Land and Environment Court Seminar - Appeals from the Land and Environment Court

3 August 2016

Mark Leeming[*]

The appendix to this paper identifies – hopefully comprehensively – criminal and civil appeals and applications for leave to appeal from the Land and Environment Court, determined in the last twelve months. All of you will be aware of some if not most of those decisions, but even so it is hoped that aspects may be of interest and utility to this audience.

The substantive decisions of the Court of Criminal Appeal and the Court of Appeal may be summarised as follows:

Jurisdiction	**Number**	**Appeals allowed**	
Class 1	4	1	(*Wingecarribee Shire Council v De Angelis* – allowed 1 Aug 2016)
Class 3	5	3	(*Kessly v Hasapaki, RMS v Allandale, Valuer-General v Oriental Bar*)
Class 4	8	3	(*De Angelis v Pepping, Rossi v Living Choice, Community Housing Ltd*)
Class 5	3	1	(*Turnbull* – allowed as to costs order only)
Total	20	8	

Note that the second column excludes most interlocutory and procedural judgments (a small minority of these are, however, included in the appendix). The third column includes cases where an appeal is allowed in part but otherwise dismissed. In order to avoid double counting cross-appeals have not been counted separately.

[*] Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney.
I am grateful for the assistance of Ms Elizabeth Daley in the preparation of this paper. All errors are mine.

General themes

As you will see, a number of themes emerge, despite the number of judgments being quite small. First, appeals from the Land and Environment Court form an appreciable and important component of the work of the Court of Appeal – although somewhat less than 10% of the workload, on one crude measure. (The most recent publicly available statistics – the "Provisional Statistics (as at 25 February 2016)" – record that in the calendar year 2015, there were 433 "disposals" of proceedings in the Court of Appeal, and historically, the large majority of "disposals" are by court decision, as opposed to settlement or abandonment.)

Secondly, appeals from the Land and Environment Court are but a small component – of the order of 1% – of the work of the Court of Criminal Appeal (there were 400 "disposals" in 2015, overwhelmingly sourced from the District Court).

Thirdly, some of the appeals are heavy (for example, *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244 and *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7; 212 LGERA 307 were three and two day appeals respectively) and some are of significant public importance (for example, *Botany Bay City Council v Minister for Local Government* [2016] NSWCA 74; 214 LGERA 173 and *Ashton Coal Operations Pty Ltd v Hunter Environment Lobby Inc* [2015] NSWCA 358; 212 LGERA 265).

Fourthly, as a proportion of matters determined by the Land and Environment Court, appeals are relatively scarce. To this, Class 4 litigation is something of an exception. The most recent annual report states that there were 52 and 44 Class 4 proceedings resolved by hearing in 2013 and 2014 respectively; assuming 2015 was similar, that reflects an appeal rate of significantly more than 10%.

Fifthly, very few Land and Environment Court decisions are the subject of a further appeal to the High Court. The *Berrima Gaol claim* has been granted special leave, but has not yet been heard: *NSWALC v Minister Administering the Crown Lands Act* [2016] HCATrans 144. The Perilya valuation appeal was refused special leave: *Perilya Broken Hill Ltd v Valuer-General of New South Wales* [2016] HCATrans 174.

Sixthly, it is to be expected that both the number of appeals and the prospects of their success are significantly affected by the nature of the appeal. The narrow appellate jurisdiction in appeals from decisions in Classes 1 and 3 to questions of law might be expected to result in a greater rate of failure.

On this point, a Full Court of the Federal Court constituted by Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 last year undertook a comprehensive review of authorities on appeals on a question of law, and emphasised (a) the need first to identify whether an appeal invokes the appellate jurisdiction of this Court, confined as it is to questions of

law, and (b) the "great importance that the question or questions of law should be stated with precision": at [19] and [91]; the same point was made by French CJ in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [33]:

> "An appellant invoking [the appellate jurisdiction] should identify the decisions of the Tribunal of questions with respect to matters of law which are the subject of the appeal. A decision of a question with respect to matters of law is not merely a condition of the jurisdiction ... it is the subject matter of that jurisdiction."

Obviously, the same principles apply to s 56A appeals within the Land and Environment Court.

