ENVIRONMENTAL LAW REPORTER

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NEW SOUTH WALES

LAND AND ENVIRONMENT COURT

(23-037) Helm No. 18 Pty Ltd v North Sydney Council (No 2) [2022] NSWLEC 103

Robson J – 12 August 2022

Keywords: Stay of execution – Commissioner's judgment revoking interim heritage order – awaiting s.56A appeal – Notice of Motion for stay of Commissioner's decision – Notice of Motion granted

The Council filed a Notice of Motion seeking a stay of execution of an Acting Commissioner's decision to revoke an interim heritage order over two lots in Cremorne, with one lot being the subject of an impending complying development certificate for the demolition of the structure applied for by the Applicant. The Council had commenced a s.56A appeal against the Acting Commissioner's judgment.

The Council submitted that the Acting Commissioner had erred on a question of law, that it had actual prospects of success in the s.56A appeal, and that if no stay was granted irreparable harm would be caused (by way of demolition of the structure).

The Applicant, opposing the Notice of Motion, submitted that the Council had not identified a material question of law, that the Acting Commission understood what was before them and that it was incurring significant "holding costs" in circumstances where they were not afforded the protection of an undertaking for damages from the Council.

HELD:

1. There was a serious question to be tried. The Council submitted that the Acting Commissioner erred on a decision of a question of law and there were actual prospects of success with regard to the question of law raised.

2. A stay of the decision in question was supported on the basis of consideration of the balance of convenience. The existing structure would likely be demolished if a stay was not granted which would limit the Council's success in the s.56A appeal. The ability of the Court to hear the s.56A appeal within the fortnight, the availability of the parties on that date and the narrow nature of the question to be heard further supported the grant of the stay.

3. While the Applicant was incurring costs for the development site without the protection of an undertaking as to damages from the Council, the lack of offer of an undertaking was not determinative.

Decision and orders made by the Acting Commissioner suspended until the s.56A appeal heard on 22 August 2022.

Reporter: Lia Bradley

(23-038) No 1 Victoria Dragons Pty Ltd v AEN Developments Pty Ltd [2022] NSWSC 1345

Black J – 6 October 2022

Keywords: Contracts — construction — interpretation — implied terms – rectification – silence - residential apartment building - construction of a clause specifying an apartment mix – specific performance – affidavit evidence – copying of substantial parts of the affidavits

No 1 Victoria Dragons (**1VD**) sought a declaration that it was entitled to specific performance of a deed (**Deed**) made with the defendant AEN Developments (**AEN**) and an order that AEN pay the final instalment of $1.4 million pursuant to cl 2.2 and 24.11 of the Deed. AEN sought several types of relief by way of cross-claim, including claims for an implied term, rectification and misleading and deceptive conduct.

The Deed between the parties provided for a range of payments based on 1VD's delivery of a development consent (**Consent**) for a site in Kogarah, which AEN wished to acquire. Clause 24.11 prescribed that the Consent must include at least 96 apartments and could not contain more than 22 one-bedroom apartments, but it did not mention studio apartments. The initial plans submitted with the development application did not contain any studio apartments and was refused for breaching the height requirements of the *Kogarah Local Environmental Plan* (**LEP**). Through appeal proceedings in the Land and Environment Court 1VD amended the plans and development consent was granted to plans consisting of 96 apartments including 17 studio apartments and 21 one-bedroom apartments.

1VD advised AEN that the Consent had been granted and sent AEN an invoice for the final instalment amount. Approximately 2 weeks later AEN sent a letter to 1VD purporting to rescind the Deed pursuant to cl 24.11.

The main issue in dispute was the construction of cl 24.11. AEN argued that the true understanding between the parties, formed over several meetings that led up to the execution of the final Deed, was that the approved design was to contain no more than 22 one-bedroom OR studio apartments and no apartments of less than 50 square metres.

Both parties led evidence of oral conversations between their representatives. 1VD relied on 5 affidavits of its director Mr Coulston. Under cross-examination Mr Coulston reaffirmed his evidence that he had never been informed that studio apartments or apartments less than 50 square metres could not be included in the proposed development. Black J accepted his evidence, which was consistent with the absence of reference to that position in contemporaneous documentation.

