the power to impose a publication order was in addition to, but not a substitution of, the financial penalty. The powers of the Court to impose a fine, and to impose a publication order, are located in different, distinct provisions, and are, therefore, independent.

HELD:

1. The sentencing judge was not obliged to consider the making of a publication order when determining the quantum of a fine.

2. The sentencing judge was not required to deliberate on hypothetical offending when determining objective seriousness.

3. There was no merit in the Appellant's argument that the sentencing judge erred in failing to consider the hypothetical potential offences.

4. It was open to the sentencing judge to make a finding on the limited evidence (an unsworn letter and submissions of counsel) of contrition and remorse.

5. There was no substance in the Appellant's argument that the sentencing judge failed to give proper weight to the prior lack of offending and years of business.

6. The quantum of the fine was not manifestly excessive.

Appeal dismissed.

Reporter: Serafina Carrington

LAND AND ENVIRONMENT COURT

Arcadia Investment Holdings Pty Ltd v Environment Protection Authority [2022] NSWLEC 2

Duggan J – 6 January 2022

Keywords: Practice and procedure — Prosecutorial obligation to disclose — s 247E of *Criminal Procedure Act 1986* (NSW) — confidentiality of mediation — exceptions to confidentiality — disclosure required

Arcadia challenged a clean-up notice variation issued by the EPA in a Class 4 proceedings.

A mediation agreement entered into between the parties in relation to those Class 4 proceedings provided for confidentiality and privilege for all parties, unless otherwise compelled by law.

The EPA, as prosecutor, later commenced unrelated Class 5 proceedings using the same solicitor who believed that material arising from the mediation in the Class 4 proceedings was relevant to a fact in issue in the prosecution and, therefore, should be disclosed to the defendant in the unrelated Class 5 proceedings.

The EPA submitted that they were compelled to disclose the material to the defendant under s 247E of the *Criminal Procedure Act 1986* and this prosecutorial duty to disclose triggered the exception to confidentiality under the mediation agreement between it and Arcadia. The EPA further submitted that it had a general law obligation to disclose on the basis of materiality as held in *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72.

Conversely, Arcadia submitted that it did not consent to the use of or production of the material. They relied on *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets* [2004] NSWSC 1901 in arguing that s 247E of the Criminal Procedure Act could not be relied on due to a lack of "legitimate forensic purpose". Also, Arcadia relied on *Crown Resorts Ltd v Zantran Pty Ltd* (2020) 267 FCR 477, which focused on the importance of the enforcement of contract law in its analysis of the balance between public interest and the proper administration of justice. Further, Arcadia submitted that the Court did not have the power to make declarations

regarding the mediation agreement and the agreement was confidential by both its own operation and under s 31 of the *Civil Procedure Act 2005*.

HELD:

1. The Court has the power to:

   a) make any determination relating to the disclosure of any document produced in a Court ordered mediation with regards to both the Civil Procedure Act and the mediation agreement; and

   b) make orders and declarations regarding matters ancillary to Class 4 proceedings.

2. The prosecutorial duty of disclosure does not relate to the admissibility of the material.

3. The relevant question is whether the mediation material is "material" such that disclosure would be required. What is considered "material" or "relevant" for the purpose of disclosure is up to the prosecutor, not the court. Meaning the prosecutor was obliged by both the Criminal Procedure Act and persecutorial duties to disclose the material under both statutory and general law once the prosecutor formed the opinion that disclosure was required.

4. The prosecution was compelled at law to disclose the mediation material to the defendant.

Declarations made. Notice of motion dismissed.

Reporter: Amelia Malone

Bowers v Northern Beaches Council and Anor [2022] NSWLEC 8

Robson J – 9 February 2022

Keywords: Judicial review – grant of development consent for caretaker's flat in industrial premises – whether decision affected by fraud or bad faith

Mr Gerd Grigull lived on industrial-zoned land on Chard Road, Brookvale (**Premises**), owned by Grigull Custodian Pty Ltd (**Grigull Custodian**). A development application was lodged to seek development consent for a caretaker's flat in the Premises. The Northern Beaches Council subsequently granted development consent subject to conditions.

