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NEW SOUTH WALES
LAND AND ENVIRONMENT COURT

(23-062) Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016 [2023] NSWLEC 62

Preston CJ – 9 June 2023

Keywords: judicial review – Aboriginal land claim – Minister's decision to grant claim – claimable Crown lands – whether land claimed was lawfully used or occupied – land leased and subleased – whether sub-lessee's use of land lawful – whether Minister misconstrued statutory provision of lease in deciding use not lawful – lessee's submissions objecting to land claim – whether Minister owed lessee procedural fairness to consider submissions – whether Minister shown to have failed to do so

The applicant, Quarry Street, sought to review the Minister's decision to approve the New South Wales Aboriginal Land Council's (**NSWALC**) claim to Crown lands known as the Paddington Bowling Club brought pursuant to s 36 of the *Aboriginal Land Rights Act 1983* (**ALR Act**). The land comprised bowling greens, a club house and tennis courts. The claim was lodged on 19 December 2016 and determined by the Minister on 10 December 2021.

The land was the subject of a lease granted to Paddington Bowling Club from 1 December 2010 for a term of 50 years. The lease had been assigned from the Bowling Club to CSKS Holdings Pty Ltd (**CSKS**) on 30 December 2011 and subsequently assigned from CSKS to Quarry Street, with the consent of the Crown by a Deed of Consent to assignment of Lease dated 1 February 2018 (**Assignment Deed**) which was registered on 24 April 2018.

Quarry Street raised three grounds of review. Quarry Street's first ground was that the Minister erred in deciding that the land was 'claimable Crown land' because the Minister formed the view that the land was 'not lawfully used or occupied' at the date of the claim. Section 36(1)(b) of the ALR Act provides that 'claimable Crown lands' for the purpose of s.36 must be lands that 'are not lawfully used or occupied' when a claim is made.

In making his decision, the Minister approved the recommendations made in a brief from the Aboriginal Land Claim Investigation Unit of the Department of Planning, Industries and Environment which included an analysis of the facts relevant to the land. The brief stated that evidence demonstrated that the land, excluding the tennis courts, was unoccupied at the date of the claim as the bowling greens and club house had not been used by the Bowling Club after it had assigned the Lease to CSKS on 30 December 2011 or by CSKS or Quarry Street after the assignments of the lease to them. The only part of the land in use was the tennis courts, which had been leased from CSKS to the Wentworth Tennis Club (Tennis Club) on or about 8 June 2015. The brief considered that the use of the tennis courts was not 'lawful' because CSKS had no lawful authority to permit the Tennis Club's use or occupation rights as s. 39(a) of the lease from the Crown to CSKS prohibited the parting of possession of the land except with the consent in writing of the Crown, which had not been given.

Quarry Street firstly submitted that the absence of owner's consent was inconsistent with a term of the Assignment Deed which provided that 'the Landlord covenants and agrees the Tenant was compliant with all its leaseholder obligations on and about 19 December 2016'. Quarry Street's second submission was that CSKS had not 'parted with possession' by permitting the Tennis Club's use and occupation of the tennis courts.

Quarry Street's second and third grounds concerned a submission made by the applicant that the Crown itself was lawfully using the land for the purpose of leasing (**Leasing Submission**). In the second ground, the applicant contended that the Minister erred in law by rejecting the Leasing Submission in that it was either not considered or considered and erroneously rejected (i.e. that the Minister proceeded on the basis that the lease of the land by the Crown could not constitute a relevant use).

The Leasing Submission was attached to the brief and tagged. The brief contained a list of attachments which included the Leasing Submission, which the Minister initialled. The Minister also circled the word 'Approved' and signed and dated the brief.

Quarry's Street's third ground was that it was denied procedural fairness if the Minister failed to consider the Leasing Submission.