AEN relied on affidavits from its director, Mr Yan, his assistant, Ms Wang, and its solicitor, Mr Ngo. Substantial parts of Mr Yan's affidavit were identical with Ms Wang's affidavit. Other parts of Mr Yan's affidavit were identical to Mr Ngo's affidavit. Mr Yan and Ms Wang also made similar errors in the same terms about what had occurred at meetings between the parties (for example, whether a particular person was present at a meeting) and sought to correct those errors at the same time when they became apparent under cross-examination. Mr Yan's evidence was also inconsistent with contemporaneous documentation and, upon cross-examination, parts of his affidavit were shown to be false (for example, whether the parties had expressly discussed studio apartments).

Mr Ngo was cross-examined about the affidavits and stated that because the representations made by Mr Yan and Ms Wang, and instructions given to him, were similar, that he used and copied phrases that they would have said. Black J did not accept these claims, finding that it was inconceivable that Mr Yan, giving instructions in Mandarin (through an interpreter) would have made substantially similar representations to Ms Wang, giving instructions in English.

1VD submitted that the only plausible explanations for the similarities in affidavit evidence were that either Mr Yan and Ms Wang colluded in their evidence to ensure its consistency, or that Mr Ngo coordinated the evidence of Mr Yan and Ms Wang, to ensure its consistency.

Black J did not make a finding on whether Mr Ngo's conflict of interest between his duty to AEN and his personal interest in avoiding claims made by AEN against him prejudiced the interests of justice under r 27.2 of the ***Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015***.

HELD:

1. Where it was apparent that many paragraphs of an affidavit had been copied into another affidavit, that evidence could not be treated as reflecting a genuine individual recollection of events, as distinct from a collective construction of them, and those affidavits should be given little or no weight in determining contested matters.

2. The parties had not turned their minds to studio apartments and so the true construction of cl 24.11 of the Deed dealt only with one-bedroom apartments. Studio apartments were not to be counted as one-bedroom apartments in construing cl 24.11 of the Deed.

3. The final plans approved with the Consent conformed with the requirements of the Deed and therefore 1VD had performed its obligations under the Deed.

1VD succeeded in its primary claim and AEN failed in its cross-claims. AEN was ordered to pay the final instalment and costs of the proceedings to 1VD.

Reporter: Stephanie Miller

(23-039) Environment Protection Authority v Afram [2022] NSWLEC 38

Pain J – 13 April 2022

Keywords: Class 5 proceedings – Supply of misleading information in the course of dealing with waste – risk of significant environmental harm – deposition of asbestos and solid restricted waste – mitigating factors

The NSW Environment Protection Authority (**Prosecutor**) commenced Class 5 proceedings against Fayed Afram (**Defendant**) concerning the provision of falsified weighbridge disposal dockets, transaction reports and emails (**Falsified Documents**) in the course of disposing waste material (including asbestos contaminated material) (**Waste**) between 2016 and 2017.

The Waste was taken by the Defendant from a site in Green Square and, rather than being deposited at licensed waste facilities at Kemps Creek and Bowral (**Licenced Facilities**) as the Defendant had indicated to the head contractor for the Green Square works (**Head Contractor**), was deposited unlawfully on properties in Horsley Park, Kulnura and elsewhere.

The Defendant then created the Falsified Documents comprising nearly 350 weighbridge dockets, 36 weighbridge transaction reports and emailed them to the Head Contractor purporting to prove the deposition of the Waste at the Licenced Facilities.

The Defendant entered an early plea of guilty following the conclusion of the Prosecutor's investigation and the commencement of the proceedings. Two other proceedings in separate courts were brought against the Defendant, with the Defendant being convicted in the District Court by NSW Police in relation to a charge of fraud relating to the Falsified Documents (**Separate Offence**).

The issue before the Court was the severity of the fine to be imposed on the Defendant in light of his personal circumstances, character references and the application of the rule in *Hanna v Environment Protection Authority* (2019) 280 A Crim R 575; [2019] NSWCCA 299 concerning the Separate Offence being taken into account in the sentencing process in these proceedings.

HELD:

1. Objective matters and circumstances taken into account included the large number of Falsified Documents, the undermining of the regulatory system for waste management, the deliberate nature and concealment of the Defendant's conduct, the foreseeability of substantial harm to the natural environment which were collectively held to be objectively serious matters. The Defendant was not able to adduce sufficient evidence proving his inability to pay a substantial fine.

