ENVIRONMENTAL LAW REPORTER

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NEW SOUTH WALES

COURT OF APPEAL

(24-105) Dibb v Transport for New South Wales [2024] NSWCA 157

Payne JA, Kirk JA and Stern JA – 28 June 2024

Keywords: compulsory acquisition – appeal made under s 57(1) of the *LEC Act*- leave to rely upon fresh evidence on whether expert evidence should have been inadmissible due to adversarial bias – whether expert joint conferencing conclave should have been judicially supervised – whether primary judge erred in applying s 56(1) of the *Just Terms Act* – whether primary judge erred in application of adjustments to comparable sales – cross-claim – whether stamp duty on a replacement property was available pursuant to s 59(1)(f)– Appellants' appeal dismissed – Respondent's cross-claim allowed.

Mr Raymond Dibb and Mrs Wendy Dibb (together, the **appellants**) appealed aspects of the Land and Environment Court's decision in *Dibb v Transport for New South Wales* [2023] LEC 114 (**Trial Decision**) pursuant to s 57(1) of the LEC Act. The Trial Decision arose out of Transport for New South Wales' (**TfNSW**) compulsory acquisition of the Appellants' property (**Acquired Land**) on 30 July 2021, and the Appellants' objection to the amount of compensation offered by the Respondent.
In the Trial Decision, the appellants were awarded $1,330,000 for the market value of the Acquired Land pursuant to s 55(a) of the Just Terms Act, and $57,717 for stamp duty on the purchase of replacement property pursuant to s 59(1)(f).

On appeal, the Appellants contended that:

1. **Ground 1:** The primary judge failed to comply with the requirements of s 56 of the Just Terms Act by not considering the perspective of both a hypothetical willing but not anxious vendor, and a hypothetical willing but not anxious purchaser.

2. **Ground 2:** The primary judge failed to comply with s 56(1) by not determining the potentiality of the land for its highest and best use when determining market value.

3. **Ground 3:** TfNSW's hydrology and valuation expert evidence should have been ruled inadmissible by the primary judge due to adversarial bias.

4. **Ground 4:** The appellants were denied procedural fairness by being threatened with "punitive consequences" if they varied their Points of Claim to rely on the then-recently decided decision in *G & J Drivas Pty Ltd v Sydney Metro* [2023] NSWLEC 20).

5. **Ground 5:** The appellants were denied procedural fairness by being precluded from relying on evidence that would have served to damage TfNSW's credibility and would have supported their case.

6. **Ground 6:** The primary judge's determination of market value contradicted an earlier finding in the Trial Decision as to the likely zoning of the Acquired Land.

7. **Ground 7:** The primary judge fell into legal error by reason of the joint conferencing conclave of the parties' valuation experts not being judicially supervised.

8. **Ground 8:** The primary judge fell into legal error by applying a location adjustment to a comparable sale.

9. **Ground 9:** The primary judge fell into legal error by not placing weight on a comparable sale on the basis that the comparable property was compulsorily acquired and its price was not the result of a negotiation.

The appellants filed a Notice of Motion pursuant to s 75A(8) of the *Supreme Court Act 1970* to rely on additional documentary evidence during the appeal that was not before the Court in making the Trial Decision.

In parallel, TfNSW filed a cross-appeal seeking to set aside the primary judge's award of compensation for stamp duty pursuant to s 59(1)(f), as the decision in *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5*)* had been decided since the Trial Decision, and had the effect of finding that an award of stamp duty is not available under s 59(1)(f).

HELD:

1. Dismissing the appellants' Notice of Motion to rely on new evidence:

    a) The appellants did not satisfy the Court that there were "special grounds" warranting the admission of further evidence, as required by s 75A(8) of the Supreme Court Act.

    b) The Appellants should not be permitted to rely on fresh evidence in support of contentions that it did not advance during the trial, or to support Ground 4 and Ground 5.

    c) In considering each document sought to be relied on, the Court found that several of the documents could have been made available to the Court during the trial. Several documents also post-dated the acquisition date, yet the relevance of those documents was not explained to the Court.

2. Dismissing the "procedural fairness" grounds (Grounds 4 and 5):

    a) The Court found that Ground 4 had no merit given that the decision in *Drivas* in the Court of Appeal. In any event, the appellants ultimately decided not to amend their Points of Claim during the trial. Whilst the appellants may have made what, for them, was a difficult decision, that did not mean that any form of duress was applied to the appellants by the primary judge.

    b) The appellants did not establish that they did not have a reasonable opportunity to be heard during the trial. The Court found that counsel's role is to apply their own forensic judgment in deciding what arguments should be run during a trial, and what material should be tendered. Evidence that was not pressed by the appellants' Senior Counsel was in the nature of evidence that would likely have low probative value.

    c) The appellants did not make any objection regarding the conduct of the valuer conclave to the primary judge. In any event, the appellants' valuation expert had the opportunity during his oral evidence at trial to correct any errors made in the joint valuation report.

3. Dismissing the "adversarial bias" ground (Ground 3):

    a) The appellants did not submit to the primary judge during the trial that TfNSW's expert hydrology and valuation evidence should be rejected on the basis of adversarial bias.

    b) Additionally, there was no evidence to suggest that either of TfNSW's experts had approached their task in a manner inconsistent with the Expert Witness Code of Conduct.

