ENVIRONMENTAL LAW REPORTER

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NEW SOUTH WALES

COURT OF APPEAL

(24-087) Boensch v Transport for NSW and Registrar General of New South Wales [2023] NSWLEC 82; Boensch v Transport for NSW [2024] NSWCA 86

Robson J – 28 July 2023
Leeming JA – 17 April 2024

Keywords: Summary dismissal – Security for costs – compliance with procedural directions – costs already incurred

The Applicant owned land in Rydalmere which shared a boundary with Subiaco Creek, being land owned by Transport for NSW (**TfNSW**).

The location of the common boundary was disputed by the Applicant who applied to the Registrar General for boundary determinations under Part 14A of the *Real Property Act 1900*.

The Registrar General refused to make the boundary determinations and the Applicant commenced proceedings in Class 3 of the Land and Environment Court appealing against those decisions. TfNSW and the Registrar General were named as First and Second Respondents in those proceedings.

TfNSW and the Registrar General each filed a notice of motion seeking summary dismissal, contending that the proceedings were frivolous or vexatious, did not disclose a reasonable cause of action, and were otherwise an abuse of process.

The Court upheld the motions and the proceedings were dismissed on the basis that the application did not disclose a reasonable cause of action and in particular because the Applicant had no right of appeal in Class 3 of the Court's jurisdiction.

The Applicant then commenced proceedings in the Court of Appeal seeking leave to appeal from the interlocutory judgment dismissing the proceedings. However, a notice of intention to appeal was not filed in time, and the subsequent filing of the notice of appeal was similarly filed out of time.

TfNSW filed a motion seeking to have the appeal dismissed as incompetent on the basis that no application had been made by the Applicant for an extension of time and the appeal had insufficient prospects of success to warrant the extension of time. TfNSW also sought security for costs on the basis of the Applicant's relative impecuniosity.

While TfNSW's motion was filed six weeks before the appeal was listed for final hearing, the motion was only heard 5 business days before the final hearing. By that time, the appeal was ready for hearing except that the Respondents had not filed their submissions.

The Court was not satisfied that TfNSW's motion should be granted, in circumstances where it would deny the Applicant his entitlement to have his appeal heard the following week, and where TfNSW had not filed its motion sufficiently promptly or complied with the Registrar's directions to supply submissions. Security for costs was also refused.

HELD:

1. Applications for security for costs should be made promptly.

2. Orders for security for costs generally relate to costs to be incurred into the future. While the Court may in the exercise of its discretion order security for costs already incurred, it is ordinarily unfair to do so, which is why such applications must be sought and made early in the proceedings.

3. In considering an application for summary dismissal, the Court can consider the conduct of both parties, including non-compliance with procedural directions.

TfNSW's motion is dismissed. Costs to follow the event.

Reporter: Georgia Appleby

(24-088) Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016 [2024] NSWCA 107

White, Adamson, and Stern JJA – 10 May 2024

Keywords: Aboriginal Land Rights Act – meaning of "claimable Crown lands" – meaning of "lawfully used or occupied" – whether leasing land by the Crown is a "use" of land (even without physical use by the tenant)

Quarry Street Pty Ltd leased land from the Crown known as the "Paddington Bowling Club". The lease was for the purpose of "community and sporting club facilities, tourist facilities and services, access". Despite the grant of the lease, the land had largely fallen into disuse.

La Perouse Aboriginal Land Council (LPALC) lodged a claim under the ***Aboriginal Land Rights Act 1983*** (ALR Act) over various parcels of land, including the land that was subject to the lease.

The Minister administering the Crown Land Management Act 2016 granted that portion of LPALC's claim which related to the leased land.

The Appellant challenged the Minister's decision on a number of bases, including that the Minister had failed to consider (or otherwise rejected) a submission made by the Appellant that the Crown's lease amounted to a use, such that the land was not "claimable Crown land" within the meaning of s 36 of the ALR Act.

