EPLA CONFERENCE

5 November 2021

YEAR IN REVIEW – CASES IN THE COURT OF APPEAL

John Basten*

While I propose to review the recent cases in our Court, it is not entirely helpful to read them in isolation. Accordingly I propose to adopt a thematic approach.

My theme is that recent cases demonstrate a re-balancing of a thread of tension that runs throughout our legal system. Thus, within the State system, the Land and Environment Court is the primary judicial authority for determining disputes involving environmental and planning issues. The jurisdiction of the Land and Environment Court is entirely statutory. Environmental and planning law is also statute-based: the regulation of land use involves a network of instruments. However, as in many areas, modern forms of statutory regulation (and indeed judicial functions) did not arise like Venus, fully developed, from no identifiable source other than the will of the gods. The problem is always to construe the *language* in the relevant statute or instrument, but with an appreciation of social context and the previous law. There may be a tension between past practice and the language of the statute.

My first illustration is a recent case involving the assessment of compensation for land compulsorily acquired. This year's case was *Ryde Council v Azizi*.[1] The Land Acquisition Act[2] imposes an inflexible system for the assessment of compensation, yet it was formulated against a background of legal principle dating back at least a century. In the early 1990s, it was difficult for lawyers with experience of earlier times to avoid the assumption that whatever precise language the new legislation had adopted, well-established principles should continue to be applied unless clearly inconsistent with the new legislation. One example was the *Point Gourde* principle that the market value of acquired land should not include any increase in value caused by the carrying out of the public purpose for which the land was acquired.[3] However,

---

* Court of Appeal, Supreme Court of New South Wales.

1 *Council of the City of Ryde v Azizi* [2021] NSWCA 165.

2 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

3 See *Point Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

in 2008 in *Walker Corporation*, the High Court insisted that we should focus on the statutory language and not be distracted by cases discussing earlier and differently expressed powers.[4] This principle was applied in a case which was discussed in last year's presentation, *Apokis v Transport for NSW*.[5] In a similar vein, in 2018 in *Moloney* we cautioned against the use of non-statutory language such as the phrases "just compensation override", "double dipping" and references to "intimate connection" with the land to be acquired.[6]

A somewhat different issue arose in *Azizi*. Compensation is initially assessed by the Valuer-General, with a right of objection to the inadequacy of the assessment available to the dispossessed landowner. The acquiring authority can only challenge the assessment on the basis of some error of legal principle applied by the Valuer-General. Ryde Council did avail itself of this power in *Azizi*, but with limited effect. An error in the first assessment was corrected, but the quantum was not significantly reduced. However, when Mr Azizi sought to challenge the assessment, compensation was to be determined afresh by the Land and Environment Court. That could result in a lower assessment than that made by the Valuer-General, but in the meantime the acquiring authority had to pay 90% of the amount assessed by the Valuer-General. The statutory scheme caused a problem for the Council: it believed that the assessment was too high, and indeed more than 10% too high, but that if it paid 90% to the former landowners and succeeded in reducing the assessment below that amount, it would not be able to recover the excess. Accordingly, to protect its interests, after paying the amount it considered reasonable, it then paid the balance of the 90% amount into a trust account held by its solicitor. The owners sought an order from the Land and Environment Court directing the Council to pay them the balance. Two issues arose: first, did the LEC have power to order the Council to perform its statutory duty, if in breach? Secondly, was it in breach?

Justice Moore found that he had power to make such orders and did so. The Court of Appeal granted leave on the basis that there was an issue of general importance as

---

[4] *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259; [2008] HCA 5 at [47].

[5] (2020) 101 NSWLR 844; [2020] NSWCA 39.

[6] See *Moloney v Roads and Maritime Services* (2018) 98 NSWLR 651; [2018] NSWCA 252 at [7]-[16].

to whether the Land and Environment Court had jurisdiction to enforce statutory obligations under the Land Acquisition Act.[7] Although the Court has a jurisdiction to enforce obligations under a "planning or environmental law", the Land Acquisition Act was not such a law.[8] The landowners submitted that while the judge had power to make the order sought, had he been concerned about the insolvency of the landowner, he could have made an injunction in the form of a freezing order, but the Council did not seek such an order. The Council said the judge had no power to condition an injunction by a freezing order, which is why it took the step of withholding payment.

The case turned out to be one where the result lay in the distinction between power and jurisdiction. In 1990 in *NPWS v Stables Perisher*[9] the Court of Appeal held that the LEC had no power to consider a claim in tort for damages resulting from the costs of carrying out work pursuant to an invalid development consent. Such a claim might have fallen within a jurisdiction conferred in relation to "associated matters", as is found in s 32 of the *Federal Court of Australia Act 1976* (Cth), but there was no such provision in the LEC Act. Thereafter, s 16 of the LEC Act was amended to provide the Court with jurisdiction in a matter "ancillary to" a matter otherwise within the Court's jurisdiction. Mr Azizi placed reliance on this provision and on the obligation under s 22 of the LEC Act to determine finally all matters in controversy between the parties, so as to avoid a multiplicity of proceedings. Following *Philip Morris v Adam P Brown Male Fashions*[10] our Court held that s 22 conferred power but not jurisdiction. As to s 16, the Court distinguished the concept of an associated matter from one which was merely "ancillary to" another matter, the latter indicating matters subordinate or subservient to matters within jurisdiction expressly conferred.[11]

However, applying s 22, the Court of Appeal held that the obligation to make a payment of 90% of the assessed value arising only upon commencement of proceedings by the former landowner, the power to determine the issues in dispute, extended to dealing with interlocutory matters, including the payment to be made pending determination of the proceedings, and an order for repayment of any excess.