4. Dismissing Ground 7:

    a) There was no evidence before the primary judge that TfNSW's valuation expert had not complied with the Expert Witness Code of Conduct, nor did the appellants raise any compliant with the primary judge as to the conduct of the valuer conclave during the trial.

    b) In any event, the primary judge did not fall into error by accepting aspects of TfNSW's valuation evidence.

5. Dismissing Ground 1:

    a) The primary judge correctly identified that the relevant question that the Court was required to consider was what each of the hypothetical parties would consider was the applicable controls for the Acquired Land as at the Acquisition Date, to determine where the hypothetical parties would meet on market value.

    b) The hydrology issues were relevant to determining the risk that a hypothetical purchaser would attribute to the Acquired Land insofar as those issues limited the property's development potential. Conversely, the hypothetical vendor would simply seek to secure the highest amount for its property that a hypothetical purchaser would be willing to pay.

    c) Accordingly, the primary judge did not err in concluding that the risk arising from the

hydrology evidence was a matter determinative of what a hypothetical purchaser would pay for the property, and was therefore a matter that the hypothetical parties would have regard to when meeting on price, as required by s 56(1).

6. Dismissing Ground 2:

   a) In the Trial Decision, the primary judge stated that the appellants should be compensated on the basis of the property's highest and best use, being the most financially rewarding use legally permitted.

   b) The primary judge's preference for aspects of TfNSW's valuation expert's methodology over that of the appellants' did not mean that the primary judge did not value the property in accordance with its highest and best use.

7. Dismissing Ground 6:

   a) The Appellants' disagreement with the primary judge's valuation conclusion was outside of the Court's jurisdiction on an appeal made under s 57(1) of the LEC Act.

   b) In any event, the primary judge did not value the property on the basis that only 9% was zoned as low density residential (as contended by the appellants). Rather, the primary judge valued the property on the basis that it was, in its entirety, zoned low density residential. However, that finding did not mean that the entire land was developable when having regard to the hydrology and town planning constraints established in the expert evidence.

8. Dismissing the "comparable sales" grounds (Grounds 8 and 9):

   a) Adjustments to comparable sales made in the course of determining market value under s 56(1) did not amount to an error of law, and were therefore matters beyond the Court's jurisdiction in hearing an appeal made under s 57(1) of the LEC Act.

   b) In any event, the primary judge's acceptance of TfNSW's valuation expert's location adjustment to a comparable sale was properly based on available evidence.

   c) The primary judge did not fall into error by determining that a compulsorily acquired property was not a comparable sale to the Acquired Land, because the dispossessed landowner did not have to negotiate the price for its land (having accepted an offer made by the Valuer-General). There was no evidence before the primary judge as to why the dispossessed landowner had accepted that offer of compensation.

9. Allowing TfNSW's cross-appeal:

   a) The primary judge had relied *on the first instance decision in Drivas* in awarding the appellants compensation pursuant to s 59(1)(f). The subsequent finding in *Drivas* in the Court of Appeal that stamp duty is not compensable under s 59(1)(f) required that order made by the primary judge in the Trial Decision to be deleted.

Appellants' appeal dismissed and TfNSW's cross-appeal allowed. Appellants to pay the TfNSW's costs.

Reporter: Lily Whiting

(24-106) Piety Developments Pty Ltd v Cumberland City Council [2024] NSWCA 173; Piety Developments Pty Ltd v Cumberland City Council (No 2) [2024] NSWCA 196

Payne JA; Adamson JA, Griffiths AJA – 23 July 2024
Payne JA; Adamson JA, Griffiths AJA – 7 August 2024

Keywords: Contracts – specific performance – communication of acceptance – council resolution – application for a stay pending special leave

The Council owned land in Lidcombe. Two tenderers were invited to submit "best and final" offers for the purchase of that land.

At a Council meeting, the Council resolved to "accept" the offer made by the appellant and delegated authority

to the General Manager to execute the documents. That Council meeting was livestreamed, and unsigned minutes were published to Council's website the following day.

Following the meeting, a notice of motion for recission was lodged in respect of the Council's resolution. Consideration of that recission motion was deferred because Council was entering a caretaker period which prevented it from entering into the sale contract. Council also resolved to adopt and sign the minutes of the previous meeting which had 'accepted' the appellant's offer.

After the end of the caretaker period, the recission motion was added to the agenda for consideration at a Council meeting.

The appellant commenced proceedings in the Supreme Court seeking specific performance of the contract for sale, claiming that an enforceable agreement arose because Council had publicly resolved to accept their offer. The appellant also obtained an interim injunction restraining Council from taking action to rescind the resolution concerning the sale.

The matter was heard before Parker J at first instance, who dismissed the appellant's claim on the basis that (1) the contract was not legally effective because acceptance of the offer was not validly communicated to the appellant; and (2) the contract was otherwise unenforceable pursuant to s 54A of the Conveyancing Act 1919: see *Piety Developments Pty Ltd v Cumberland City Council (No 3)* [2023] NSWSC 1627.

Section 54A of the Conveyancing Act relevantly provides that no action or proceedings may be brought in respect of a contract for sale unless the agreement or memorandum or note is in writing and signed.

The appellant appealed to the Court of Appeal, claiming that the primary judge erred in finding that acceptance was not sufficiently communicated so as to constitute a binding and enforceable contract, and that the signed form of the minutes comprised a memorandum of contract for the purpose of s 54A.