Seventhly, the Court of Appeal disposes of Land and Environment Court appeals relatively quickly, as is to be expected, since many do not involve many, or any, questions of fact. Of the 17 substantive appeals and applications for leave to appeal heard and determined by the Court of Appeal in the last 12 months, 6 were the subject of judgments given *ex tempore*, 7 were delivered within 4 weeks, 2 were reserved for 2 months, and the multiday appeals of *Rossi v Living Choice Australia* and *RMS v Allandale Blue Metal* were reserved for 4 and 5 months respectively.

The balance of this paper is unavoidably selective, but focusses principally on the minority of appeals which were allowed.

Appeals to the Court of Criminal Appeal

Within the last twelve months, there was one s 5F appeal, one sentence appeal, and one procedural ruling.

Benedict Industries Pty Ltd v Sutherland Shire Council [2015] NSWCCA 272 was an interlocutory appeal under s 5F of the *Criminal Appeal Act 1912* (NSW). The Court of Criminal appeal upheld the decision of the primary judge dismissing Benedict's application for summary dismissal of four charges relating to the construction of an earthen bund on the perimeter of a quarry in West Menai in the Sutherland Shire. Benedict submitted that the "Sutherland Shire Tree and Bushland Preservation Order 2001" was invalid because (a) a defect in the drafting of resolutions meant that it had not been made; (b) because when made, parts of other local plans had not been amended so as to permit the making of a Shire-wide order; (c) because the order was ultra vires as purporting to prohibit more than was authorised; and (d) whether it had been impliedly repealed. The Court granted leave, but dismissed all grounds. However, the Court accepted the concession by the Council that it was not possible to make an order which sprang into valid operation at some stage in the future, differentially, after later amendments to local environmental plans had been made.

Turnbull v Chief Executive of the Office of Environment and Heritage [2015] NSWCCA 278; 213 LGERA 220 was an appeal against the sentence imposed upon Mr Ian Turnbull

following a plea of guilty to clearing two properties without approval in north western New South Wales in 2011 and 2012. All grounds were rejected and essentially turned upon the facts of the case. Two points may be noted.

The first is the division of opinion in relation to the question posed by Basten JA in *Clarke v R* [2015] NSWCCA 232 where there are findings of fact made by a sentencing judge. The traditional view was that it is necessary to establish that a finding was not open. However, Basten JA said at [34]:

> "In some circumstances, factual findings will themselves involve an evaluative judgment, of a kind similar to the exercise of a discretionary power. No doubt the appellate court should exercise restraint in interfering with such findings. However, if the court is satisfied that the sentencing judge made a mistake with respect to a particular factual finding, which was material to the exercise of the discretionary power, the court should identify error and then enter upon its own consideration of the appropriate sentence."

McCallum J did not express a view between the two possibilities. Button J, who wrote the lead judgment, observed that it would not make a difference in the present case, and applied the conventional test. Meagher JA agreed with Button J.

This is a question of general importance, which may be expected to be resolved definitively relatively soon, in an appeal where it matters.

The second is that the Court accepted the concession by counsel for the prosecutor that an error had been made by the primary judge in ordering costs extending to the reasonable investigation costs of the prosecutor. There was no power to make such an order, and consequently the order as to costs was amended so as to be confined to the reasonable legal costs and disbursements of the prosecutor as agreed or assessed.

Environmental Protection Authority v Riverina (Australia) Pty Ltd (No 2) [2015] NSWCCA 252 deals with a point of procedure following the determination by the Court of Criminal Appeal of questions raised on a stated case pursuant to s 5AE of the *Criminal Appeal Act 1912*. Perhaps surprisingly, there was debate about whether an order should be made remitting the proceedings following the answer of the questions. Both parties sought such an order, although Hall J, with whom Hoeben CJ at CL and Garling J agreed, referred to authorities establishing that an order was unusual and unnecessary.

The Court made a costs order favourable to the successful party. The Court declined to decide whether it was necessary to establish "special reasons" before doing so, finding that the prosecutor's failure to amend the summons when attention was brought to defects in the proceedings below was sufficient to warrant an order.

Finally, the Court rejected the submission that the power to award costs extended to the costs at first instance. At [24], Hall J said that s 257C of the *Criminal Procedure Act 1986* (NSW) governed the award of costs in proceedings of this type and required first

the dismissal or withdrawal of the proceedings. This is addressed in some detail in *Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204; (2013) 85 NSWLR 125 at [75]-[99].