2. Aggravating factors included the previous conviction for the Separate Offence and the fact that the offences relating to the Falsified Documents and the deposition of the Waste were all within the high range of objective seriousness.

3. The Defendant's early guilty plea attracted the usual 25% discount, but no other subjective circumstances were given any weight or warranted any further reduction in sentence.

4. Specific sentencing principles taken into account included the fact that the Defendant had previously been convicted for polluting land in addition to his conviction for the Separate Offence. The principle of parity, or even-handedness, was considered in determining if a sentencing pattern for similar offences should be followed to ensure that a consistent approach to penalties would be applied by the Court.

5. The concept of double punishment was considered and held not to apply to the offences concerning the Falsified Documents and the Separate Offence as the elements were held to be distinct, nor to the Waste offence given the serious environmental harm that the deposition of the Waste had caused. However, the double punishment principle was applied to partially (but not fully) reduce the sentence given in respect of the Falsified Documents.

6. The principle of totality was applied to the Falsified Document offences only.

The Defendant was fined $112,500 for the offences concerning the Falsified Documents, $127,500 for the offence concerning the deposition of the Waste and was ordered to pay the Prosecutor's legal and investigative costs of $230,001 (with a 50% moiety ordered in respect

of the Prosecutor's legal costs). Publication order made in respect of each offence.

Reporter: Peter Clarke

(23-040) IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust v Special Minister of State [2022] NSWLEC 86

Duggan J - 15 July 2022

Keywords: Judicial review – failure to consider mandatory considerations pursuant to ss 32(1)(c) and (d) of the *Heritage Act 1977* – mandatory considerations not referred to in Minister's reasons for decision – whether inference that mandatory considerations not considered available – decision set aside

The proceedings concerned the decision on 31 May 2021 of the Special Minister for State ("the Minister") to direct the Heritage Council to list the MLC Building ("the Building") on the State Heritage Register.

On 1 September 2020 the Heritage Council resolved to give a notice of intention to consider listing the Building. In response, IOF Custodian Pty Limited atf 105 Miller Street North Sydney Trust ("the Applicant") made various submissions to the Heritage Council, the Minister and the IPC outlining its opposition to the listing of the Building, including referring to the mandatory considerations of s 32(c) and (d) of the ***Heritage Act 1977*** which required the Minister to consider whether the listing of the building would render the item incapable of reasonable or economic use (s 32(c)) and whether the listing would cause undue financial hardship to the owner or lessee of the item (s 32 (d)) (together, "the Mandatory Considerations").

In May 2021, the IPC provided a report to the Minister recommending that the Building be listed on the State Heritage Register, and on 31 May 2021 the Minister directed the listing occur. The State Heritage Council published the decision on its website along with a brief statement of reasons as required by s 34(4) of the Heritage Act. The reasons did not refer to the Mandatory Considerations.

HELD:

1. The Minister was required by the provisions of the Heritage Act to provide reasons for his decision that exposed the basis for his decision, including the weighing of competing interests. A finding that the Minister did not intend that the reasons fulfil that statutory obligation would require clear and compelling evidence.

2. The evidence did not establish that the Minister had in fact considered the mandatory considerations or that his published reasons were not intended to be a true statement of considerations taken into account in the decision making.

3. The Minister failed to take into account the Mandatory Considerations.

The Minister's decision to direct the listing of the MLC Building was declared invalid and set aside.

Reporter: Ellen Woffenden

(23-041) Jones v Stephenson [2022] NSWLEC 36

Duggan J – 4 April 2022

Keywords – Contempt – class 2 - tree dispute - failure to prune trees to specific height

The Applicants filed an Amended Notice of Motion which alleged that the Respondent failed to comply with Court orders requiring pruning of trees within a specified timeframe.

The pruning of three trees was to be carried out by April 2017, and required ongoing compliance and pruning.

The Applicants commenced contempt proceedings in 2020, at which time the Court determined that no conviction or penalty was warranted in the circumstances. Those circumstances includes personal qualities and difficulties experienced by the Respondent, the Respondent's deposed intention to prune the trees in the future, and as the Court found he was unlikely to reoffend.