HELD:

1. Rejecting ground one:

    a) Under ss. 36(1) and (5) of the ALR Act, the Minister's satisfaction that land was claimable Crown land is to be determined at the time the claim was made and must be formed on the evidence concerning the use and occupation of the land that existed at that date. The Crown's opinion in the Assignment Deed did not change the facts of what occurred at the grant of the lease to the Tennis Club and at the date of the claim.

    b) There are legal criteria to determine whether a person is a possession of land in law, but the first question is whether a person is in possession of land in fact. Possession in fact involves a relationship between the person and the land and can be evidenced by physical control, including actual use or occupation of the land, and being able to exclude others from using or occupying the land. The evidence of the Tennis Club was that CSKS permitted the Tennis Club to have exclusive use and management of the tennis courts in return for payment of rent.

2. Rejecting ground two:

    a) Applying *Stambe v Minister for Health* (2019) 2770 FCR 173 at [74], as a general proposition it is appropriate to infer that a Minister reads a briefing note with which they are provided, where that briefing note is intended to provide the Minister with sufficient information to make a decision about whether or how to exercise a statutory power. Sometimes there may be evidence which assists the drawing of such an inference, such as handwriting, however, such evidence is not necessary for the inference to be available and drawn. In the present case, the Minster's handwriting was evidence in support of the inference that he had read the Brief and all attachments, including the Leasing Submission; and

    b) Consideration of Quarry Street's alternative argument, that the Minister erred at law, did not arise as no evidence was adduced as to what the Minister's view of the Leasing Submission was.

3. Rejecting ground three:

    a) As per ground two, it was appropriate to apply the inference that the Minister had considered the Brief including all attachments; and

    b) There is no statutory requirement for the Minister to provide reasons for a decision under s. 36(1) or (5) of the ALR Act nor is there a requirement at common law to give reasons for administrative decisions.

Proceedings dismissed with costs.

Reporter: Joanna Ling

(23-063) Ogilvie v Rovest Holdings Pty Ltd [2023] NSWLEC 17

Moore J – 16 March 2023

Keywords: judicial review – statutory construction – moveable dwellings – definition of building - *ejusdem generis* principle – failure to consider mandatory matter – mandatory relevant considerations – invalid development consent

Rovest Holdings Pty Ltd (**Rovest**) lodged a development application with Blayney Shire Council (**Council**) seeking development consent for the use of the Blayney Bowling Club as a hotel or motel.

As part of the development application, Rovest sought approval from Council under section 68 of the ***Local Government Act 1993*** **(LG Act)** for the installation of prefabricated modular units to form the accommodation facilities for the motel. Council accepted that the modular units were 'moveable dwellings' under the LG Act and granted consent to the development application, including the section 68 application.

Mr Ogilvie commenced Class 4 proceedings challenging, amongst other things, the validity of the section 68 approval.

Mr Ogilvie's primary argument was that the modular units should be characterised as 'buildings', rather than 'moveable dwellings' under the LG Act. Mr Ogilvie's submission was that the terms 'other portable device' in subclause (a) of the definition of 'moveable dwelling'

in the LG Act was of the same genus or class as the preceding things in that definition, being any tent, caravan or other van. These things shared a common characteristic of modest size, and portability, which excluded the modular units.

Rovest argued that, properly characterised, the modular units were 'other portable devices' within the definition of 'moveable dwellings' in subclause (a) of the LG Act. Rovest submitted that the words 'other portable device' in this definition were very general words which were wide enough to include many shapes, sizes and dimensions. The words 'tent, caravan or van' contained in this definition could not be described as a genus with 'other portable devices' as there was no common characteristic.

If the moveable dwellings were characterised as 'buildings' as defined under the ***Environmental Planning and Assessment Act 1979*** **(EPA Act)** rather than 'moveable dwellings' as defined under the LG Act, Council would have failed to assess the development under the correct regime.

Grounds 2 and 3 of Mr Ogilvie's amended summons alleged that the Council failed to form the required state of satisfaction when assessing the mandatory relevant considerations under clause 6.2 and 6.8 of the ***Blayney Local Environmental Plan 2012*** (**BLEP**).