Successful Class 3 appeals

Kessly v Hasapaki [2015] NSWCA 316 was technically from a decision in Class 3 of the Court's jurisdiction, but in fact was an appeal which emerged from a contempt prosecution, of one neighbour by another, for failing to comply with orders resolving a boundary dispute between them. The orders were made by consent in 2004. The prosecution was commenced almost a decade later. Following an unsuccessful application for an adjournment, the solicitor acting for the defendant was granted leave to withdraw, and the defendant was thereupon convicted. This Court (Basten and Macfarlan JJA and Sackville AJA) confirmed the desirability of contempt prosecutions being determined promptly (at [22]), but allowed an appeal because, prior to the solicitor withdrawing, the judge had indicated that he proposed to resolve the proceedings by a practical regime falling short of making findings of guilt. In those circumstances, it was not open to the primary judge to proceed to find a contempt and impose a penalty in the defendant's absence.

The other two cases in which appeals succeeded are more typical Class 3 appeals. In *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7; 212 LGERA 307, land was acquired for the purpose of constructing part of the F3 Freeway. The effect of the acquisition was to reduce the expected life of a quarry by 1.7 years. Both the land owner and its tenant made claims for compensation. The tenant compromised Class 3 proceedings for compensation in the amount of $807,758. The landlord (Allandale) rejected an offer a little in excess of $1m and, following an 18 day hearing, obtained an order for payment of compensation in the amount of $3,387,796. The appeal was allowed on only one, relatively minor, ground: a component of compensation amounting to $272,625, comprising 15% of the value of a significant area of timbered land which had been severed from the rest of the quarry.

At the time of the trial, some of the legal steps necessary to complete the grant of access had not been performed (apparently because the Freeway had not been dedicated as a public road and declared as a main road and a controlled access road). However, a substantial sum had already been spent on the construction of an underpass, in accordance with a condition of consent requiring provision of access, and as a matter of practicality Allandale already had unrestricted access to the "severed" land. Basten JA, with whom in this respect the other members of the Court agreed, found error in the finding of a reduction in the value of the severed land.

More importantly, the decision raises a question mark over this Court's recent decision in *Health Administration Corporation v George D Angus Pty Ltd* [2014] NSWCA 352; 88 NSWLR 752. Sackville AJA saw no conflict between the two decisions: at [103]. However, Basten JA, with whom Ward JA agreed, said at [42] that it was difficult to

reconcile the result in this appeal with the reasoning in *George D Angas*. The problem is familiar: assume the land which is compulsorily acquired is the subject of an informal or non-commercial lease between related parties, and both lessor and lessee make a claim for compensation. The answer is not something that I shall attempt to predict in this paper, but given the seeming rise in recent months in the amount of Class 3 litigation, it is as well to be aware of the unresolved issue.

The second important valuation case is *Valuer-General of New South Wales v Oriental Bar Pty Ltd* [2016] NSWCA 48, complex litigation with a troubled history. Although the dispute extended to the unimproved land value of three inner city hotels, the litigation was confined to one test case, the Mountbatten Hotel in Haymarket. The Valuer-General conceded, in response to an objection, that his $2.75m valuation was too high, and reduced the unimproved land value to $2.125m. The objector appealed. The parties relied on a valuation based on Gross Floor Area multiplied by a rate per square metre, and it soon became common ground that the Valuer General had used (in each of the three properties) the wrong GFA. The Valuer-General advanced evidence supporting a higher valuation of $2.5m, on the basis that if the Court accepted that evidence, it would dismiss the proceedings and leave in place the $2.125m valuation.

The primary judge accepted the evidence adduced by the Valuer-General as to the $2.5m valuation, but proceeded to apply the psm rate to the correct GFA, resulting in a lower valuation (of some $1.72m). The Valuer-General's appeal was allowed on this ground.

The cross-appeal raised further questions. Moreover, there was a large question concerning the only property said to be comparable. That was a property at Riley St in Woolloomooloo with a heritage listing, which had formerly been a car/garage workshop, which sold for $2.6m in 2011 without development approval, and for $3.6m in 2012 with development approval for use as a licensed restaurant. The primary judge found (and it was not challenged) that that property was conceptually comparable to the Mountbatten Hotel, but what sales figure was to be used? That required an analysis of the operation of both s 6A and s 14G.

The reasons of Sackville AJA, with whom Simpson JA agreed, and Basten JA, contain a valuable analysis of s 6A and 14G: at [11]-[15] and [61]-[67] and [120]-[128]. In relation to the largest issue, there was held to be no error of law in declining to adjust downwards the higher price achieved by the Riley St property: at [144]-[155]. As will frequently be the case in valuation appeals to the Court of Appeal, the limited scope of appellate jurisdiction – confined to questions of law – will confine the scope of what is determined.