During the course of the proceedings, the three trees the subject of dispute were removed by agreement of the parties.

However, the matter proceeded to hearing as the Applicants were dissatisfied due to the tree removal taking place two days after the date directed by the Court, the arborist supervised the tree removal but did not

undertake it himself, and the remnants remained located on the Respondent's land.

The Applicants did not appear at the hearing.
The Respondent appeared.

Whilst the Respondent did fail to comply with the orders in the original Class 2 proceedings, that did not warrant a conviction or order finding the Respondent in contempt of the Court, or the imposition of a fine or penalty.

Given the trees were removed, and ongoing compliance, the Respondent had been punished adequately.

HELD:

1. The Respondent was in breach of the Tree Order.
2. No finding of contempt.
3. It was necessary for the Applicant to commence the proceedings. The Respondent to pay the Applicant's costs of $311.65 for filing the proceedings.

Amended Notice of Motion dismissed.

Reporter: Serafina Carrington

(23-042) Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council [2023] NSWSC 262

Basten JA – 27 March 2023

Keywords: rates and charges – claim for recovery of rates - statute limiting recovery of rates – categorisation of land – restitutionary grounds – reasonable doubt as to correct court.

Mangoola Coal Operations Pty Ltd (Mangoola) and Muswellbrook Shire Council (Council) had been in dispute since 2018 about the categorisation of land adjacent to a mine (Land). On 15 September 2021 (after earlier proceedings in the Land and Environment Court (LEC) and the Court of Appeal) consent orders were filed in the LEC upholding the challenge by Mangoola to the categorisation of the Land for the financial years 2016/17 and 2017/18. The consent orders had the effect of recategorizing the Land to 'farmland' instead of 'mining' under the land categorisation regime in the ***Local Government Act 1993*** (LG Act).

Mangoola commenced proceedings to recover the difference between the rates it had paid assessed on a 'mining' categorisation versus the rates it should have paid assessed on a 'farmland' categorisation. Class 4 proceedings were commenced in the LEC where Mangoola claimed Council had breached Chapter 15 of the LG Act. Mangoola also brought a common law claim in the Supreme Court alleging that Council had received money that it was not entitled to retain, it having been paid to Council under a mistake of law. The LEC proceedings were transferred to the Supreme Court under s 149B of the ***Civil Procedure Act 2005***.

Mangoola argued that following the LEC consent orders, Council was required by s 527 of the LG Act to make an appropriate adjustment to the rates paid by refunding the amount of overpaid rates. It resisted the application of the ***Recovery of Imposts Act 1963*** (Imposts Act) asserting that the statutory claim made in the Class 4 proceedings did not involve 'restitutionary grounds' (being the type of claim potentially statute barred by s2(1) of the Imposts Act). It also contend that if the LG Act contained a provision allowing for the challenge to (and potential adjustment of) the impost that effectively involved a limitation period of other than 12 months, in which case s2(2) of the Imposts Act removed the application of the time limit in s2(1).

HELD:

1. Mangoola's claim was barred by operation of the Imposts Act. Proceedings cannot be brought to recover taxes (including rates) after 12 months from the date of payment, pursuant to s 2 of the Imposts Act (save for the application of s 2(2), which the plaintiff failed to satisfy).
2. For subs 2(2) of the Imposts Act to remove the time limit in subs 2(1), the provision relied upon to challenge the tax must also say something about the time limit within which proceedings for the recovery of the payment must be commenced.
3. Under s 527 of the LG Act, Council was under no obligation to provide a refund. It was only obliged to take steps involving the service of a notice which is required to affect an adjustment of rates (relying on *Bayside Council v Karimbla Properties (No 3) Pty Ltd* (2018) 99 NSWLR 66).
4. Rates were taxes for the purposes of the Imposts Act.

5. In circumstances where there was doubt about the correct court in which to proceed for recovery of overpaid rates, the commencement of separate proceedings in two different Courts was not an abuse of process.

Council was ordered to repay $68,000 (plus interest), being the amount of rates overpaid in the last 12 months only. The remainder of Mangoola's claim was dismissed and Mangoola was ordered to pay Council's costs in the common law proceedings.

The Class 4 proceedings transferred from the LEC were dismissed with costs.

Reporter: Alan McKelvey/Stephanie Miller

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