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LAND AND ENVIRONMENT COURT

(22-022) Friends of Glebe Wetlands Incorporated v Littlewoods Civil Contracting Pty Ltd [2022] NSWLEC 21

Pepper J – 21 March 2022

Keywords: Judicial review – no delegation – development consent invalid – declaratory relief – contradictor

On 25 May 2021, the Senior Town Planner as a delegate of Bega Valley Shire Council (**Council**) purported to modify development consent 2016.515 (**Consent**). The power of a Council to delegate functions under the Local Government Act 1993 requires delegations to the General Manager and then those functions, in certain circumstances, may be sub-delegated to Council officers. Council's Register of Delegations did not delegate any functions under the EPA Act to the General Manager. Therefore, there could be (and was not) any sub-delegation to the Senior Town Planner. In light of this, the parties agreed (albeit on the third day of hearing) that it was appropriate for the Court to make declaration that the Consent was invalid.

HELD:

1. Delegation under the LG Act is a two-stage process. First, Council may delegate a function to a general manager under s 377(1) of the LG Act. Second, the General Manager may sub-delegate to a council officer under s 378(2) of the LG Act.

2. As Council's Register of Delegations did not delegate any functions under the EPA Act to the General Manager, it followed there could not be any delegation to the Senior Town Planner, and the grant of Consent was invalid.

3. Before granting declaratory relief, there must be a contradictor – consent of the parties is insufficient. Even though the orders were ultimately by consent, given the proceedings had been contested on the first two days it was appropriate to grant declaratory relief.

Declaration that the Consent was invalid, and orders quashing the Consent.
Council to pay the costs of the Applicant and First Respondent up to 2 February 2022, First Respondent to pay the costs of the Applicant after 2 February 2022.

Reporter: John Zorzetto

(22-023) Donvito v Hawkesbury City Council [2022] NSWLEC 26

Moore J – 24 March 2022

Keywords: Development consent – whether development consent lapsed – staged development – construction and interpretation of development consents and conditions – whether necessary to comply with condition

The applicants obtained development consent in 2013 to construct a boarding house (**Consent**). The development was permissible with consent in 2013, but was prohibited development at the time of the proceedings.

A construction management plan for the first stage of development was accepted by Council on 13 June 2018. An early works stage construction certificate was issued on 21 June 2018. Early work was conducted, and an inspection certificate was issued on 25 June 2018 recording that the activity outcome was satisfactory.

Council was not satisfied that the early work was sufficient to have 'commenced' the Consent, and that the Consent had therefore lapsed in accordance with EPA Act s 4.53(1)(a). In response, the applicants sought a declaration from the Court that the Consent had commenced and not lapsed.

Council relied upon Condition 12 of the Consent, which provided that "the existing asbestos roof shall be removed and replaced by a metal roof. The plans submitted with the construction certificate must indicate the installation of a metal roof." At the time of the proceedings this work had not been completed and no plans contemplating the installation of a metal roof had been submitted.

The applicants relied on Condition 15 of the Consent, which envisaged that multiple stages of construction would be completed. Additionally, a related 'DA Conditions Compliance Matrix' set out that works encompassing the asbestos roof would be addressed in a Stage 2 construction certificate.

HELD:

1. Because of Condition 15 and the DA Conditions Compliance Matrix, the Consent contemplated multiple stages of works being undertaken.

2. To conduct the multiple stages of works, the Consent anticipated that multiple construction certificates may be issued.

3. Satisfaction of Condition 12 could be deferred until a stage of works which contemplated removal of the asbestos roof.

4. Stage 1 early building works were carried out prior to the consent lapsing date and satisfied the requirements of EPA Act s 4.53(1)(a).

Declaration made that development consent had not lapsed.

Reporter: Rainer Gaunt

(22-024) Alramon Pty Ltd v City of Ryde Council [2022] NSWLEC 108

Pain J – 22 August 2022

Keywords: Development application – refusal – easement not reasonably necessary for effective use of land – adequate compensation – public interest

Alramon Pty Ltd (Alramon) and parties related to it (Applicants) owned a childcare centre on Coxs Road, North Ryde. The Council of the City of Ryde (Council) owned an adjacent car park, which the applicants used for decades for the egress of vehicles.
Alramon lodged a development application (DA) which sought to rely on access to Council's car park for traffic arising from the childcare centre. Council refused the DA. Alramon appealed against the refusal of the DA in a class 1 proceeding. In a related proceeding (commenced in the Supreme Court but transferred to the Land and Environment Court's Class 4 jurisdiction) the Applicants sought an easement under s 88K of the ***Conveyancing Act 1919*** for a right of carriageway over Council's land.

HELD:

1. The proposed easement on Council's car park for vehicles from the applicants' childcare centre was prohibited because: (a) what was proposed was not a road for the purposes of the ***Ryde Local Environmental Plan 2014*** and did not fall within the definition of 'road' under the ***Roads Act 1993***; and (b) the easement was designed to serve the applicants' land unlike a regular road.

2. The applicants' proposed deferred commencement conditions were not acceptable.

3. Despite the applicants' longstanding use of the car park, they did not establish that the easement was reasonably necessary for the effective use of its land. Indeed it would have created a substantial burden on servient land.

4. The use of the applicants' land for its current use was not inconsistent with the public interest, but militated against the grant of the easement sought.