The Court of Appeal dismissed the appeal, finding in favour of the Council. This had the effect of automatically discharging the injunction which had prevented the recission motion being considered by Council.

Following the delivery of the judgment, the appellant filed a motion seeking a further injunction preventing Council from taking action in respect of the recission motion, noting that the appellant had instructions to file an application for special leave to appeal to the High Court.

HELD:

In *Piety Developments Pty Ltd v Cumberland City Council* [2024] NSWCA 173:

1. Context is important in assessing the conduct and actions of parties in respect of a contract for sale. Consideration of the legislative and regulatory framework affecting Council decision-making is part of the relevant context, including express powers to rescind resolutions.

2. The passing of the resolution and publication of the unsigned minutes did not constitute communication by Council of its acceptance of Piety's offer. Although this position may have been different if there was evidence that an authorised person communicated the substance of these matters directly to Piety.

3. The signed minutes did not comprise a "memorandum or note" for the purposes of s 54A of the Conveyancing Act. The minutes were required to be signed under the LG Act, and at the time of signing, the recission motion had been lodged and was awaiting determination.

Appeal dismissed. Costs to follow the event.

In *Piety Developments Pty Ltd v Cumberland City Council (No 2)* [2024] NSWCA 196:

1. No question of public importance arises as part of the appeal, and there are no substantial prospects of special leave being granted.

2. There is no evidence as to whether the recission motion is likely to succeed, such that Piety cannot demonstrate that it will suffer prejudice if the stay is not granted.

3. In weighing the balance of convenience, it is relevant to take into account the public interest in the Council's timely discharge of its statutory and

legal duties. This extends to its consideration of the recission motion.

Motion dismissed. The appellant to pay the respondent's costs.

Reporter: Georgia Appleby

(24-107) oOhmedia Fly Pty Ltd v Transport for NSW [2024] NSWCA 200

Leeming, Kirk and Adamson JJA – 24 May 2024

Keywords: Compulsory acquisition valuation – leasehold interest in land improved by billboards – procedural fairness in rejecting "profit rent approach" valuation method – application of statutory disregard to unrealised improvements – claimed failure of jurisdiction – claimed failure to give reasons

The respondent compulsorily acquired the appellant's leasehold interest in land near Sydney Airport for the "Sydney Gateway" road project. The acquired land was improved by 18 roadside billboards.

At first instance, the appellant submitted that it had intended to digitise the billboards (**Digitisation Project**), which would have significantly increased the value of the land, but the Digitisation Project was suspended once it learned of the respondent's interest in compulsorily acquiring the land. It argued that, disregarding the public purpose in accordance with the ***Land Acquisition (Just Terms Compensation) Act 1991*** (JTA) s 56(1)(a), it would have proceeded with its Digitisation Project and the land should therefore be valued on the basis that the project had proceeded. This argument failed at first instance.

On appeal, the issues in dispute were whether the primary judge:

1. Denied the appellant procedural fairness in its rejecting of the "profit rent approach" to market value and its finding that there was no evidence to support the "profit rent approach".

2. Incorrectly applied the statutory disregard under JTA s 56(1)(a) in relation to the Digitisation Project.

3. In the alternative to (2), erred in not taking the potentiality of the Digitisation Project in assessing market value under JTA s 56.

4. Failed to give adequate reasons for rejecting the appellant's claim for a "tax gross-up" as either special value (JTA s 57) or a loss attributable to disturbance (JTA s 59(1)(f)).

HELD:

1. While important points ought to be raised in written submissions, Australian courts operate within an oral tradition. The appellant had the chance to respond through its own oral submissions, and there was no denial of procedural fairness no matter how brief the oral submissions made.

2. The factual matrix was not materially indistinguishable from *Sydney Metro v G&J Drivas Pty Ltd* [2024] NSWCA 5 in which the Court rejected the proposition that land should be valued on the basis that development would have been carried out but for a compulsory acquisition where the decision not to carry out the development was solely the decision of the owner because the causation test in the statutory disregard in s 56(1)(a) of the JTA could not be met.

3. The potentiality of the Digitisation Project, for the purposes of valuation, was not addressed by the appellant at trial. Its consideration would have necessitated a further hearing and evidence. The primary judge was entitled to refuse to allow that to occur.

4. The tax gross-up was rejected by the primary judge as part of his rejection of the appellant's special value claim. The appellant did not seek to claim the tax gross-up as part of its disturbance claim under JTA s 59(1)(f). The primary judge could not have failed to give reasons for a claim that was not formally made.

Appeal dismissed with costs.

Reporter: Rainer Gaunt

(24-108) Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd [2024] NSWCA 205

White JA, Adamson JA, Price AJA - 16 August 2024

The appeal related to a development consent granted by the Independent Planning Commission (**IPC**) for a state significant development application (**SSDA**) for an open cut silver, lead, and zinc mine (**Consent**), which the applicant had unsuccessfully sought to overturn in the LEC.

The key issue in the appeal related to a transmission line which was required to provide power to the mine, but did not form part of the SSDA as the Respondent intended to seek separate consent for it (likely via part 5 of the EPA Act). The applicant challenged the decision of the IPC on the basis that it had failed to consider all likely impacts of the proposed development as required under the EPA Act, given it did not consider the environmental impacts of the transmission line. The SSDA did not include information as to the likely or possible routes of a transmission line.