At first instance, the primary judge held that there was no evidence to suggest that the Minister had failed to consider the Appellant's submission, or that the submission had been rejected as a matter of law (meaning there was no jurisdictional error).

The key issue on appeal was whether the primary judge erred in failing to find jurisdictional error, and relatedly whether it was open to the Minister to be satisfied of the criteria in:

4. s 36(1)(a) of the ALR Act, that the land was able to be lawfully leased, given the existence of the registered lease; and
5. s 36(1)(b) of the ALR Act, that the land was not "lawfully used or occupied" (noting the Appellant's argument that the Crown's lease was relevantly a "use").

HELD:

1. In relation to the criterion in s 36(1)(a), the Court found that, notwithstanding the existing lease to the Appellant, the land was still able to be leased owing to the doctrine of concurrent leases. The relevant question was whether the land could be leased, not whether it could be leased *again*.
2. In relation to the criterion in s 36(1)(b), the Court found that:
    - The term 'used' in s 36(1)(b) had to be construed by reference to the definition of 'land' in s 4 of the ALR Act. 'Land' was defined as including any estate or interest in land.
    - Where 'land' was defined as not only physical land, the relevant 'use' therefore did not necessarily denote physical use.
    - The Appellant was therefore lawfully using the land as lessee.

Appeal upheld.

Reporter: Brigitte Rheinberger

(24-089) Boensch v Transport for NSW [2024] NSWCA 119

Meagher JA, Payne JA and Basten AJA – 21 May 2024

Keywords: Appeal – water boundary dispute – refusal to make determination - class 3 proceedings – real property – right of appeal - appeal out of time and incompetent – statutory construction

The self-represented Applicant is the registered proprietor of land in Rydalmere with a water boundary to Subiaco Creek. In 1996, the Second Respondent (the Registrar-General) determined the position of the water boundary under Pt 14A of the of the *Real Property Act 1900* (RPA) by reference to the mean high-water mark. This determination was based on a 1952 survey completed

by the Maritime Services Board and registered on title. However, the position of the boundary has remained in dispute between the Applicant and the registered proprietor of the creek, Transport for NSW (TfNSW).

The Applicant commenced proceedings in Class 3 of the Land and Environment Court (LEC) appealing the Registrar-General's refusal to make a boundary determination under Part 14A of the RPA. The Applicant also sought to appeal against the 1996 boundary determination and raise a claim regarding a retaining wall structure under the *Encroachment of Buildings Act 1922*. The Applicant constructed the retaining wall in the 1990s along the contested boundary, which was also the subject of 2022 orders in the Supreme Court.

The Applicant's appeal in the LEC was dismissed pursuant to r 13.4 of the *Uniform Civil Procedure Rules 2005* on the basis that there was no appeal right for a refusal to make a boundary determination under Pt 14A of the RPA and an appeal against the 1996 boundary determination was an abuse of process as it related to the trespass proceedings before the Supreme Court brought by TfNSW.

The Applicant sought leave to appeal under s 57 of the LEC Act challenging the interlocutory orders made by the LEC.

HELD:

1. Leave granted for Applicant to appeal the LEC decision as the appeal raises questions of statutory construction and general application.

2. Section 135D(2) of the RPA expresses the condition precedent to the Registrar-General's exercise of power to make a boundary determination under Pt 14A. This requires the Registrar-General to be satisfied there is some degree of doubt regarding the boundary in question. If the Registrar-General is not satisfied under the terms of s 135D(2), there is no power or authority to make a determination and the Registrar-General "must" refuse to proceed to do so.

3. The right of appeal under s 135J of the RPA does not extend to a refusal to make a boundary determination under Part 14A. This does not result in an unreasonable outcome because there are other common law and statutory remedies available, including under ss 121 & 122 of the RPA and s 69 of the *Supreme Court Act 1970*.

4. The Applicant's appeal from the 1996 determination was out of time and incompetent as s 135J(3) of the RPA provided for a 28 day appeal period and the LEC could not extend or abridge the time for appeal under r 7.3 of the *Land and Environment Court Rules 2007* (LECR), which only applied to a time fixed by the LECR or by any judgment or order for the Court.