Successful Class 4 appeals

In *De Angelis v Pepping* [2015] NSWCA 236 an appeal was allowed and a declaration made that an amendment to an LEP was invalid. The amendment affected a single parcel of land, that owned by Mr De Angelis. It rezoned that land from Mixed Use to Medium Density Residential. There was no saving provision, such that the effect of the making of

the amendment was to deny power to consent to a pending application before the Council. There were 22 grounds of appeal, but this paper focusses on the following three.

First, there was a successful challenge to the authority of Mr Pepping, the Group Manager Strategic and Assets within the Council, who purported to sign the instrument on its behalf. He did so pursuant to a Council resolution in the following terms:

> "[P]roceed with the making of the amendment to Wingecarribee LEP 2010 to vary the controls over [the Site] to rezone the land from B4 Mixed Use to R3 Medium Density Residential, to remove the current Floor Space Ratio control of 1.1, to remove the current Maximum Building Height control of 9 metres and to introduce a minimum lot size of 700m^2."

That language did not in terms suggest a departure from the ordinary process by which an amending LEP was made. A submission that the remaining function was essentially "secretarial" was unsuccessful, on the basis that the terms of the resolution by Council were what mattered, not the quality of the act. The fact that Council could delegate its function to the General Manager (someone other than Mr Pepping) told against the construction of the resolution.

Secondly, against the possibility that the primary judge was wrong on the question of authority, her Honour had stated that as a matter of discretion she would have withheld relief. Sackville AJA, with whom Macfarlan and Gleeson JJA agreed, stated that the primary judge's contingent exercise of discretion miscarried, essentially because her Honour had accepted the submission that the function was "secretarial" and that the "operative act" was Council's resolution of 27 November 2013. The Court said that this was not a mere technicality which could be overcome by an assertion that remedial action would have been taken at the time. Hence declaratory relief issued.

The third matter concerns s 56(8) of the *Environmental Planning and Assessment Act 1979* (NSW), which provides:

> "A failure to comply with a requirement of a determination under this section in relation to a proposed instrument does not prevent the instrument from being made or invalidate the instrument once it is made. However, if community consultation is required under section 57, the instrument is not to be made unless the community has been given an opportunity to make submissions and the submissions have been considered under that section."

This paragraph was subjected to a *Project Blue Sky* analysis, with regard being given to the distinction between the first and second sentences. The former, but not the latter, refers in terms to validity. Sackville AJA said at [103]:

> "The contrast in language suggests that the second sentence of s 56(8) may be directed to the Minister as the decision-maker under s 53(1) of the EPA Act. On

> this approach, the second sentence directs the Minister not to make the LEP if the required opportunity to make submissions has not been provided. But a failure to provide that opportunity does not result in the invalidity of the instrument. In other words, the second sentence of s 56(8) does not qualify the statement in the first sentence, namely that non-compliance with the requirements of a gateway determination (including community consultation requirements) does not invalidate the instrument."

However, Council expressly declined to adopt this construction of s 56(8). On that basis, and because it was not necessary to the ultimate decision on appeal, the Court did not determine the point, although Sackville AJA said that the proper construction of s 56(8) "is by no means clearcut": at [104]. That is another question awaiting determination in a case where it is necessary to do so.

Rossi v Living Choice Australia Ltd [2015] NSWCA 244 is a very lengthy judgment following a three day appeal, addressing a number of issues of importance. The first is the vexed question of the relationship between a council and a joint regional planning panel established pursuant to s 23G of the Act. The judgment deals with the imprecise way in which the Act delineates responsibilities in such cases, and the practical questions as to joinder and the role of each respondent to judicial review in Class 4 proceedings. Broadly speaking, the council has a limited, but important role, depending upon the aspects of decision making left to it and the nature of the challenge. Secondly, the decision is a rare appellate examination of the principles applying to s 25B – the power to suspend the operation of a consent and to specify conditions which, when satisfied, will validate it. Thirdly, the decision analyses costs in such proceedings.