HELD:

1. The modular units were not 'moveable dwellings' under the LG Act because of key factors such as the lack of portability and intended permanence of the modular units and other structures on site.

2. The structures were classified as 'buildings' under the EPA Act and were required to be assessed in accordance with the EPA Act. The installation of the modular units could not be approved under section 68 of the LG Act.

3. Council's assessment report and the conditions of consent did not sufficiently address two of the mandatory relevant matters required to be addressed by clause 6.2 of the BLEP. This error of law meant that the development consent was invalidly granted.

4. A deferred commencement condition could be adopted by consent authorities to ensure that a development consent would not become operative unless all essential services were or would be available to a proposal for which development consent was sought. The imposition of this condition was sufficient to demonstrate that Council had formed the requisite state of satisfaction in considering clause 6.8 of the BLEP.

Moore J deferred consideration of the Court's power to grant discretionary relief and costs to a supplementary hearing.

Reporters: Katharine Huxley and Bribie Stansfield

(23-064) Ogilvie v Rovest Holdings Pty Ltd (No 2) [2023] NSWLEC 67

Moore J – 28 June 2023

Keywords: judicial review – discretionary relief – declaration of invalidity – rectifying invalidity – costs liability – apportionment of costs – submitting appearance save as to costs – cause of invalidity

The proceedings concerned the appropriate relief following a finding of invalidity of a development consent and activity approval for a motel development with modular accommodation units in *Ogilvie v Rovest Holdings Pty Ltd* [2023] NSWLEC 17, and the question of costs of those proceedings.

Mr Ogilvie's amended summons sought an order for declaratory relief, an order for the development consent to be set aside, a prohibitory injunction permanently restraining Rovest Pty Ltd (**Rovest**) from carrying out the works under the consent and a mandatory injunction requiring Rovest to demolish and remove all work carried out under the development consent. At the time Mr Ogilvie commenced the proceedings, construction of the modular units and structures on site was substantially advanced.

Rovest submitted that the Court should not grant the relief sought in Mr Ogilvie's amended summons, having regard to the factors informing the Court's exercise of discretion. These included that the breaches were 'technical breaches' and that Rovest was entitled, as a matter of law, to act on the consent and that Mr Ogilvie was aware that Rovest was acting on the consent but failed to take steps to seek interlocutory relief to restrain the work.

Mr Ogilvie's submissions included that the failure of

Council to assess the modules under the *Environmental Planning and Assessment Act 1979* and to consider stormwater matters carried a real potential for consequences from the resulting development. Mr Ogilvie submitted that an order requiring removal of the modules and demolition of works should be made, but could be made subject to an opportunity to regularise the use and works, within an appropriate time period.

As to costs, Rovest submitted that it and the Council should be jointly and severally liable for Mr Ogilvie's costs. The Council argued that the entirety of the costs burden of the proceedings should fall on Rovest. The Council had filed a submitting appearance save as to costs in the proceedings.

HELD:

1. It was entirely conventional for Rovest to be given an opportunity to regularise its development via an application for a building information certificate and a development application for the use of the site as a motel notwithstanding the declaration of invalidity of the consent.

2. The Council was liable for a portion of Mr Ogilvie's costs of the proceedings. The Council's error, in failing to consider all mandatory relevant matters, gave rise to a separate and sufficient basis upon which invalidity was established. Costs liability was triggered by the error in Council's processes.

3. The Council's liability for costs was not intended to punish the Council, but to acknowledge that the validity of this element of Mr Ogilvie's challenge arose as a consequence of the defect in the Council's assessment process.

4. The liability for costs can be apportioned between parties based on the extent to which issues arose which contributed to the complexity of a hearing and the extent to which the hearing concerned different issues. However, differential apportionment was not appropriate in the circumstances. The Council was not led into error by Rovest in the assessment of the application. The Court rejected the submission that the Council should bear less liability for the Applicant's costs.