Duggan J dismissed the appeal in first instance, finding that the transmission line was not a part of a 'single development' under s 4.38(4) of the EP&A Act such that it was mandatory for the IPC to consider the environmental impacts of the transmission line or was required to be determined as part of granting the Consent and that s 4.38(4) is directed to determining whether or not development consent should be granted.

HELD:

The Court of Appeal overturned the decision of Duggan J, with White JA (Adamson JA agreeing) relevantly finding:

1. the 'single development' for the purposes of s4.38(4) was the proposed mine sought by the SSDA, of which the transmission was a component which was integral to the operation of the mine [17], [54], [55];

2. Duggan J was in error regarding the purpose of s 4.38(4) - its purpose is to require a consent authority to determine development that would not otherwise require development consent under Div 4.7 of the EP&A Act, if it is part of a single development that does require such consent [61]; and

3. the mine would require electrical power to be delivered via an off-site transmission line, so its likely impacts were a mandatory consideration under s 4.15(1)(b) of the EP&A Act [24], [71]. Duggan J was right in saying that the likely route of the transmission line could not be determined on the material presented to the IPC – this was because the Respondent did not provide the information [73].

Set aside orders made by LEC, and in lieu thereof, order that the Consent is void and of no effect.

Reporter: Lee Cone

> ***Editor's Note*** *– A Bill was introduced to Parliament on 16 October 2024 which sought to amend s4.38 to allow the Planning Secretary to determine whether particular development does or does not form part of a 'single proposed development'. The Legislative Assembly Second Reading Speech notes that the proposed amendment responds to the decision in this case, and seeks to remove uncertainty. The Environmental Planning and Assessment Amendment (State Significant Development) Act 2024 was passed on 21 November 2024 and assented to on 2 December 2024.*

(24-109) Cameron v Woollahra Municipal Council [2024] NSWCA 216

Pain JA, White JA and Price AJA – 3 September 2024

Keywords: Judicial review – extension of time to review certifier's decision to issue construction certificate – decision to issue construction certificate was legally unreasonable – effect of jurisdictional error on validity of construction certificate

The appellants lodged a modification application seeking to modify a development consent approving the demolition of an existing structure and construction of a three-storey house by (among other things) including a cellar level in the approved development. The modification was granted but removed the cellar level and specified that the area that was proposed to be the cellar

level must remain unexcavated. A construction certificate was subsequently issued permitting the installation of a crane and excavation in the cellar level area.

At first instance, the first respondent was granted an extension of time under r 59.10 of the UCPR to seek judicial review of the certifier's decision to issue the construction certificate. The primary judge found that the modified development consent prohibited excavation in the cellar level area and that the construction certificate was inconsistent with the modified development consent. The decision to issue the construction certificate was held to be legally unreasonable and those parts of the construction certificate relating to the cellar level area were declared invalid.

The key issues on appeal were whether the decision to issue the certificate was legally unreasonable and whether the certificate was invalid as a result. The appellants argued that there was a clear and reasonable justification for the certifier's decision having regard to the terms of the whole of the development consent and that, in any event, legal unreasonableness did not necessarily result in a finding of invalidity in these circumstances relying on *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404.

The appellants also contended that the extension of time should not have been granted having regard to the public interest in certainty/finality of decisions to issue construction certificates, as well as the fact that there was sufficient time for the first respondent to commence proceedings.

HELD:

1. The primary judge did not err in granting an extension of time. Generally, extensions of time for judicial review of decisions to issue construction certificates should not be granted lightly, however, the absence of any evidence of prejudice to the appellants by the extension of time in the present case was striking.

2. Inconsistency between a development consent and a construction certificate does not automatically establish that the decision of the certifier to issue a construction certificate was legally unreasonable. The proper question is whether a certifier, acting rationally, could have come to the same conclusion, having regard to the development consent as a whole. The answer to this question was no, as the development consent clearly prohibited the excavation and there was no basis upon which the certifier could reasonably conclude that the excavation was necessary for the construction of the house.

3. The usual consequence of a finding of a jurisdictional error, where the materiality of such error is not called into question, is that the decision is invalid. Jurisdictional error having been found, the impugned decision was void, at least in part.

Appeal dismissed with costs.

Reporter: Jessica Noakesmith

NEW SOUTH WALES

LAND AND ENVIRONMENT COURT

(24-110) C-Corp Nominees Pty Ltd v Inner West Council [2024] NSWLEC 65

Preston CJ - 26 June 2024

APPEAL – appeal of questions of law – Commissioner's refusal of development consent for development in a heritage conservation area – development of a negative detraction and non-contributory element in DCP – incorrect assessment by Commissioner – error not established

The Appellant appealed against the decision and orders of the Commissioner to refuse a development application for development in a heritage conservation area under s 56A(1) of the *Land and Environment Court Act 1979*. The Appellant argued that the Commissioner had erred in several ways in her consideration of the Development Control Plan (DCP) in its application to the Heritage Conservation Area (HCA). The Appellant raised the following grounds:

1. **Ground 1** – Incorrect interpretation: The Commissioner wrongly determined the development

application by not considering and applying the provisions of Chapter E-1 of the DCP concerning detracting buildings. The development was classified by the Federal Fyle HCA Character Statement as being a detracting building, but the Commissioner did not accept this characterisation.