Finally, there is a useful statement by Basten JA at [16] (with whom Ward and Emmett JJA) agreed) as to the scope of appellate jurisdiction conferred by s 58 of the Act:

> "Although it is commonly said that the right of appeal is not restricted to questions of law, that is not always the case: the right of appeal will be restricted to the jurisdiction invoked in the Land and Environment Court, which may be by way of judicial review. Proceedings brought to restrain a breach of the EP&A Act (or of an environmental planning instrument) may, depending upon the nature of the breach, rely on grounds equivalent to those permitted by way of judicial review. Thus, to the extent that the regional panel was said not to have taken into account mandatory considerations, what was alleged was an error of law."

Community Housing Ltd v Clarence Valley Council [2015] NSWCA 327; 90 NSWLR 292 was a Class 4 challenge to rating notices issued by the respondent Council in respect of land said to be used to provide subsidised community housing. The Court held that the special provisions and 30 day time limit imposed by s 574 of the *Local Government Act 1993* (NSW) did not impliedly carve out an exception from the power conferred by s 674 to make orders to restrain or remedy a breach of that Act and that more generally, specific appeal provisions do not limit the Class 4 jurisdiction exclusively conferred on the Land and Environment Court by s 20(2) of the *Land and Environment Court Act 1979*

(NSW). These aspects of the reasons are of general application in relation to specific appeal provisions.

Secondly, applying *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185, the requirement that residents be of "low income" fell within a charitable purpose for the relief of poverty, and the fact that the company was also entitled to provide training, vocational and related education, did not take it outside notions of charity, relying upon *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159.

Thirdly, the fact that from time to time some of the numerous properties held by Community Housing Ltd would be vacant did not stand in the way of the exemption being established.

Finally, an appeal was allowed on Monday 1 August 2016 in *Wingecarribee Shire Council v De Angelis*. The reasons of the Court were not available at the time this paper was prepared, but it is understood that the question turned upon the construction of standard savings provisions in many LEPs.

3 August 2016

APPENDIX

COURT OF CRIMINAL APPEAL

Environment Protection Authority v Riverina (Australia) Pty Ltd (No 2) [2015] NSWCCA 252

Hoeben CJ at CL; Hall J; Garling J

Class 5

APPEAL – Costs – Stated case under s 5AE Criminal Appeal Act from Land and Environment Court of New South Wales – Principal proceedings initiated by appellant (the Environment Protection Authority) challenging rulings by that Court that Summons was duplicitous - Successful respondent sought costs of appeal and costs of proceedings in the Land and Environment Court - Respondent entitled to costs of appeal but costs of the proceedings below are in the discretion of the trial judge subject to the relevant statutory rules and not the Court of Criminal Appeal. APPEAL – Ancillary orders – The questions raised in the case stated having been answered by the Court of Criminal

Appeal, an order remitting proceedings to the Land and Environment Court is not necessary – That court has sufficient trial management powers to resume proceedings after stated case resolved – However remittal order made in this case on the basis of agreement by both parties.

Benedict Industries Pty Ltd v Sutherland Shire Council [2015] NSWCCA 272

Macfarlan JA; Adams J; Fagan J

Class 5

ENVIRONMENT AND PLANNING – environmental offences – appeal – challenge to validity of Tree and Bushland Preservation Order the subject of four criminal charges – whether Council purported to make the Order – whether the Order lawfully made by Council under relevant environmental planning instrument – whether, by purporting to prohibit certain conduct, the Order was outside the authority conferred on the Council by the planning instrument – whether the Order was impliedly repealed by the repeal of the relevant planning instrument by a later environmental planning instrument – appeal dismissed

Turnbull v Chief Executive of the Office of Environment and Heritage [2015] NSWCCA 278; 213 LGERA 220

Meagher JA; McCallum J; Button J

Class 5

CRIMINAL LAW – appeal against sentence – clearing of native vegetation in contravention of s 12 of the Native Vegetation Act 2003 (NSW) – whether the primary judge erred in making findings of fact adverse to the applicant – whether the primary judge erred in ordering the applicant to pay the costs of the proceedings on sentence – appeal allowed with regard to costs order only

COURT OF APPEAL

De Angelis v Pepping [2015] NSWCA 236

Macfarlan JA; Gleeson JA; Sackville AJA

Class 4

ENVIRONMENT AND PLANNING – validity of amendments to Local Environmental Plan (LEP) – gateway determination issued by delegate of Minister – whether community consultation requirements under the Environmental Planning and Assessment Act 1979 (NSW) have been complied with – whether failure to comply with requirements leads to invalidity of amending LEP – whether appellant had notice of the planning proposal - whether council officer had power to make LEP as agent of the council - whether appellant denied procedural fairness