5. The development consent declared was invalid and works carried out in reliance on the development consent were ordered to be demolished and removed from the site within six months from the date of the orders. However, the order for demolition was suspended until the Council determined the applications for a building information certificate and the use of the structures.

6. The Council and Rovest were jointly liable for Mr Ogilvie's costs, except for the costs incurred in relation to a further supplementary discretion hearing.

Reporters: Katharine Huxley and Bribie Stansfield

(23-065) Crush and Haul Pty Limited v Environment Protection Authority [2023] NSWLEC 60

Pritchard J – 8 June 2023

Keywords: Judicial review – integrated development – development consent granted – general terms of approval – application for environment protection licence – whether the Environment Protection Authority can be compelled to issue an environment protection licence – powers of approval bodies – fit and proper person – statutory interpretation – inconsistency between Acts – appeal dismissed

Crush and Haul Pty Limited (**Applicant**) sought a declaration from the Court that the Environment Protection Authority was required, by operation of s. 4.50(1) of the *Environmental Planning and Assessment Act 1979* to issue an environment protection licence (**EPL**) to the Applicant.

On 20 September 2022, the Applicant applied for an EPL under s. 53 of the POEO Act to carry out extractive activities at a quarry located at Dirty Creek. Development consent for these activities had been granted by the Northern Regional Planning Panel on 24 November 2020 to a separate entity, Rixa Quarries Pty Ltd (**Rixa**). The EPA was notified of the integrated development application and issued general terms of approval proposed to be granted in relation to the proposed development. The general terms of approval included condition A2.1 which provided that 'the applicant must, in the opinion of the EPA, be a fit and proper person to hold a licence under the Protection of the Environment Operations Act 1997, having regard to the matters in s. 83 of the Act'.

The Applicant was separately convicted of an offence against s. 48(2) of the POEO Act for failing to hold an EPL in relation to scheduled activities being undertaken at Corindi Quarry. The Applicant's director at the time, Mr Luke Cauchi, was also convicted of a related executive liability offence as he knew or ought reasonably to have known that the offence was being committed and he failed to take reasonable steps to prevent or stop the commission of the offence.

The EPA issued a notice of intention to refuse the Applicant's EPL application on the basis that it was not a fit and proper person. As the EPA had not determined the Applicant's EPL application within 60 days of it being made, the application was deemed to be refused, and the Applicant appealed.

The Applicant submitted that the purpose of the integrated development regime was to ensure consistency between the EPA Act and other statutory regimes, and that s. 4.50(1) operated as a 'one-stop shop' whereby all matters to be assessed are done so at the general terms of approval stage. It was further submitted that the provisions of the integrated development regime were designed to promote certainty for applicants by ensuring that the carrying out of development that has been granted development consent was not frustrated by the denial of and approval contained in s. 4.46(1) of the EPA Act at a later point in time.

The EPA submitted that the provisions of the EPA Act were to be read subject to the provisions of the POEO Act in the event of any inconsistency, pursuant to s.7(2)(a) of the POEO Act – 'this Act prevails over any other Act or statutory rule to the extent of any inconsistency' (**inconsistency provision**). The EPA also argued that the Applicant's construction of s. 4.50(1) would mean that the EPA would not be able to have regard to events that go to whether or not an applicant is a fit and proper person after general terms of approval were issued.

HELD:

1. The EPA was not required, by operation of s. 4.50(1) of the EPA Act, to issue an EPL to the Applicant. On the proper construction of s. 4.50(1), the granting of development consent for integrated development does not compel the EPA to issue an EPL to any entity, including that which applied for the development consent.

2. While the integrated development scheme in the EPA Act establishes a coordinated assessment and approval regime, the EPA exercises different powers in relation to decisions regarding the issuing of general terms of approval proposed to be granted by the EPA (s. 45(1) of the *Environmental Planning and Assessment Regulation 2021* (NSW)) and the issuing of an EPL pursuant to s. 45 of the POEO Act.

3. The EPA Act is to be read subject to the POEO Act where there is inconsistency. The POEO Act commenced after the integrated development regime in the EPA Act was established and the inconsistency provision provides that the POEO Act prevails over any other Act in the event of any inconsistency.