5. There was a reasonable likelihood of Council deciding to develop its land in future. It could not be adequately compensated for the loss and disadvantage it would have suffered if the easement was imposed and intangible losses could not be quantified.

6. Although the applicants wrote to Council twice with offers to purchase the easement, they did not show that reasonable attempts been made to obtain any other easement from another neighbour or a different easement from Council.

Proceedings dismissed. Applicants to pay Council's costs of Class 4 proceeding.

Reporter: Nicholas Andrews

SUPREME COURT

(22-025) Dragon Property Development & Investment Pty Ltd v 183 Eastwood Pty Ltd (No 2) [2022] NSWSC 1000

Peden J – 27 July 2022

Keywords: Calderbank offer – costs

The sole issue in the proceedings was whether the Defendant had given a rogue, Scott Chan, any authority to enable him to persuade the Plaintiff that he was acting as the Defendant company in entering into a contract and taking the Plaintiff's money. On 6 July 2022, Peden J found the Defendant had done so, and therefore awarded the Plaintiff $1,672,000. The Defendant was ordered to pay the Plaintiff's costs on the ordinary basis as agreed or assessed, unless a party sought a different costs order.

The Plaintiff sought a special costs order on the basis that on 13 January 2022 the Plaintiff had sent a letter to the Defendant

with reference to the principles of ***Calderbank v Calderbank* (1975) 3 All ER 333**. The letter offered full and final settlement of the dispute on the terms that the Defendant pay $1,600,000 to the Plaintiff. The letter noted that the plaintiff had incurred approximately $70,000 in costs.

The Court relied on the summary of the principles of Calderbank offers set out by Ward P in ***Abdi v Abdi (No 2)* [2022] NSWSC 582 [19]-[30]**. The offer, or the circumstances in which it is conveyed, must indicate an intention to rely on it as to costs if rejected and a more favourable judgment is achieved. The party seeking the special costs order bears the onus of demonstrating that the rejection of the offer was unreasonable in all circumstances of the case.

HELD:

1. The offers statement of "without prejudice save as to costs" was sufficient to constitute a valid Calderbank offer.

2. An all-inclusive offer with no separate reference to costs may constitute a Calderbank offer where the approximate legal costs already incurred by the Plaintiff to the date of the offer are specified and it is possible to know the total sum of costs.

3. The Defendant unreasonably rejected the Plaintiff's offer on the basis that:

    a) the offer was made at a time of the proceedings when all the affidavit evidence had been served;

    b) 14 days was ample time for the Defendant to consider the offer;

    c) the offer was $72,000 less than the terms of the judgement; and

    d) the offer correctly identified the prospects of success and findings that would be made at the hearing.

4. The Plaintiff was entitled to a special costs order based on the offer.

The costs order in the principal judgment was set aside. Defendant ordered to pay the Plaintiff's costs on the ordinary basis as agreed or assessed up to 13 January 2022 and on an indemnity basis thereafter.

Reporter: Taylor Finnegan

COURT OF APPEAL

(22-026) Sheppard v Smith [2022] NSWCA 167

Gleeson JA, Beech-Jones JA and Basten AJA
– 29 August 2022

Keywords: Easements – application to extinguish an easement – abandonment – non-user and construction of temporary obstacles not sufficient to manifest intention to abandon right of way – historic use for removal of nightsoil and disuse after sewerage connections not enough for right of way to be deemed obsolete

The appellants and respondents are the owners of adjacent properties, with the respondents having the benefit of an L-shaped right of way running along the rear and far side of the appellant's property that was historically used for the removal of "nightsoil". The respondents would have access from the rear of their property to the street along the L-shaped strip if it was trafficable. After the connection of sewers in around 1908, traffic along the right of way ceased and it fell into disuse.

The appellants sought an order for the right of way to be extinguished under s 89(1) of the ***Conveyancing Act 1919* (CA)**. The appellants relied on all three limbs of s 89(1), namely that: (i) by the "acts or omissions" of the persons from time to time entitled to the easement it "may reasonably be considered [that they] have abandoned the easement"; (ii) that the easement "ought to be deemed obsolete" or that the continued existence of the easement "would impede the reasonable user of the land subject to the easement … without securing practical benefit to the persons entitled to the easement"; and (iii) that the proposed extinguishment of the easement "will not substantially injure the persons entitled to the easement". The appellants also relied on s 89(1A) which provides that an easement may be treated as abandoned if the Court is satisfied that the easement has not been used for at least 20 years.

HELD:

1. The primary judge did not err in finding that the respondents manifested an intention not to abandon the right of way in December 2010 when they had the right of way noted on their title. The act of

recording the right of way on title was a public form of affirming the existence of, and intention to retain the benefit of, the right of way.

2. There was no error in the primary judge failing to find intention on the respondent's part to abandon the right of way through their actions from the time they purchased their property in 2008. The construction of "non-permanent" features, such as a paling fence, garden shed and a knee-high concrete wall on the respondent's property did not manifest an intention to abandon the right of way.

3. There was no error in the primary judge failing to find intention on the part of the previous owners of the respondent's property to abandon the right of way.

4. The primary judge did not err in finding that the easement should not be deemed obsolete. The construction of sewage connections in 1908 and the historic use of the right of way for the removal of "nightsoil" were considered but determined to not constitute obsolescence.

Appeal dismissed with costs.

Reporter: Lia Bradley

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