Mr James Bowers, who had objected to the DA, sought declaratory and mandatory injunctive relief on the bases: (1) Council's decision was affected by fraud or bad faith; and (2) Council did not have power to grant development consent as the proposed use of part of the Premises as a caretaker's residence was prohibited development because it was not ancillary to the use of the Premises for the purpose of industrial use.

HELD:

1. Mr Bowers did not properly articulate the allegations of fraud as required by ***Uniform Civil Procedure Rules 2005*** r 15.3.

2. Mr Bowers did not establish that the DA or Council's consideration of it were tainted by fraud or bad faith because:

   a) Council was not deceived in relation to any alleged unlawful use (it was aware of the residential use of the Premises);

   b) it was not relevant to the Council's consideration of the DA whether Grigull Custodian had intended to use the premises unlawfully;

   c) there was no satisfactory evidence that Grigull Custodian actually intended to flout the development consent and occupy the premises unlawfully (had there been it could not affect Council's consideration of the DA);

   d) Council had addressed any ongoing concern regarding the future use of the premises by the imposition of conditions on the development consent; and

   e) there was no evidence that Council had acted in bad faith.

3. Council's decision to grant the consent was made for legitimate reasons, was not perverse and did not lack material foundation or intelligible justification. It was open to Council to determine that the proposed use of the caretaker's residence constituted a development which was ancillary to the industrial use, was not an independent use, and was permissible.

Proceedings dismissed. Mr Bowers to pay 75% of the costs of each of Council and Grigull Custodian (see ***Bowers v Northern Beaches Council and Anor (No 2)*** **[2022] NSWLEC 46**).

Reporter: Nicholas Andrews

Simo Popovac v Dominic Kennedy [2022] NSWLEC 9

Pepper J – 14 February 2022

Keywords: Costs – Class 2 tree proceedings – presumption that each party pays its own costs unless fair and reasonable to otherwise order – Calderbank offer

Mr Simo Popovac owned a property on Headland Rd, North Curl Curl. Dominic and Jessica Kennedy owned an adjoining property.

Mr Popovac wrote to the Kennedys requesting trees in their garden be pruned – in particular a tuckeroo tree – and unsuccessfully attempted to arrange a mediation with the Kennedys. In July 2021 Mr Popovac filed a Class 2 Tree Dispute application seeking orders to prune trees and a hedge on the Kennedys' property. In August 2021, the Kennedys sent Mr Popovac a letter (stated to be written according to the principles in ***Calderbank v Calderbank*** **[1975] 3 All ER 333**) offering to resolve the proceedings with the Kennedys pruning the trees and with each party bearing its own costs.

The tree application was heard and refused: ***Popovac v Kennedy*** **[2021] NSWLEC 1635** and the Kennedys filed a notice of motion seeking orders that Mr Popovac pay their costs on an ordinary basis until 30 August 2021 and thereafter on an indemnity basis because: (1) Mr Popovac had brought the proceedings for an improper purpose; (2) Mr Popovac acted unreasonably by commencing and continuing a claim that had no prospects of success; and (3) because he rejected the *Calderbank* offer.

HELD:

1. Mr Popovac's application to prevent the future obstruction of his views by the trees was misconceived: only the tuckeroo tree caused an obstruction and the other trees were not impacting his views. Whilst the application was misconceived on a misapprehension of the law, this does not, without more, amount to an improper purpose and did not justify awarding costs. Mr Popovac also did not act unreasonably in commencing and continuing his claim because he had sought independent legal advice and the advice of his expert supported his claim even if the Court did not accept his expert's view.

2. It was not unreasonable for Mr Popovac to reject the Kennedys' settlement offer because the offer did not represent a real compromise due to its limited nature; and was rejected in reliance upon legal and expert advice.