Appeal dismissed with costs.

Reporter: Isabelle Alder

LAND AND ENVIRONMENT COURT

(24-090) Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Limited [2024] NSWLEC 17

Duggan J – 28 November 2023

Keywords: Class 4 judicial review – alleged failure to consider environmental impact of transmission line – material jurisdictional error – mandatory relevant considerations

The Applicant commenced Class 4 judicial review proceedings seeking a declaration that the decision made by the Independent Planning Commission (**IPC**) to grant development consent to the First Respondent for the operation of a silver, lead and zinc mine (**Consent**) was void and of no effect. The Applicant also sought an injunction preventing the First Respondent from carrying out any works in accordance with the Consent.

The Applicant submitted that the IPC was required to consider and assess the environmental impacts of constructing a 66kV transmission line when it granted the Consent. That transmission line was not part of the development for which consent was sought. Further, the Applicant contended that consideration of the environmental impacts of the 66kV transmission line was a mandatory consideration for the purposes of the EP&A Act and that, by failing to consider those impacts, the

Consent was infected by a material jurisdictional error.

The parties agreed that there were three real issues for determination, being:

1. Was the construction of a 66kV transmission line "part of a single proposed development that is State significant development" within the meaning of s 4.38 of the EP&A Act?

2. If so, were the 66kV transmission line and its impacts required to be considered by the consent authority before it granted development consent for the proposed development by reason of s 4.38(4)?

3. Alternatively, were the impacts of the 66kV transmission line "off-site impacts" required to be considered under s 4.15(1)(b) of the EP&A Act?

HELD:

1. On the proper construction of s 4.38 of the EP&A Act, the 66kV transmission line was not part of a "single proposed development" that is State significant development to which the provisions of s 4.38(4) would apply. This is because s 4.38 of the EP&A Act is limited to the scope of the development application. Additionally, there is no requirement under the EP&A Act that requires all parts of a development to be included in the same development application.

2. The second issue did not arise for consideration as s4.38 of the EP&A Act did not apply.

3. While there was a fundamental need to provide electricity to the proposed development, it had not been determined where the proposed 66kV transmission line would go. As such, the off-site impacts of the 66kV transmission line were not able to be determined at the time the Consent was granted. The Applicant's submission that it would be open to the IPC to assess all possible impacts across all possible routes for the 66kV transmission line did not reflect what was required by s4.15(1)(b) of the EP&A Act.

4. Accordingly, the Applicant failed to establish that the Consent was affected by jurisdictional error.

Amended Summons dismissed and costs reserved.

Reporter: Teagan Wood

(24-091) Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW [2024] NSWLEC 39 and Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW (No. 2) [2024] NSWLEC 40

Duggan J – 19 April 2024

Keywords: Compulsory acquisition – compensation – public purpose behind acquisition – application of statutory disregard – effect of Outer Sydney Orbital and Western Sydney Airport – effect of integral public purpose on market value

Transport for New South Wales (TfNSW) issued the Applicant, who owned 31.79ha of land in Luddenham, with a proposed acquisition notice (PAN) for the acquisition of 14.66ha of the Applicant's land (Acquired Land) in June 2021. The remnant parcel of the Applicant's land (Residue Land) was landlocked as a result of the subdivision and acquisition of the Acquired Land.

TfNSW had made an offer to the Applicant for the purchase of the Acquired Land earlier in 2021 for the amount of $24,307,366.36 excluding GST prior to issuing the PAN. The Applicant did not accept that offer, and instead commenced a Class 3 appeal in the Land and Environment Court (Proceedings) seeking compensation for the Acquired Land in the amount of $55,636,727.59. The NSW Valuer-General determined the value of the Acquired Land to be $130,112.58, and subsequently TfNSW revised its valuation to be $4,138,179.78. It relied on this valuation figure in the Proceedings.