Rossi v Living Choice Australia Ltd [2015] NSWCA 244

Basten JA; Ward JA; Emmett JA

Class 4

ENVIRONMENT AND PLANNING – development applications – functions of local councils and regional panels – nature of the "assessment" function of a council – whether the assessment of a development application by a council is amenable to judicial review where the application is later determined by a regional panel – State Environmental Planning Policy (Major Development) 2005, cl 13F ENVIRONMENT AND PLANNING – development applications – assessment function of local council – whether the primary judge erred in finding that the council had assessed fill material intended to be placed along the boundary of the appellant's land ENVIRONMENT AND PLANNING – development applications – mandatory considerations in s 79C of the Environmental Planning and Assessment Act 1979 (NSW) and cll 33-36 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 – whether the primary judge erred in finding that the council and the regional panel had breached those provisions ENVIRONMENT AND PLANNING – development applications – notification of determination of applications – requirements of a valid notice – whether defects in such a notice should result in a declaration of invalidity – consequences of defects ENVIRONMENT AND PLANNING – development applications – relief – orders under s 25B of the Land and Environment Court Act 1979 (NSW) – whether s 25B orders should be made in respect of the impugned development consent instead of a declaration of invalidity – form of ameliorative orders

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248

Meagher JA; Leeming JA

Class 1

APPEALS – application for leave to appeal – appeal confined to question of law – whether leave should be granted in respect of point not pressed below – whether error of law demonstrated in decision below – leave refused

Stankovic v The Hills Shire Council [2015] NSWCA 279

Basten JA; Ward JA

Class 4

PRACTICE and PROCEDURE – application for leave to appeal – extension of time – application 10 years out of time – challenge to costs order – proceedings earlier dismissed but reinstated – ground of proposed appeal unarguable – absence of justification for delay

Rossi v Living Choice Australia Ltd (No 2) [2015] NSWCA 301

Basten JA; Ward JA; Emmett AJA

Class 4

JUDGMENTS AND ORDERS – finding that planning consent for development partly invalid – determination of appropriate orders for ameliorative relief to protect privacy and amenity of land adjacent to development – disagreement between experts – matter remitted to Land and Environment Court for determination JUDGMENTS AND ORDERS – finding that planning consent for development partly invalid – whether order should be made suspending the operation of the consent – terms of termination of suspension – relief where terms substantially complied with – whether developer can seek lifting of suspension – Land and Environment Court Act 1979 (NSW), s 25B, s 25C COSTS – order for costs of trial varied to allow for result of appeal – whether to apportion costs by issue in complex litigation – whether global apportionment appropriate to settle disputation – whether liability of respondents to be joint and several – order for costs of appeal – appellant partly successful – assessment of overall degree of success

Kessly v Hasapaki [2015] NSWCA 316

Basten JA; Macfarlan JA; Sackville AJA

Class 3

CONTEMPT OF COURT – non-compliance with Land and Environment Court order to grant easement – contemnor application for adjournment for medical reasons refused – whether denial of procedural fairness CONTEMPT OF COURT – non-compliance with Land and Environment Court order to grant easement – contemnor represented but absent – indication by trial judge that practical orders leading to execution of easement preferred to contempt findings – finding of contempt made – whether denial of procedural fairness

Community Housing Limited v Clarence Valley Council [2015] NSWCA 327; 90 NSWLR 292

Basten JA; Gleeson JA; Leeming JA

Class 4

COURTS – jurisdiction – supervisory jurisdiction of superior courts – whether supervisory jurisdiction impliedly excluded by specific right of appeal - Local Government Act 1993 (NSW), ss 574, 674 – Land and Environment Court Act 1979 (NSW), s 20 CHARITABLE TRUST – whether providing housing for low income persons charitable – whether providing training, vocational and skills development charitable LOCAL GOVERNMENT – rating – exemptions – whether landowner was a public charity – whether landowner used or occupied land for charitable purposes – Local Government Act 1993 (NSW), s 556(1)(h) STATUTORY CONSTRUCTION – whether specific right of appeal impliedly excluded general right conferred by same statute to restrain breaches – qualifications in other provisions of statute told against implication – provisions were complementary not conflicting