3. In Class 2 proceedings the Court must consider whether it is fair and reasonable in the circumstances to depart from ***Land and Environment Court Rules 2007*** r 3.7 and cost applications are not determined upon the basis of *Calderbank* offers. A rejection of a *Calderbank* offer is however relevant as a factor in determining whether an award of costs is fair and reasonable. There was no reason to displace the presumptive rule that parties bear their own costs.

Notice of motion dismissed. Parties to bear their own costs.

Reporter: Nicholas Andrews

Friends of Gardiner Park Inc v Bayside Council [2022] NSWLEC 22

Preston CJ – 22 March 2022

Keywords: determinations to upgrade sports fields in heritage-listed park – whether development consent required – development for purpose of recreation area may be carried out without consent – assessment of environmental and heritage impact – assessment of modified activity

The Applicant sought judicial review of the Respondent's determinations to approve an upgrade of the sports fields (**the activity**) in the heritage-listed Gardiner Park in Banksia. The first determination to approve the activity was made on 27 October 2020 and a second determination approving three modifications to the activity was made on 15 February 2021 (**the modified activity**).

The Applicant's contended that the Respondent did not follow the proper legal process when making the first and second determinations in three respects. First,

the Respondent did not obtain development consent to carry out the activity. Second, the Respondent failed to examine and take into account to the fullest extent possible the heritage impacts of the activity in breach of s 5.5(1) of the *Environmental Planning and Assessment Act 1979*, because it had considered the impacts of the activity only on certain features or structures in the park rather than the park as a whole. Third, the Respondent failed to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the modified activity in breach of s 5.5(1) of the EPA Act, because the Respondent had assessed only the individual modifications to the activity rather than the modified activity as a whole. Further, the exemption to s 5.5(1) in s 5.4(a) of the EPA Act did not apply.

HELD:

1. In relation to the first ground, cl 65(3) and cl 111(1) of the *State Environmental Planning Policy (Infrastructure) 2007* prevailed over cl 2.7 and cl 5.10 of the *Rockdale Local Environmental Plan 2011* and permitted the Respondent to carry out the activity without development consent because it was development for the purpose of a recreation area and stormwater management systems. Further, paragraphs (a) to (c) of cl 65(3) of the Infrastructure SEPP were not mutually exclusive.

2. In relation to the second ground, a fair reading of the Respondent's evidence pertinent to its consideration of the heritage impacts of the activity established that the Respondent did not fail to examine and take into account to the fullest extent possible the heritage impacts of the activity and, importantly, the Respondent had considered the whole of Gardiner Park as the listed heritage item, rather than only certain features or structures in the park. The Applicant had not established that the Respondent had breached s 5.5(1) of the EPA Act.

3. In relation to the third ground, whether the Respondent had assessed the environmental impact of the modified activity was a question of fact, and the assessment of the environmental impact of particular modifications was the means by which the environmental impact of the activity as so modified was able to be assessed. The Applicant had not established that the Respondent had breached s 5.5(1) of the EPA Act. It was therefore unnecessary to determine whether the Respondent was exempted from the duty contained in s 5.5(1) of the EPA Act by operation of s 5.4.

Applicant's further amended summons dismissed. Costs reserved.

Reporter: Amelia Cook

Boensch v Parramatta City Council [2022] NSWLEC 78

Robson J – 28 June 2022

Keywords: Costs – Class 2 proceedings – appeal against registrar's decision not to award costs – presumption that each party pays its own costs unless fair and reasonable to otherwise order

Franz Boensch operated a classic car repair business in Rydalmere. In January 2021, Parramatta City Council (Council) provided a notice of intention to issue an order under s 124 of the ***Local Government Act 1993*** in relation to vehicles parked illegally on Council land in Rydalmere. Mr Boensch asked Council to extend the time before issuing order so he could consider the issues and obtain legal advice. In February 2021, Council issued the order.

In March 2021, Mr Boensch commenced Class 2 appeal proceedings against Council's order. In May 2021, Mr Boensch indicated to the Court he wished to discontinue the proceeding. In June 2021, Council revoked the order. In July 2021, Mr Boensch applied for an order that Council pay his costs of the proceedings.