The PAN expressly stated that the Acquired Land was to be used for the purposes of the *Roads Act 1993* in connection with the construction, operation and maintenance of the M12 Motorway. The PAN did not expressly refer to either the recent ***State Environmental Planning Policy (Western Sydney Aerotropolis) 2020*** (SEPP Aerotropolis), which had the effect of rezoning nearly the entirety of the Acquired Land as Enterprise (ENT), nor to the Outer Sydney Orbital project included within the SEPP Aerotropolis (OSO). The Acquired Land had previously been zoned RU2 – Rural Landscape (RU2) under the applicable local environmental plan.

The key argument put forward by the Applicant was that the public purpose for the acquisition of the Acquired

Land pursuant to s 56(1)(a) of the ***Land Acquisition (Just Terms Compensation) Act 1991*** (Just Terms Act) was limited to the purpose expressed in the PAN (that is, solely for the purposes of the construction, operation and maintenance of the M12 Motorway) and thus the market value of the Acquired Land (with that public purpose disregarded) should be based on the current ENT zoning of the Acquired Parcel (and not the prior RU2 zoning, which would have resulted in a much lower valuation as the Valuer-General had determined).

The Respondent contended that the public purpose to be disregarded was not limited to the M12 Motorway, but instead was associated with the Western Sydney Airport project as a whole (to which the construction of the M12 Motorway was linked). The public purpose to be disregarded therefore encapsulated the aims of the SEPP Aerotropolis, and required the Acquired Land to be valued as if it were zoned RU2.

A claim for injurious affection was also made by the Applicant in respect of the Residue Land arising out of alternative access arrangements via means other than the Acquired Land. This claim partly arose out of the effect of the SEPP Aerotropolis also designating part of the Residue Land as being considered for the OSO (Affection Claim).

Further, the Applicant sought to include within the scope of disturbance costs pursuant to s 59(1)(a) of the Just Terms Act, its legal costs incurred in commencing mandamus proceedings in the Supreme Court of New South Wales against the Valuer-General (Mandamus Proceedings) seeking an order that the Valuer-General be forced to make a determination of compensation as required by s 42(1) of the Just Terms Act.

Finally, following the hearing of the Proceedings in May 2023, the NSW State Government and the Australian Federal Government made further funding arrangements concerning the Western Sydney Airport (although no changes were proposed to any physical works associated with the new airport, nor to any works on the M12 Motorway nor the OSO). The Applicant sought to reopen the Proceedings in November 2023 to adduce this additional evidence in relation to the appropriate public purpose which ought to be applied by the Court in the Proceedings - *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW (No. 2)* [2024] NSWLEC 40 (the Reopening Application).

HELD:

1. The public purpose for the acquisition of the Acquired Land was part of a government wide project in constructing the Western Sydney Airport and associated infrastructure, which the SEPP Aerotropolis was passed to enable (thus rezoning the Acquired Land ENT). The Respondent acted in furtherance of that purpose in purchasing the Acquired Land, with the delivery of vehicular infrastructure being one element of the overall goal.

2. In applying the statutory disregard to that public purpose, the proper zoning that should be applied to the Acquired Land is RU2 and the land should be acquired based on the value of RU2 zoned land.

3. In relation to the Affection Claim, while the Applicant was entitled to an amount arising out of the alternative access arrangements for the Residue Land, it was not entitled to any amount associated with the OSO as there was no proven decrease in the value of the Residue Land arising out of that future project. There was insufficient detail in the SEPP Aerotropolis concerning the exact location of the OSO and as such the Applicant had not proven that the OSO formed part of, or was influenced in its placement by, the M12 Motorway (and thus the statutory disregard did not apply).

4. In relation to the Applicant's costs of the Mandamus Proceedings, these were costs associated with separate proceedings against a different party to the Respondent (i.e. the Valuer-General and not TfNSW). The test of these costs being "in connection with" the Respondent's purchase of the Acquired Land was therefore not satisfied, and these costs were not able to be included within the quantum of disturbance payable under s 59(1)(a) or (b) of the Just Terms Act.