4. The Applicant's construction of s. 4.50(1):

   a) failed to engage with the inconsistency provision;

   b) gave the EPA's power to revoke an EPL in s. 79(5)(f) of the POEO Act on the grounds that a person is 'no longer a fit and proper person' no work to do. The provision contemplates a change in circumstances between the issue of general terms of approval and the circumstances existing at the time of the grant of approval. At the time that the general terms of approval were issued to the Applicant, the EPA was not privy to the EPL application and the Court had not convicted the Applicant of and offence under the POEO Act ;

   c) would give the EPA no scope to comply with its obligations regarding matters it must take into consideration when exercising its licensing functions, contained in s.45 of the POEO Act;

   d) was inconsistent with a regulatory authority's discretion to grant an EPL, conferred by s.55(1)(a)(i) of the POEO Act;

   e) would render nugatory the EPA's obligations under s. 45(f) of the POEO Act to take into consideration whether an applicant for an EPL is a fit and proper person, which is ; and

   f) would result in the EPA being bound to issue an EPL to an environmental offender because of the issue of a development consent.

5. Declaratory relief was refused on the basis that there would be no useful result as it was clear that the EPA would take steps to revoke any EPL it would be ordered to issue to the Applicant . In doing so, the EPA would not be exercising 'pre-judgment bias of the most extreme kind' or exercising this power 'capriciously' or 'unreasonably' [110]-[112].

Summons dismissed with costs.

Reporter: Lia Bradley

(23-066) Randwick City Council v Belle Living Pty Ltd [2023] NSWLEC 63

Pritchard J – 13 June 2023

Keywords: interlocutory injunction – draft heritage item – complying development certificate for demolition

The applicant Council sought to maintain an interlocutory injunction restraining the respondent from carrying out demolition works to a dwelling which was proposed to be listed as a heritage item under the Local Environmental Plan. The Court had granted an urgent application for an interlocutory injunction two working days prior. On that occasion, the Council gave the usual undertaking as to damages. On this occasion, the Council submitted that it should not continue that undertaking on the basis that the proceedings were brought in the public interest.

The demolition works were the subject of a Complying Development Certificate (CDC) which the Council sought to challenge the validity of on the basis that the dwelling was a 'draft heritage item' within the meaning of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Codes SEPP**).

Sections 1.17A and 1.18 of the Codes SEPP impose limits on the application of the complying development provisions in certain circumstances. In particular, s. 1.17A(1)(d)(iii) provides that complying development must not be carried out on land 'identified as an item of environmental heritage or a heritage item by an environmental planning instrument or on which is located an item that is so identified'. Section 1.18(1)(c3) provides that complying development must not be carried out on land 'that comprises, or on which there is, a draft heritage item'.

'Heritage item' and 'draft heritage item' were separately defined in s. 1.5 of the Codes SEPP. The Council contended that 'draft heritage item' should be interpreted to include heritage items which were the subject of a proposal to amend an LEP to list the item on which public consultation had concluded.

HELD:

1. The general principle justifying the grant of interim relief is the incidental power of courts to ensure the exercise of their jurisdiction. The applicant must satisfy the Court that making an order is best calculated to satisfy 'the requirements of justice' in the circumstances of the case.

2. The relevant principles to be considered in granting or refusing interlocutory relief are:

   i) whether there is a serious question to be tried or that the plaintiff has made out a prima facie case; and

   ii) whether the balance of convenience favours the granting of an injunction.

3. There was a serious question to be tried in relation to the validity of the CDC and the proper construction of the Codes SEPP.

4. The balance of convenience favoured the granting of the injunction because if the Council's position was correct, the CDC was liable to be declared invalid and demolition works could not be carried out in the absence of development consent .

5. The proceedings were brought in the public interest, having regard to s.4.2(3) of the *Land and Environment Court Rules 2007*, so the Council was not required to continue the usual undertaking as to damages.