In March 2022, the Registrar dismissed Mr Boensch's application. Mr Boensch filed a notice of motion seeking to set aside the Registrar's decision and an order that Council pay his costs.

HELD:

1. There was no error made by the Registrar or material change in circumstances that would empower a review of the Registrar's decision. The Court could not be satisfied that Mr Boensch's argument that Council conducted itself unreasonably in making an order which was unlawful would have succeeded (because the proceeding was discontinued). In Class 2 proceedings the Court is not to make any

order for the payment of costs unless it considers that the making of an order is fair and reasonable in the circumstances: ***Land and Environment Court Rules 2007*** r 3.7. The "no discouragement" principle supports the rule, that is, a person should not be discouraged from making or defending an application by the prospect of an adverse costs order. There was no conduct on the part of Council which made it fair and reasonable to displace the presumptive rule.

2. It was not unreasonable for Council not to allow Mr Boensch further time before issuing the order. While allowing further time may have been appropriate, it did not constitute conduct which would justify awarding costs. There was also no evidence that Council conducted itself unreasonably in relation to the proceedings.

Notice of motion dismissed. No order for costs.

Reporter: Nicholas Andrews

Agostino v Penrith City Council [2022] NSWLEC 1258

Gray C - 23 May 2022

Keywords: Development application for enlargement, expansion and intensification of the existing use - extent of the "building, work or land" for which development consent was granted, to define the "existing use" – consent granted for part of a development application

The Applicant had been operating a fruit and vegetable store on 312 Third Avenue, Llandilo (Land) for over 30 years. The Land relevantly held a fruit and vegetable store (Store), an uncovered loading area (Loading Area), and a metal storage shed (Shed).

The Applicant sought consent for alterations and additions to the Store, and for the enlargement, expansion and intensification of the Store use into the Shed (to be used as storage of fruit and vegetable pending sale in the store). Fruit and vegetable store was a prohibited use on the Land, so the Applicant relied on existing use rights to operate the Store and sought to rely on those rights to expand the Store, including into the Shed. The Respondent refused the application.

In the 1980s when fruit and vegetables began being sold from the Land, fruit and vegetable store was a prohibited use on the Land.

On 12 July 1991, ***Penrith Local Environmental Plan No 201 (Rural Lands)*** *(LEP 201)* came into force, but fruit and vegetable store remained a prohibited on the Land.
On 24 June 1992, the Shed consent was granted. The consent described the development as a "farm shed" and noted that its use was restricted to the parking of farm vehicles and equipment and for storage of produce grown on the Land.

On March 1992, ***LEP 201*** was amended to include a site-specific clause which made a fruit and vegetable store with a maximum floor area of 150m2 permissible with development consent on the Land.

On 10 July 1992, consent was granted for the Store, described as "Occupation of an existing building and proposed extension for the sale of fruit and vegetables together with ancillary goods…". The consent reflected the restriction on floor area to 150m2 and required all materials and goods associated with the use to be stored within the building.

On 26 August 1999, the consent for Loading Area granted. The parties agreed that Loading Area purpose was associated with the Store.

On 22 September 2010, the ***Penrith Local Environmental Plan 2010*** *(PLEP 2010)* commenced, rezoning the Land and making shops a prohibited use.

The parties agreed that on commencement of the ***PLEP 2010***, the use as approved by the Store and Loading Area consents became an existing use for the purpose of a fruit and vegetable store under s 4.65(b) of the ***EPA Act***.

The issues in dispute were the extent of the land that benefits from the existing use arising from the Shed and Loading Area consents; and the use permitted by the Shed consent.
The Applicant argued that the existing use was carried out on the whole of the Land, or at least the access driveway and the Shed. The Respondent argued that the existing use did not include the Shed, as the consent was for a different purpose.

The Applicant submitted that the Shed use was for the storage of produce prior to sale in the Store. The Respondent submitted that the Applicant had not adequately established this use.