Bobolas v Waverley Council (No 4) [2015] NSWCA 337

Basten JA; Leeming JA; Tobias AJA

Class 4

LOCAL GOVERNMENT - enforcement of order to remove waste - whether order invalid - whether order served - whether denial of procedural fairness - no error shown - Local Government Act 1993 (NSW) s 678 PRACTICE - appeal - adjournment - application for further adjournment refused where history of noncompliance with court directions and application unsupported by evidence

Forgall Pty Ltd v Greater Taree City Council [2015] NSWCA 340

Basten JA; Simpson JA

Class 1

APPEAL – civil – application for leave – decision of judge of Land and Environment Court on appeal from decision of Commissioner in Class 1 jurisdiction – whether arguable error – whether issue of principle – whether procedural unfairness – whether detailed landscape plan required – whether "concession" by Council that plan could form part of conditions of consent PLANNING AND ENVIRONMENT – development prohibited unless consistent with objectives of zone – onus on applicant to satisfy Court that condition complied with – preparation of draft conditions if consent forthcoming

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349

Beazley P; Macfarlan JA; Leeming JA

Class 3

ABORIGINAL LAND RIGHTS – claim to Crown land dedicated for public purposes – land dedicated for use as a gaol – gaol decommissioned but dedications not revoked – land and buildings secured and maintained and used on weekends by offenders serving community service orders – primary judge found the land to be lawfully occupied – whether primary judge erred in finding facts, including shifting of evidential burden – whether primary judge erred in law in finding occupation in fact – whether primary judge erred in law in failing to consider parts of the claimed land separately – whether occupation was lawful where activities were not inconsistent with dedications – whether effect of New South Wales Constitution Act 1855 was to require statutory authorisation for occupation of Crown land – Aboriginal Land Rights Act 1983 (NSW), s 36 – New South Wales Constitution Act 1855 (18 & 19 Vict c 54), s 2 APPEAL – appeal confined to question of law – requirement of errors of law to be material or operative – whether error of law in failing to address submission not made at first instance CROWN LAND – dedications – land dedicated for gaol purposes – New South Wales Constitution Act 1855, s 2 vested "entire Management and Control of the Waste Lands belonging to the Crown ... in the Legislature" – whether effect was to require statutory authorisation for occupation of Crown land on behalf of the Crown – whether s 2 in force in New South Wales – construction of s 2 – whether s 2 abrogated prerogative – relevance of land being brought under Torrens title

Ashton Coal Operations Pty Ltd v Hunter Environment Lobby Inc [2015] NSWCA 358; 212 LGERA 265

Beazley P; Macfarlan JA; Gleeson JA

Class 1

LAND AND ENVIRONMENT – approval of an open-cut coal mine under the Environmental Planning and Assessment Act 1979, Part 3A – conditions of approval – project as approved required use of a parcel of land owned by a third party – condition imposed that the appellant must not carry out any development work on the project site until the appellant had purchased, leased or licensed that property – whether condition could be lawfully imposed – whether condition was an unreasonable exercise of the power to impose conditions – whether condition was inconsistent with the Environmental Planning and Assessment Regulation 2000, s 8F(1)(c) – whether condition was contrary to the public interest – whether condition was contrary to the Newbury test of reasonableness

Perilya Broken Hill Ltd v Valuer-General [2015] NSWCA 400

Bathurst CJ; Macfarlan JA; Leeming JA

Class 3

PRACTICE – late application to adduce further evidence – no error of law disclosed in refusal of application by primary judge PRECEDENTS – precedential authority of decision on construction of identical words in different statute – precedential authority of Australian appeals to Privy Council VALUATION – methods of valuation – hypothetical fee simple of mine – minerals in fact reserved to Crown – whether land value to be determined on assumption that minerals privately owned – distinction between laws of general application and qualifications upon the particular grant – Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610 and Gollan v Randwick Municipal Council [1961] AC 82 considered – Crown reservation of minerals to be ignored in valuation of hypothetical fee simple

Roads and Maritime Services v Allandale Blue Metal Pty Ltd [2016] NSWCA 7; 212 LGERA 307