5. In relation to the Reopening Application, the criteria required to be met in order for the proceedings to be reopened were not met. The evidence concerning funding between various governments related to a change in circumstances nearly three years after the PAN was issued, had no effect on

the physical works for which the Acquired Land was in fact acquired, and did not change the scope or nature of the public purpose which the Court had determined as applying to the purchase of the Acquired Land. The Reopening Application was dismissed with costs being in the cause of the Proceedings generally.

The Respondent was ordered to pay the Applicant compensation for market value in the amount of $9,523,500, injurious affection in relation to the Residue Land in the amount of $100,000 and disturbance in the amount of $137,979.78. The Applicant was also awarded its costs of the proceedings (including of the Reopening Application).

These proceedings have been appealed. The appeal will be heard later in the 2024.

Reporter: Peter Clarke

(24-092) MKB Contracting Pty Ltd v Transport for NSW [2024] NSWLEC 50

Pain J – 15 May 2024

Keywords: Civil procedure – Review of Senior Deputy Registrar's decision not to permit additional expert evidence – Whether in interests of justice to set aside decision

The Applicant, who seeks compensation for the compulsory acquisition of part of its land by the Respondent pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991, by notice of motion and pursuant to r 49.19(1) of the *Uniform Civil Procedure Rules 2005* (UCPR), sought to set aside orders made by the Senior Deputy Registrar dismissing its application to rely on expert architectural evidence (expert evidence) pursuant to r 31.19 of the UCPR.

The Applicant argued that because its valuer had chosen to adopt a method of valuation of 'rate per place' which necessitated the need for architectural evidence, it was in the interests of justice that it be allowed to adduce the expert evidence to enable the valuer to undertake the valuation methodology he considered appropriate.
The Respondent argued that the expert evidence was not required because the Applicant's valuer could proceed on the various other expert evidence already available to the parties. It also argued that granting the Applicant leave to adduce the expert evidence would not be in keeping with the overriding purpose in s 56 of the *Civil Procedure Act 2005*.

HELD:

1. The extent to which the hypothetical buyer and seller are assumed to be informed, including by obtaining expert reports to assist them, must be part of the consideration of the extent to which such reports ought to be allowed to be adduced by the parties. A proliferation of expert reports in court proceedings beyond that which is likely to occur in the assumed hypothetical market is an important consideration.

2. The purposes of pt 31 div 2 of the UCPR, within which sits r 31.19, include the restriction of expert evidence to that which is reasonably necessary in order to resolve the proceedings and to avoid unnecessary costs associated with retaining different experts.

3. It was not apparent that the expert evidence was reasonably necessary in light of the other expert evidence available to the Applicant's valuer.

4. The Applicant had not discharged its onus of establishing that it was in the interests of justice for the Court to set aside the decision of the Senior Deputy Registrar. There was no material change of circumstance between the decision of the Senior Deputy Registrar and the time at which the Applicant's notice of motion was heard, nor had the Applicant alleged any error of law or *House v The King* error as would normally be required. The Court does not lightly interfere with a considered decision of a Registrar.

Applicant's notice of motion dismissed.

Reporter: Amelia Cook

(24-093) Environment Protection Authority v Pullinger (No 2) [2024] NSWLEC 51

Pritchard J – 22 May 2024

Keywords: failure to comply with clean-up notice and prohibition notice – whether notices were valid – whether "reasonable excuse"

Truegain Pty Limited (**Truegain**) was a waste oil processing and waste storage premises. Truegain went into liquidation in September 2016, after it was discovered that Truegain was discharging harmful substances (including toxic firefighting chemicals and the 'forever chemical' PFAS) into a sewer leading to the nearby Hunter River.

Mr Robert Pullinger, the Defendant, was a director of Truegain from March 1992 and its secretary from February 1997. Between August and September 2016, the Defendant was Truegain's sole director.

The EPA issued a clean-up notice on 5 June 2017 (**initial clean-up notice**) and a varied clean-up notice on 18 May 2018 (**varied clean-up notice**) under s 110 of the *Protection of the Environment Operations Act 1997*. On 25 August 2020, the EPA issued a prohibition notice (**prohibition notice**) under s 101 of the POEO Act.