HELD:

1. The existing use as a fruit and vegetable store did not extend to the whole of the Land.

2. The consent for the Shed did not authorise the use of the Shed for the purpose of a fruit and vegetable store, and therefore the proposed use for that purpose was prohibited.

3. Consent could be granted for alterations and additions to the existing Store on the Land, except for the enlargement, expansion and intensification of the use of the fruit and vegetable store into the Shed.

Appeal upheld. Part of the development application (excluding the use of the Shed) approved.

Reporter: Lee Cone

Helm No. 18 Pty Ltd v North Sydney Council [2022] NSWLEC 1296

Senior Commissioner Dixon – 6 June 2022.

Keywords: Bias – Apprehended Bias – application for recusal – fair-minded lay observer – "Double Might" test – whether a fair-minded lay observer might reasonably apprehend that the commissioner might not bring an impartial and independent mind to the fair resolution of the issues in the case

North Sydney Council (Council) made a formal application at the commencement of a Class 1 development appeal hearing to have Senior Commissioner Dixon recused from determining the appeal on the grounds of apprehended bias.

The alleged apprehended bias arose from the Senior Commissioner's disclosure of recent professional contact with the Applicant's expert about a private development outside of the North Sydney local government area.

Council relied on the "double might" test set out in the decision of ***Lu v Walding*** **[2020] NSWLEC 94** at [20]-[21] and submitted that a fair-minded lay observer might question the Senior Commissioner's ability to remain impartial due to her recent professional contact with the Applicant's expert.

The Applicant opposed the application on the basis that Council had not clearly articulated the facts that could cause the Senior Commissioner to be impartial in the proceedings.

The Court referred to the well-known principles recently considered by the Court of Appeal in ***Polsen v Harrison*** [2021] NSWCA 23 at [46], and the requirement to demonstrate "a 'realistic possibility' of the apprehension of bias which is not 'fanciful or extravagant' but is based on the 'established facts' of the matter" with the fair-minded lay observer being "neither complacent nor unduly sensitive or suspicious".

HELD:

1. An application of apprehended bias is dependent on the circumstances of each individual case and should only be upheld with proper reason.

2. A Judge or Commissioner's own opinion about independence and impartiality bears little importance in considering the "double might" test.

3. Due to the recent professional contact between the Senior Commissioner and the Applicant's expert the Court accepted that a fair-minded lay observer might have an apprehension of bias.

4. The Senior Commissioner recused herself from determining the appeal.

Reporter: Naomi Simmons

COURT OF APPEAL

Tahmoor Coal Pty Ltd v Visser [2022] NSWCA 35

Basten JA; Gleeson JA; Payne JA – 11 March 2022

Keywords: Compensation claim - mine subsidence - joinder principles -proper parties - statutory compensation schemes - procedural fairness

The Applicant, Tahmoor Coal Pty Ltd (**Company**), sought to join proceedings in the Land and Environment Court

commenced by the first and second respondents, Jan and Yvonne Visser (**Respondents**) claiming compensation pursuant to s 19(f1)of the LEC Act.

The Respondents owned a property near Picton (**Land**) and had suffered subsidence due to the coal mining operations undertaken by the Company in an active coal mine. The Respondents made a claim for compensation under s 11 of the ***Coal Mine Subsidence Compensation Act 2017*** and after refusing the initial compensation amount offered by the Company, sought a review of the compensation amount by the Secretary, Department of Customer Service under s 15(1) of the Compensation Act. A delegate of the Secretary determined compensation in the amount of $402,000. Being dissatisfied with this determination, the Respondents then commenced proceedings in the Land and Environment Court against the Department of Customer Service.

The purpose of the LEC proceedings was for the Respondents to claim a larger amount than that determined by the Secretary on review, for which the Company accepted liability. Section 8 of the Compensation Act provided that compensation under the Act was to be paid by the proprietor of the coal mine that caused the subsidence, in the case of an active coal mine, which was the Company. Following notification of the LEC proceedings, the Company sought to join the proceedings as a respondent by notice of motion, which was dismissed by the primary judge.