Basten JA; Ward JA; Sackville AJA

Class 3

APPEAL – grounds – question of law – factual finding not challengeable where some evidence available and finding reasonably open – Land and Environment Court Act 1979 (NSW), s 58 ENVIRONMENT AND PLANNING – acquisition of land – compensation – whether compensation payable to owner of acquired land should be reduced on account of payment to lessee – whether owner's interest in fee simple qualified by expectation that the lessee would have continued to exploit the quarry on the land – whether lessee's compensable interest exceeds the market value of its monthly tenancy ENVIRONMENT AND PLANNING – acquisition of land – valuing residual land – whether loss of value caused by carrying out purpose of acquisition – when calculation to be undertaken STATUTORY INTERPRETATION – statutory provision for compensation on just terms – whether expression of elements of compensation varies effect of general law principles WORDS AND PHRASES – "market value" – Land

Acquisition (Just Terms Compensation) Act 1991 (NSW), s 55, s 56; "special value of the land" - Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 55(b); "loss attributable to disturbance" – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 55(d), s 59

Elachi v Council of the City of Shoalhaven [2016] NSWCA 15; 212 LGERA 446

Basten JA; Ward JA; Sackville AJA

Class 4

PLANNING AND ENVIRONMENT – clearing vegetation – whether development consent required to clear prescribed vegetation – whether an exemption for clearing native vegetation from land identified on the Clauses Map, cl 5.9(9A) Shoalhaven Local Environmental Plan 2014 – whether Shoalhaven Development Control Plan 2014, cl 5.2.3 is inconsistent or incompatible with, or overlaps Shoalhaven Local Environmental Plan 2014, cl 5.9(8) and (9A) PLANNING AND ENVIRONMENT – clearing native vegetation on land with environmental zoning – whether consent required under Shoalhaven Local Environmental Plan 2014 – whether activity exempt under Native Vegetation Act 2003 (NSW) – whether offence under Environment Planning and Assessment Act 1979 (NSW), s76A(1) STATUTORY INTERPRETATION – principles – relationship between provisions in different statutes of same polity – legislation creating hierarchy of instruments – functional approach to provisions conferring power on different authorities – legislation limiting need for dual authorisations

Valuer-General of New South Wales v Oriental Bar Pty Limited [2016] NSWCA 48

Basten JA; Simpson JA; Sackville AJA

Class 3

VALUATION OF LAND – heritage listed property – unimproved land value – relationship between s 6A(1) and s 14G(2) of the Valuation of Land Act 1916 (NSW) – Valuer-General's determination affected by error as to gross floor area (GFA) – primary Judge makes finding that land value higher than Valuer-General's determination on the basis of correct GFA – whether primary Judge erred in subsequently adjusting land value downwards – whether sale price of comparable property had to be adjusted to take account of value added by a development consent for that property – whether sale price of comparable property should be adjusted to take account of GST – whether primary Judge double counted "land improvements"

Botany Bay City Council v Minister for Local Government [2016] NSWCA 74; 214 LGERA 173

Bathurst CJ; Beazley P; Ward JA

Class 4

JUDICIAL REVIEW – grounds of review – mandatory relevant considerations in the examination and report of proposal for amalgamation of councils under the Local Government Act 1993 (NSW), ss 218F and 263 – whether Council proposal made under

s 218F constituted a mandatory relevant consideration JUDICIAL REVIEW – grounds of review – procedural fairness in the examination and report of proposal for amalgamation of councils under the Local Government Act 1993 (NSW), ss 218F and 263 – whether denial of procedural fairness in Council proposal not being taken into account LOCAL GOVERNMENT – proposal for amalgamation of councils under the Local Government Act 1993 (NSW), ss 218D-218F – examination and report of proposal under ss 217F(2) and 263 – proper construction of s 263

Bobolas v Waverley Council [2016] NSWCA 139

McColl JA; Simpson JA; Sackville AJA

Class 4

LOCAL GOVERNMENT – enforcement of orders – Local Government Act 1993 (NSW) s 124 – Environmental Planning and Assessment Act 1979 (NSW) s 121B – whether orders invalid – whether orders served – whether denial of procedural fairness PROCEDURE – adjournment application – Legal Aid Commission Act 1979 (NSW) s 57 – where parties seeking adjournment did not appear – whether primary judge erred in refusing adjournment application – whether bona fide appeal or intention to appeal refusal of legal aid SERVICE – service of originating process – whether service effected PROCEDURE – affidavit – whether affidavit valid despite irregularities in form – Uniform Civil Procedure Rules 2005 (NSW) rr 35.1, 35.7B – power of court to deal with procedural irregularities – Civil Procedure Act 2005 (NSW) s 63 EVIDENCE – ability to attend court – probative weight of heavily redacted medical certificates