The Defendant was charged with:

a) two offences under s 91(5) of the POEO Act of failing, without reasonable excuse, to comply with directions 7 and 10 of the varied clean up-notice; and

b) one offence under s 102 of the POEO Act, of failing, without reasonable excuse, to comply with the prohibition notice.

At hearing, the Defendant launched a "collateral challenge" to the validity of the varied clean-up and prohibition notices.

HELD:

1. The Defendant was found guilty of two offences under s 91(5) of the POEO Act and one offence under s 102 of the POEO Act.

2. Direction 7 of the varied clean-up notice was valid. The EPA was the appropriate regulatory authority. The EPA formed a (subjective) suspicion that a pollution incident had occurred and, when objectively assessed, that suspicion was reasonably formed. There was a relevant connection between the suspected pollution incident and the subject of the varied clean-up notice.

3. The prohibition notice was "warranted" within the meaning of s 101 of the POEO Act, on the basis of the same facts on which the varied clean-up notice was issued.

4. The Defendant did not comply with the prohibition notice. Even though no waste was received at Truegain's premises after 14 September 2016, the Defendant continued to store and keep potentially harmful substances.

5. The Defendant failed to discharge its onus of proving, on the balance of probabilities, that he had a "reasonable excuse" for non-compliance with the notices. The Defendant could not establish, on the balance of probabilities, that he had a reasonable excuse for failing to comply because compliance was not technically possible. The Defendant could have but did not apply to the EPA for an extension of time (with evidence showing the extension would have been granted). The Defendant did not prioritise expenditure of available funds on compliance and otherwise provided no evidence to demonstrate his financial incapacity.

Reporter: Georgie Juszczyk

(24-094) Fairfield City Council v Camilleri [2024] NSWLEC 56

Robson J – 30 May 2024

Keywords: Civil contempt – breach of consent orders to remove waste – mental illness - no contrition or remove - previous conviction of contempt

On 24 May 2022, Council commenced civil enforcement proceedings against Mr Camilleri seeking orders that he cease using premises for the purposes of a waste management facility and that he remove the waste from his land. On 3 November 2022, consent orders were made

and required the waste to be removed within 3 months. The waste was not removed in the required time and on 11 August 2023 contempt proceedings were commenced.

Mr Camilleri led evidence from a consultant psychologist that he suffered from a number of disorders, including hoarding disorder. Mr Camilleri did not lead any evidence of contrition. Mr Camilleri had also previously been charged and punished for contempt: *Fairfield City Council v Camilleri* [2019] NSWLEC 95.

HELD:

1. The contempt was wilful and serious, particularly given the length of time which had passed since the orders were made.

2. In some cases, where mental health contributes to the commission of an offence, the moral culpability of a person may be reduced and the offender may be an inappropriate vehicle for either general or specific deterrence. However, in this case, general deterrence was important given consent orders had been entered into and specific deterrence appropriate given the contempt had not been purged despite sufficient time and notice.

3. A fine was appropriate given the seriousness of the contempt, Mr Camilleri's previous convictions for contempt, the lack of contrition or remorse, and the need for general and specific deterrence. An ongoing monthly fine was not imposed it was not apparent this would encourage the adherence of the consent orders.

4. Indemnity costs were appropriate given contempt proceedings serve a public interest, it marks the Court's condemnation of Mr Camilleri's conduct, and the Court was not satisfied that there would be full compliance with the Court Orders.

Mr Camilleri fined $20,000 and ordered to pay costs on an indemnity basis.

Reporter: John Zorzetto

(24-095) Environment Protection Authority v Maules Creek Coal Pty Ltd [2024] NSWLEC 58

Pain J – 4 June 2024

Keywords: criminal – practice and procedure – multiple charges of breaches of s 64 of Protection of the Environment Operation Act 1997 (NSW) – whether summons patently duplicitous – whether summons latently duplicitous and uncertain

The Defendant was charged with eight offences under s 64 of the *Protection of the Environment Operations Act 1997* for failure to comply with a condition of an Environment Protection Licence (**EPL**). The eight charges arose from eight different blasting events.