At first instance, the primary judge found that although the involvement of the mine proprietor was integral as the proprietor liable for the compensation to a claimant, the general principles of joinder of parties did not apply to statutory compensation schemes such as the Compensation Act which generally identified the appropriate parties within the legislation establishing the scheme. Accordingly, there was no provision in the Compensation Act to warrant a finding that the Company ought to be joined as a party. The Company sought leave to appeal this finding.

HELD:

1. The general principles relating to joinder of parties under common law and contained within ***Uniform Civil Procedure Rules (***UCPR) rr 6.24(1) and 6.27, also apply to statutory compensation schemes.

2. The Compensation Act does not need to identify the proper parties to the proceedings in the Court and the general principle applies that a party liable to make payment is entitled to be heard in the proceedings and should be bound by the judgment.

3. The Company as the entity liable to pay the compensation, was a necessary party to the proceedings and ought to be joined to the LEC proceedings.

Leave to appeal granted. Respondent to pay Applicant's costs for joinder motion in the LEC Court and costs in the Court of Appeal.

Reporter: Shivi Bhargava

Olde English Tiles Australia Pty Ltd v Transport for New South Wales [2022] NSWCA 108

Ward P, Gleeson JA and Mitchelmore JA, Basten AJA and Preston CJ of LEC – 28 June 2022

Keywords: Compulsory acquisition – definition of interest in land – bare licence to occupy land terminable at will by owners – meaning of "privilege over, or in connection with, land" – no interest in land

The Respondent compulsorily acquired land at 182-186 Parramatta Rd, Camperdown. Mr and Mrs Gaudioso were the registered owners of the land and also the sole directors and shareholders of the Appellant, which operated a tile manufacturing and retail business from the land. There was no lease in place between the registered owners and the Appellant and rent had not been paid.

The Respondent made an offer of compensation to the Appellant in the amount determined by the Valuer General in accordance with the Just Terms Act. The Appellant objected to the compensation offered and claimed compensation for loss attributable to disturbance including legal costs, valuation fees, financial costs incurred in connection with the relocation of the business (including loss of profits) and stamp duty payable on the purchase of other land from which to operate the business. No claim was made for market value.

The primary judge found that the Appellant's occupation of the land was terminable at will by the registered owners. Duggan J followed ***Dial A Dump Industries Pty Ltd v Roads and Maritime Services of New South***

***Wales* (2017) 94 NSWLR 554** and dismissed the claim on the basis the Appellant did not have a compensable interest in land as defined in s 4 of the *Land Acquisition (Just Terms Compensation) Act 1991*.

The Appellant asserted that its interest in land was a "privilege over, or in connection with, the land". It further asserted that the approach to the definition of "interest in land" accepted in earlier judgments of the Court of Appeal was wrong.

HELD:

1. The source of a "privilege over, or in connection with, land" must be in a legally enforceable instrument or arrangement for it to be divested, extinguished or diminished by an acquisition.

2. The word "land" in the term "over, or in connection with, the land" should be understood as a reference to a physical feature of the surface of the earth having particular spatial boundaries.

3. A permissive occupancy, terminable at will by the registered owner of the land, and dependent for its continuation on the personal relationship between the occupier and the owner, is not a relevant (compensable) interest in land.

4. The definition of "interest in land" must be construed in its statutory context. A primary object of the Just Terms Act is to guarantee compensation at "not less than the market value of the land", which assumes that a compensable interest has market value. Where a business has no interest with a market value, or any other value, the fact that the business happens to require relocation following compulsory acquisition should not be understood as giving it a freestanding right to recover the costs of relocation.

5. The fact that the Parliament legislated to make substantial amendments to the Just Terms Act in 2016 without overturning, or making amendments inconsistent with, the earlier decisions of the Court of Appeal is a factor militating strongly against overturning any earlier decisions as to the scope and operation of the Just Terms Act.

Appeal dismissed with costs.

Reporter: Tom White

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