Interlocutory injunction maintained. Consequential orders preparing the matter for substantive hearing made.

Reporter: Joanna Ling

(23-067) Li v Woollahra Municipal Council [2023] NSWLEC 1298

Registrar Froh – 14 June 2023

Keywords: Joinder application – statutory tests for joinder – interests of justice and public interest – timing of application – applicant's participation in planning assessment process and proceedings – discretion of the Court – application dismissed

The substantive proceedings involved the applicant's appeal against the Council's refusal of a development application for the demolition of two existing dwelling houses and the construction of a dwelling house, pool, landscaping and associated works in Vaucluse.

Following a mediation, section 34AA conciliation conference and hearing, the parties reached agreement pursuant to s.34 of the LEC Act with the Commissioner reserving their decision.

Two days after the agreement was entered into and whilst the judgment was reserved, Mr Wise, an objector and neighbour to the proposed development, filed a joinder application pursuant to s.8.15(2) of the EPA Act or alternatively, r.6.24 of the UCPR. The applicant in the substantive proceedings opposed the motion and the respondent Council neither consented to nor opposed the motion.

The applicant in the substantive proceedings submitted that the joinder application should be dismissed for three reasons. Firstly, that the motion was precluded by s.34(3) of the LEC Act. Secondly, that it was inconsistent with Preston CJ's decision in ***Morrison Design Partnership Pty Limited v North Sydney Council and Director-General of the Department of Planning*** **(2008) 159 LGERA 361; [2008] NSWLEC 802** that 'a mere dissatisfaction with the merit outcome of a determination by a consent authority does not entitle a person who objected to be joined as a party so as to be able to continue arguing its particular submission'. Thirdly, that the timing of the joinder application, whilst judgment was reserved, was contrary to the imperatives of 'just, quick and cheap' under s.56 of the *Civil Procedure Act 2005*.

Mr Wise submitted that if the test for joinder under s.8.15(2) of the EPA Act was not satisfied, joinder should be granted under r.6.24(1) of the UCPR.

HELD:

1. While the s.34 agreement had been filed, the Commissioner's decision was reserved and determination of whether or not the decision was one that could be made in the proper exercise of the Court's function had not yet been satisfied. The joinder application was therefore not precluded by s.34(3) of the LEC Act.

2. The test for joinder in s.8.15(2) of the EPA Act, which requires the Court to be satisfied that the applicant for joinder will raise an issue that is not likely to be addressed if that person were not joined or that it is in the interests of justice or the public interest to join that person as a party to the appeal, was not satisfied. Mr Wise's intention to further press Council's contentions (on view loss and compliance with the Woollahra DCP 2014) was not a necessary basis for joinder, and the additional contentions raised by Mr Wise, relating to view loss and compliance concerns, had been sufficiently addressed by way of response to contentions, submissions and amended materials. It was not necessary for Mr Wise to be joined in the interests of justice and the public interest as Mr Wise had been given many opportunities to express his concerns which had been sufficiently considered through the planning assessment process.

3. The Council and the applicant had engaged meaningfully with the Court's dispute resolution process. The fact that the parties reached an agreement was not analogous to the Court being deprived of a contradictor.

4. In addition to the test for joinder s.8.15(2) not being satisfied, and based on the same findings, Mr Wise was not someone who ought to have been joined to the proceedings pursuant to r.6.24 of the UCPR.

5. Although the Court found that s.8.15(2) and r.6.24 were not met and jurisdiction had not been enlivened, in circumstances where the Court would have exercised its discretion it would not have allowed the application for joinder on the basis of its timing. Mr Wise had actively participated in the planning assessment and dispute resolution processes and provided no meaningful reason for the timing of the joinder application, which had to be weighed against the prejudice that would be

caused to both parties in the proceedings. An order for joinder at this point in the proceedings would not have been consistent with the 'just, quick and cheap' resolution of the issues in dispute.

Motion for joinder dismissed.

Reporter: Lia Bradley

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