By notice of motion, the Defendant sought orders that all eight summonses be dismissed on the basis of duplicity in the charges or, in the alternative, that the proceedings be permanently stayed.

Throughout the course of the hearing, other remedies such as the election of particulars of the offences to be relied on by the Prosecutor were identified as a possible response to the Court's findings.

The Defendant submitted that each charge was bad for patent (obvious on the face of the document) *and* latent (not demonstrable on the face of the document but clear from the way the prosecution case is conducted) duplicity and uncertainty.

The parties agreed that the common law principles that criminal charges must not be duplicitous is subject to an exception where a course of continuous conduct constitutes an offence (*Walsh v Tattersall* at 107-108 (per Kirby J). The parties also agreed that where acts form part of the same transaction or criminal enterprise which individually may constitute an offence they can be charged as a single count without infringing the rule.

At issue was whether the eight charges in the summonses (as amended by the EPA) satisfied the exception or, by identifying multiple offences, did so in an impermissible way as giving rise to patent or latent duplicity and uncertainty.

HELD:

1. The Prosecutor's case as disclosed in the amended summonses was not duplicitous or was an acceptable exception to the rule against duplicity as the charges arose from carrying out a blast which necessarily arose from a course of conduct.

2. However, uncertainty due to the manner of particularisation of the charges by the Prosecutor was unfair to the Defendant.

3. Uncertainty arose for the Defendant as the amended summonses did not specify how the sub-particulars under "manner of contravention" were intended to prove each of the offences.

4. It was not clear how the amended statement of facts related to the sub-particulars of manner of contravention. The amended statement of facts needed to be rationalised accordingly.

5. The Prosecutor sought to rely on a mining industry consultant's report that referred to matters beyond the manner of contravention. Accordingly, the Prosecutor needed to specify which parts of the report it intended to rely upon to support the amended summons as pleaded.

6. The Prosecutor's letters of further particulars sent to the Defendant identified a wide range of possible behaviours that may or may not relate to the sub-particulars of the manner of contravention specified in the amended summonses. The letters of particulars did not provide certainty to the Defendant about the basis for the sub-particulars in the amended summons, which was exacerbated by the scope of the mining industry consultant's report. Accordingly, the Prosecutor needed to clarify precisely how it intended to prove each blast in relation to all the particulars of contravention provided.

No orders made.

Reporter: Joanna Ling

(24-096) Ballina Island Developments Pty Ltd v Ballina Shire Council [2024] NSWLEC 1223

Dixon SC – 26 April 2024

Keywords: s 68(1) LG Act 1993 Applications – limits of Court's power under s39(2) LEC Act 1979

The Applicant obtained development consent for a large residential subdivision from Ballina Shire Council. Conditions of the consent required the Applicant to submit material to the satisfaction of Council (Satisfaction Conditions) prior to the issue of an approval under s 68 of the *Local Government Act 1993* (**LG Act**) for drainage, sewerage, and infrastructure works (s 68 Approval).

The Applicant sought a s 68 approval from the Council which was refused on the basis that the Satisfaction Conditions had not been complied with.

In response, the Applicant appealed under s 176 of the LG Act, initiating Class 2 proceedings. The Applicant submitted that s 39(2) of the *Land and Environment Court Act 1979* (**LEC Act**) places the Court in the shoes of the Council 'at the time the application was lodged' and therefore the Court could exercise all functions of the Council relating to the Satisfaction Conditions. The Applicant also invited the Court to consider amended reports to meet the requirements of the Satisfaction Conditions. The Council contended that the Court lacked the jurisdiction to grant the s 68 LG Act approval because the Satisfaction Conditions had not been complied with.

HELD:

1. The requirement to obtain a s 68 approval arises under the LG Act, not under conditions of a development consent. It is a stand-alone power under one statute that is not dependent on, and has no relationship to, conditions of a development consent granted under a different statute (i.e., the EP&A Act).