2. **Ground 2** – The Commissioner exceeded her jurisdiction: The Commissioner failed to consider the building's classification as a detracting building as a fundamental factor. The Commissioner should have accepted the classification and applied the relevant rules corresponding to that classification under the DCP.

3. **Ground 3** – Failure to apply the correct classification: The Commissioner ignored the building's assessment as a non-contributory element, resulting in the Commissioner failing to consider the relevant issues in the case.

4. **Ground 4** – Miscarriage of justice: By disregarding the Character Statement's classification of the building as a non-contributory element, the Commissioner's assessment of the impact of the building's demolition on the heritage significance of the Federal Fyle HCA constituted a miscarriage of justice.

5. **Ground 5** – Error of law: The Commissioner's finding about the cursory nature of the heritage study was unsupported by evidence.

HELD:

1. The Commissioner correctly identified that the building, constructed in 1885, falls within the Key Period of Significance for the HCA (1879 to 1940s), and therefore does not meet the definition of a detracting building, which pertains to structures built outside this period. The Commissioner appropriately moved away from applying the provisions related to detracting buildings, as these would not apply to a building that is not genuinely detracting.

2. All grounds of appeal were rejected, with the Commissioner correctly determining that the demolition of the building would adversely affect the heritage significance of the Federal Fyle HCA. Ground 5, which criticised the Commissioner's description of the heritage study as "cursory", was also dismissed as not materially affecting her legal conclusions.

Appellant's appeal was dismissed with costs.

Reporter: Bamidele Emmanuel Akinyemi

Editor's Note: *This report is being reprinted due to a printing error in the last edition of the ELR.*

(24-111) Maules Creek Community Council Incorporated v Environment Protection Authority [2024] NSWLEC 71

Preston CJ – 18 July 2024

Keywords: Environmental protection licence – statutory requirement for review of licence - consideration of whether licence holder fit and proper person – considerations of impact of pollution and practical measures to mitigate pollution and environmental harm - inferences from licence review record – proceedings dismissed

The applicant brought proceedings under s 252 of the POEO Act seeking a declaration that the EPA exercised its functions to review the environmental protection licence (**EPL**) at Maules Creek Coal's mine in breach of s 45 of the POEO Act. Section 45 of the POEO set out the matters the EPA was required to take into consideration in reviewing the EPL. The applicant also sought an order that the EPA re-exercise its function to review the EPL, having regard to the matters required by s 45. The review of the EPL was undertaken on 2 June 2023 by an officer of the EPA who completed a licence review record (**LRR**).

The applicant alleged that s 45 of the POEO Act had been breached in three different ways. Grounds 1 and 2 concerned the EPA's alleged failure to consider whether the pplicant was a fit and proper person under s 45(f) and s 83(2). Ground 3 concerned the EPA's alleged failure to consider the pollution caused or likely to be caused by the carrying out of the activities licensed by the EPL, including the likely impact of that pollution on the environment, and the practical measures that could be

taken to prevent, control, abate or mitigate that pollution to protect the environment from harm, resulting in breaches of s 45(c) and (d).

The EPA as first respondent entered a submitting appearance. The second respondent (Maules Creek Coal Pty Ltd) submitted the applicant was precluded from challenging the EPL by the privative clause in s 78(5) of the POEO Act.

HELD:

1. Proceedings could be brought by the applicant under s 252. The phrase "the requirements of this section" in s 78(5) only refers to the requirements expressly stated in subsections (1) to (4A) of s 78. A failure to comply with the requirement in s 45 to consider the matters in s 45 in the exercise of functions under s 78 is a breach of s 45.

2. All three grounds were not established. It was found reasonable to infer:

    a) the LRR was neither intended nor required to be a statement of reasons;

    b) the officer had regard to various documents and information, including the required internal regulatory procedures and guidelines, EPA's case management systems and the licence itself. Consideration of all materials necessarily involved consideration of s 45(f) and s 83(2);

    c) the officer was aware of, and had regard to, the contextually heightened regulatory, compliance and enforcement actions associated with this ELP;

    d) the officer could find current conditions adequately addressed matters in s 45, so it was not appropriate to recommend variations or impose new conditions;

    e) either industry-wide or licence-by-licence review under s 78 are appropriate. The fact that the officer chose not to recommend a licence variation did not mean they failed to consider the pollution caused by the mine or potential practical mitigation measures ; and

    f) the officer was aware of the new EPA climate change policy and climate change action plan. These provide for the staged regulatory approach of licence variations through implementing practical measures to achieve reduced emission targets.

Proceedings dismissed.

Reporter: Isabelle Alder

(24-112) Burns v Regional Growth NSW Development Corporation; Evans v Regional Growth NSW Development Corporation [2024] NSWLEC 73

Pain J - 18 July 2024

CIVIL PROCEDURE - Legal professional privilege – claim of advice privilege over Department emails - insufficiency of proof of privilege - discretion to inspect documents under s 133 of the *Evidence Act 1995 (NSW)*

The applicants in two Class 3 compulsory acquisition matters issued subpoenas to the Department of Planning, Housing and Infrastructure (**DPHI**) for document production. DPHI claimed legal professional privilege over two categories of documents comprising two pages of emails between a principal legal officer and a DPHI officer. DPHI declined to provide an affidavit supporting its privilege claim, instead relying on a table describing the contents of the email chain. DPHI submitted that no affidavit was necessary to support its privilege claim and invited the Court to inspect the documents in accordance with s 133 of the *Evidence Act 1995*.

The applicants argued that the evidentiary basis for claiming privilege had not been established and relied in that regard on *Hancock v Rinehart* [2016] NSWSC 12 (per Brereton J) and *Rinehart v Rinehart* [2016] NSWCA 58 (which upheld Brereton J's approach).

The Court found that DPHI had failed to provide any evidence to substantiate and test its claim of legal professional privilege. As was held by Brereton J in *Hancock*, a claim for legal professional privilege must be supported by admissible direct evidence. The email

correspondence between solicitors was insufficient to establish privilege, as it was essentially hearsay and could not be tested by cross-examination.

HELD:

1. A claim for legal professional privilege must be supported by admissible direct evidence.

2. Unsworn email correspondence between solicitors was insufficient to establish privilege.

3. The broad assertion of privileged content in a table, without supporting evidence, was inadequate.

4. The Court's discretion to inspect documents pursuant to s 133 of the Evidence Act should not be exercised without a proper evidentiary basis. Relying on the presiding judge to exercise their discretion to inspect the documents in issue was not an appropriate approach to establishing legal professional privilege.

5. Reliance on s 56 of the *Civil Procedure Act 2005* could not overcome the requirement to provide evidence that can be tested to establish a claim of privilege.

The Court granted General access to subpoena packets s-14 and s-13.

Reporter: Bamidele Emmanuel Akinyemi

(24-113) Whites Beach Investments Pty Ltd v Byron Shire Council [2024] NSWLEC 75

Pain J – 25 July 2024

Keywords: Development consent – lapsing of consent – adequacy of evidence of physical commencement – declaration where no contradictor

The applicant sought declaratory relief that a development consent for the erection of a dwelling issued on 16 October 1978 (**1978 Consent**) had not lapsed as it had been physically commenced prior to the date it was to lapse under the legislative provisions in force at that time.
Development was commenced when "building, engineering or construction work relating to that development was physically commenced on the land to which the consent applied" (per s 99(2)(a) for the purpose of s 99(1)(a) of the EPA Act).

To demonstrate the 1978 Consent had been physically commenced, the applicant relied on affidavit evidence annexing various documents identified on the Council file to draw an inference, on the balance of possibilities, that building, engineering or construction work had been commenced on the land prior to the lapsing date (being 1 September 1982) to physically commence the consent. Specifically, the work relied on included fill being placed on the site prior to 1984, an electricity pole being erected on the land and electricity connected to the land, and water being connected.

Council filed a submitting appearance so there was no proper contradictor. As such the applicant bore the onus of demonstrating that declaratory relief was appropriate and the onus of establishing the factual basis for making the declarations sought.

HELD:

1. It is appropriate to make a declaration in the absence of a contradictor if a basis is established, adopting Pritchard J's observations in *PAG Services Pty Ltd v Byron Shire Council* [2023] NSWLEC 40 at [72] – [83].

2. As the 1978 Consent was deemed by the commencement of the EPA Act to have commenced on 1 September 1980, section 99(1)(a)(i) applied such that the 1978 Consent would have lapsed had it not been physically commenced two years after the date it was deemed to be a consent under the EPA Act, being 1 September 1982.

3. As to fill, the applicant did not discharge its onus by inference on the balance of possibilities that the fill was in place before 1 September 1982. There was no indication provided in the Council file or in any other material relied on by the applicant to establish when fill was placed on the land in the period between the grant of the 1978 Consent and Council's report prepared around 5 July 1984.

4. As to water, the applicant did not discharge its onus of proving the supply of water gave rise to physical commencement in the relevant period.

5. As to electricity, the applicant did establish by inference that the electricity pole was built before 1 September 1982. Given the 1978 Consent approved a country dwelling for which electricity would be needed, the erection of the electricity pole was construction work for the purposes of the 1978 Consent, was not a sham and could be relied on for the purposes of s 99(2)(a) to establish physical commencement.

6. The applicant can only rely on work which was carried out lawfully at the relevant time: *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc* (1992) 81 LGERA 132.

7. In relation to whether the erection of the electricity pole was lawful, the works should be presumed to be lawful absent any evidence to the contrary. Whilst there were no submissions about the legal regime which applied to the electricity supply at the time, Council's recognition that electricity was connected and no issues were identified in any of the correspondence or reports suggested the presumption can be relied on for this purpose and there was no breach of the 1978 Consent.

Court made a declaration that the 1978 Consent was physically commenced.

Costs reserved.

Reporter: Ashleigh Egan

(24-114) Lo v Sutherland Shire Council [2024] NSWLEC 76

Pain J - 26 July 2024

Keywords: Class 1 appeal - review of decision of Senior Deputy Registrar granting leave to council to rely on expert evidence - no error of law made out - interests of justice did not require decision to be set aside - motion dismissed

Ms Lo was the self-represented applicant in Class 1 proceedings appealing the refusal by the respondent, Sutherland Shire Council, of a modification application concerning a property at Menai in relation to which a development consent was granted in 1998. On 9 July 2024, the applicant filed a notice of motion seeking review of a decision of the Senior Deputy Registrar on 21 June 2024 granting leave to the Council to rely on a specified town planning expert in relation to Contention 1 of Council's Statement of Facts and Contentions. Contention 1 contended that the Modification Application was not substantially the same as the 1998 development consent, but in fact was "radically different".