2. Class 2 proceedings cannot provide a backdoor to re-write conditions of development consent in circumstances where Council has not been satisfied as to matters required by the conditions.

3. On the facts, the Court held that it could not utilise s 39(2) of the LEC Act to stand in the Council's

shoes to substitute its satisfaction in respect of conditions of the development consents granted under the EP&A Act in proceedings brought under the LG Act.

4. Applying *Codlea Pty Ltd v Byron Shire Council* (1999) 105 LGERA 370, the Court cannot use s 39(2) of the Court Act to import amended materials into the conditions of consent granted under the EP&A Act. That is a function outside the subject matter of the Class 2 proceedings. If the Applicant wished to appeal the Council's actual or deemed dissatisfaction in relation to the Satisfaction Conditions, the Applicant should have brought Class 1 proceedings under s 8.7(2) of the EP&A Act. In the absence of such a challenge in Class 1 proceedings, the Court did not have the power to 'step into the shoes' of the Council under s 39(2) of the LEC Act in order to satisfy the pre-cursor requirements under s 68 of the LG Act.

Appeal dismissed.

Reporter: Alexander Murphy

(24-097) Wilbec Chatswood Pty Ltd v Willoughby City Council [2024] NSWLEC 1234

Walsh C - 3 May 2024

Keywords: Class 1 appeal - development application - application to be determined on the basis of development controls in place at the time of lodgment - relevance of subsequent amendments - desired future character of site - offer to enter into planning agreement

Wilbec Chatswood Pty Ltd (the Applicant) appealed against the Willoughby City Council's deemed refusal of its development application (the DA) to construct a 26 storey mixed use building at 42 Archer Street, Chatswood, an area earmarked by the Council for a significant increase in density.

At the time the DA was lodged, in August 2022, the *Willoughby Local Environmental Plan 2012* was in force (Unamended WLEP). After the DA was lodged, substantial amendments were enacted to the WLEP (Amended WLEP). The parties agreed that the effect of the savings provisions in the Amended WLEP was that the DA was to be determined as if the Amended WLEP had not commenced, however, it was a relevant consideration as a proposed instrument under s 4.15(1)(a)(ii) of the EPA Act.

The proposal did not comply, by a significant margin, with the maximum height limit and floor space ratio in the Unamended WLEP, but did comply with the corresponding requirements in the Amended WLEP. However, the proposal did not comply with some additional requirements of the Amended WLEP, such as the design excellence requirements. The Council also cited the lack of affordable housing as one of its reasons for refusing the DA. Notably, the Amended WLEP empowered the Council to impose an affordable housing condition in the grant of any consent, while the Unamended WLEP did not confer any such power. The Applicant made an offer to the Council to make a financial contribution in line with the affordable housing rate for the area under the Amended WLEP, but this was not accepted.

HELD:

1. When considering the weight to be given to the Amended WLEP, consideration should be given to the whole instrument as opposed to individual controls.

2. The non-compliance with the floor space ratio and building height development standards in the Unamended WLEP, was justifiable on environmental planning grounds, and compliance was unreasonable and unnecessary, given the terms of the Amended WLEP.

3. It was appropriate and within Council's authority to impose a condition consistent with the offer made by the applicant regarding affordable housing, noting that the proposed planning agreement would have a public purpose (per s 7.4 of the EPA Act) and was consistent with the terms of s 7.7(3) of the EPA Act.

4. The Court did not have power to enter into a planning agreement when it exercised the function of the Council in a Class 1 appeal, that being a separate and distinct function. However, the Court

could hold that such a condition ought to be imposed, leaving it a matter for Council to determine whether or not to actually enter into the planning agreement.

5. It was sufficient for the applicant to nominate a land use as "community facility"; specific information regarding who was to own or control the space was not required.

The parties were directed to prepare final settled conditions of consent consistent with the Court's findings, with final orders granting development consent to follow.

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