The applicant argued that there was an error of law in the Deputy Registrar not specifying which particulars in Contention 1 the expert should address, and that this also constituted a denial of procedural fairness. The Senior Deputy Registrar had the benefit of the Statement of Facts and Contentions and the Statement of Facts and Contentions in Reply, which the applicant argued was insufficient information upon which to base the decision. In the alternative to an order setting aside the Senior Deputy Registrar's decision, the applicant sought an order for a parties' single expert to be appointed.

HELD:

1. The onus is on the person seeking review of a Registrar's decision to make out that it is in the interests of justice for the Court to intervene.

2. The decision was one of practice and procedure and, therefore, the applicant was required to demonstrate both an error of law, and that it was in the interests of justice to set aside the decision.

3. No error of law was established. There was no requirement for the Senior Deputy Registrar to specify the topics that the expert was to address. It was a matter for the parties to put before the Court the matters they wish to be considered in the matter. No denial of procedural fairness was made out.

4. The appeal involved questions of mixed fact and law and expert evidence was appropriate. It was not appropriate to appoint a single expert as doing so would likely require the hearing dates to be vacated and would not be in the interests of the just, quick and cheap resolution of the appeal.

Appeal dismissed with costs reserved.

Reporter: Ellen Woffenden

(24-115) Mid-Coast Council v Gazecki [2024] NSWLEC 88

Pain J – 20 August 2024

Keywords: Procedure – undertaking – release from an undertaking and acceptance of new proposed undertaking – new undertaking not agreed by applicant

The first and second respondent (**Respondents**) constructed three dams on rural land that they owned. The applicant Council commenced Class 4 proceedings seeking declarations and an order that the Respondents submit a landform restoration plan for Dam 1 in accordance with a restore works order. The second respondent commenced Class 1 proceedings appealing a development control order (**DCO**) issued by Council in relation to the dams.

On 15 April 2024:

- the Respondents gave an undertaking (**Undertaking**) in the Class 4 proceedings for certain interim works to be done to Dam 1; and
- the Court made orders by consent in the Class 1 proceedings to stay the DCO in relation to Dam 1, subject to the Respondents' compliance with the Undertaking.

The Respondents filed a Notice of Motion seeking to vary the Undertaking, which was to be heard on 16 August 2024. The Undertaking required certain things to be done by 1 August 2024, which had not been completed. On the morning of 16 August 2024 (before the Notice of Motion was heard) and without leave, the Respondents provided the Court and Council with an amended notice of motion (**Amended Notice of Motion**) and multiple affidavits, seeking an order that the Respondents be released from the Undertaking and proposing a new undertaking. The amendments to the Undertaking included amendments to provide that the Respondents can carry out works after receiving confirmation from a contractor that it is suitable for those works to commence and introducing a mechanism for extensions of time if circumstances arise which prevent the continuation or completion of the required works.

The Respondents submitted that their failure to comply with the Undertaking was due to wet weather which prevented work being undertaken in July and August 2024. The Respondents' earthworks contractor deposed that after an initial inspection in July, the conditions on the land were unsuitable due to rainfall for the rest of the month.

The Council submitted that the Undertaking should be maintained and the work undertaken as soon as possible as it reflected an agreement between the parties as to the management of the Class 4 and Class 1 proceedings.

HELD:

1. The proposed amendments to the new undertaking as set out in the Amended Notice of Motion are unenforceable and too vague. The proposed amendment leaves the commencement of the required works in the hands of a contractor (as opposed to commencement upon receipt of approval from the Council), which is not enforceable, while the mechanism for extensions of time is unnecessarily complex and would result in additional, unnecessary work for the Council to administer. Even if the Respondents discharged their onus to establish that the Court should exercise its discretion to make the orders sought, the proposed undertaking is too vague.

2. While the Council accepted that the Court had the power to release the Respondents from the Undertaking and accept a new undertaking, even where not agreed, the Council accepted the Undertaking on the basis that it would manage the Class 4 and the Class 1 proceedings. The Council agreed to stay the DCO in relation to Dam 1 in the Class 1 proceedings on the basis of the Undertaking.

Amended Notice of Motion dismissed and costs reserved.

Reporter: Lia Bradley

(24-116) Liverpool City Council v Minister for Local Government and Ors [2024] NSWLEC 94

Robson J– 2 September 2024

Keywords: administrative law – judicial review – procedural fairness – bias or apprehended bias – improper purpose – jurisdictional error affecting later decisions – interim report – public inquiry

The second respondent, Brett Whitworth, in his capacity as delegate of the Chief Executive, Office of Local Government determined that there should be an investigation under s 430 of the *Local Government Act 1993* into certain aspects of the Council's work and activities relating to recruitment matters.

The second respondent prepared and signed an Interim Report containing allegations against Council, its councillors, the Mayor and employees. With the exception of one or two individuals, none of the individuals identified or identifiable in the Interim Report were notified of the allegations.

A briefing note attaching the Interim Report was provided to the first respondent, the Minister for Local Government (the Minister). The Interim Report contained a recommendation that a public inquiry under s 438U of the LG Act be held.

The Minister appointed the fourth respondent, Ross Glover, in his capacity as Commissioner of a Public Inquiry into Liverpool Council to hold a public inquiry into the conduct of Council and issued a notice of intention to issue a suspension order to Council.

The Council commenced Class 4 judicial review proceedings seeking declaratory and consequential injunctive relief.

The respondents conceded that the making of the Interim Report involved a denial of procedural fairness and removed the Interim Report from the OLG website soon after the proceedings were commenced.

The remaining issues were:

1. whether there was power to make the Interim Report;
2. whether the Interim Report was affected by unreasonableness and actual and/or apprehended bias;
3. whether the Minister's decision to appoint a public inquiry was in breach of the LG Act because it was based on an extraneous and irrelevant consideration being the Interim Report; and
4. whether the Minister's decision to appoint a public inquiry was affected by unreasonableness and actual or apprehended bias.

HELD:

1. The power to make a report is a non-statutory power which is a necessary incident of the system of responsible government[80]. The Minister had the power to make and publish the Interim Report [110].
2. The Minister's decision to convene the public inquiry was not invalidated by the Interim Report. The validity of the Interim Report is not a statutory precondition to the exercise of power to convene a public inquiry under s438U of the LG Act [94]. Even if the Interim Report could be described as a 'nullity', it continued to exist in at the time the Minister made the decision to appoint the public inquiry.
3. Although the Interim Report made findings based upon an incomplete investigation, it was provided by the OLG to the Minister for the purposes of informing the Minister of a number of serious concerns. This conduct was not indicative of unreasonable conduct [87].
4. Neither the decision to publish the Interim Report nor appoint the public inquiry were affected by actual or apprehended bias [97]. There was no actual bias nor action that gave rise to the reasonable apprehension of bias on the part of the hypothetical reasonable observer.

Declaration made that the Interim Report failed to observe the requirements of procedural fairness.

Amended summons otherwise dismissed.

Reporter: Joanna Ling

NEW SOUTH WALES

SUPREME COURT

(24-117) Shepherd v Eurobodalla Shire Council [2024] NSWSC 1112

Rothman J – 29 August 2024

Keywords: Administrative Law – Judicial Review – Council decision to approve plan that identified the boundaries of a public road – certiorari ordered

Eurobodalla Shire Council (the Council) purported to approve a survey plan identifying the boundaries of a public road traversing land owned by the plaintiff. The plaintiff challenged this decision of the Council, arguing it was *ultra vires* s 21(1) of the ***Roads Act 1993*** (Roads Act).

There was a reserved road shown on the Crown Plan for the plaintiff's property (the "Paper Road") which had never been constructed. The Paper Road intersected with a gravel track (the "Track") which also traversed the property. The plaintiff had carried out construction works on the Track and had permitted members of the public to use it from time to time. The Council had previously resolved to transfer the Paper Road to the plaintiff, and "to identify the boundaries of the Public Road over the formed 'track in use'". The Survey Plan subsequently prepared on instruction from the Council depicted a road (the "New Road") over the same route as the Track.

The parties' submissions centred around the interpretation of Part 3, Div 1 of the Roads Act, concerning identification of the boundaries of public roads, under which the Council had caused the Survey Plan to be prepared.

The plaintiff argued that a statute should be construed strictly when to do so otherwise would interfere, to a greater extent, in the private property rights of the plaintiff. He submitted that the provision applied only to existing public roads, which the Track was not. Nor was the Council seeking to identify the boundaries of the Paper Road.

The Council relied on s 249 of the Roads Act to argue that the Track was a public road, as it had been used as a public thoroughfare since at least 1961. The Council also contended that the Track was a public road by virtue of it being a physical "approximation" of the Paper Road.

The Court found that there were essentially two key factual issues:

1. Was the New Road shown on the Survey Plan an approximation of the Paper Road that was reserved to the Crown?

2. Or alternatively, was the existence of the Track and its use by the public evidence from which the Court could be satisfied that the Track was opened or dedicated as a public road?

HELD:

1. It was clear on the evidence before the Court that there was a significant difference between the route taken by the Paper Road and the route proposed in the New Road.

2. The New Road approximated the Track, but could not reasonably be regarded as an approximation of the Paper Road.

3. The Track had never been opened or dedicated as a public road, despite its use by both pedestrians and vehicles. Part 3, Div 1 of the Roads Act is concerned with surveys for existing public roads.

4. Section 249 of the Roads Act is an evidentiary rather than substantive provision. The test as to whether a road is a "public road" is determined by whether the thoroughfare meets the definition in the Dictionary to the Act.

5. The Roads Act did not provide the Council with the authority to do as it had proposed. The Council was required, pursuant to the Act, to acquire the land under Part 12 before the land could be dedicated as a public road.

6. The process utilised by the Council in seeking to define the New Road was not open to it, and the decision was invalid.

Order of *certiorari* issued, quashing the decision of the Council of 21 November 2023.

Council restrained from registering the Survey Plan.

Order of prohibition enjoining the Council from treating the aforesaid decision as valid and enabling works or other conduct on the allegedly depicted road.

Defendant to pay the plaintiff's costs of and incidental to the proceedings.

Reporter: Georgie Cooper

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