---

[7] *Azizi* at [20].
[8] *Land and Environment Court Act 1979* (NSW) ("LEC Act"), s 20(2)(a) and (3).
[9] *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573.
[10] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 487; [1981] HCA 7.
[11] *Azizi* at [31].

The Court also held that the LEC had a power to make a freezing order pursuant to the relevant provisions of the UCPR,[12] although no such order had been sought by the Council in that case. Notably, the availability of a freezing order had been addressed by reference to a judgment of the High Court in 1986,[13] without reference to the UCPR enacted in 2005.

It is convenient, whilst considering the powers of the LEC and the inter-relationship between planning law and other legislation, to note the decision in *Aussie Skips v Strathfield Council*.[14] The applicant operated a recycling business in South Strathfield. In an attempt to limit the effects on the local amenity of noise created by the operation of the tip, the applicant was required to build an acoustic wall on one side of its operations. It did so, but the wall was built on community land owned by the Council. The Council sought orders for the removal of the wall from its land; in response, the recycler sought in the Equity Division easements over the Council's land. The easement proceedings were referred to the Land and Environment Court. Justice Duggan held that the proposed easements did not qualify as such under the general law; she further held that the Court would not have been minded to grant the easements sought assuming the power was engaged. The Court of Appeal agreed. However, it noted a further issue, namely that the land was community land, and there was doubt whether the Council had power to grant an easement over community land. If the landowner could not grant the easements sought, it was doubtful that the Court could.[15] The Court suggested that there was no such power for several reasons, two of which are relevant to the operation of planning law. First, for the Court to do something which the Council could not do would be to undermine the purpose and operation of the detailed statutory scheme with respect to community land found in the *Local Government Act*. Secondly, s 88K of the *Conveyancing Act 1919* (NSW) permitted the Court to impose an easement only if it were satisfied that all reasonable attempts had been made by the applicant to obtain the easement; that provision carried with it the implication that the owner of the land had legal capacity to grant such an easement. Finally, the Court noted that the lengthy proceedings in the Land

---

[12] Uniform Civil Procedure Rules 2005 (NSW), Pt 25, Div 2.

[13] *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; [1986] HCA 58.

[14] *Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council* (2020) 103 NSWLR 834; [2020] NSWCA 292.

[15] *Aussie Skips* at [5].

and Environment Court were a misfortune if the proceedings should have been dismissed at the outset for want of jurisdiction.[16] Careful and early attention to jurisdictional issues usually repays the investment of time.

Three other decisions in the course of the year concerned planning approvals, two of which involved construction certificates. The first, delivered on 1 February 2021, was *Omaya Investments v Dean Street Holdings*.[17] *Omaya* involved a challenge by the developer of a site near Burwood railway station to the work being undertaken by a neighbouring developer. Although a broad range of issues had been raised in the Land and Environment Court, the issues on appeal were relatively contained. A construction certificate had been issued in accordance with the development consent which included plans for excavation, shoring and piling works. The developer encountered soft rock and proposed revised plans requiring deeper excavation and a variation to the shoring and piling. These were approved by the certifier. The case was described by counsel for Omaya as having considerable significance for the system of modification of construction certificates. As a construction certificate required a written application and the issue of a formal document, it followed that a modification of a construction certificate required a written application together with a formal document certifying the modification. Omaya complained that neither requirement had been complied with. The modification had occurred as a result of amended engineering plans being handed to the certifier, who had given verbal approval for the developer to proceed on the basis of the amended plans.

The greatest legal difficulty in the case lay elsewhere: it concerned the transitional provisions following the amendments made to the EP&A Regulation in 2017 and the repeal of Pt 4A of the EP&A Act on 1 March 2017. The first construction certificate was issued seven days after the commencement of the 2017 amendments, but the transitional provisions applied the earlier legislation because the development consent had been given prior to the commencement of the amendments.

So far as a written application was concerned, the only modification of the construction certificate was that proposed in the new plans, which constituted a written document.

---

[16] Ibid.

[17] *Omaya Investments Pty Ltd v Dean Street Holdings Pty Ltd* [2021] NSWCA 2.

The Court accepted that no particular form of application was required. Further, although s 80(12) of the EP&A Act, now found in s 4.16(12) assumed that variations might be made to the construction certificate or plans and specifications, which are taken to form part of the relevant development consent, the regulations were silent as to how any variation or modification was to be effected. While the regulation assumed that a modification was to be shown on the documentation and was to be "verified by the certifying authority", so long as a verification were shown on the new plans, the regulation was satisfied. If there were some breach of the regulation on the part of the certifier, the Court held that it did not invalidate the construction certificate. The appeal was dismissed.

Another case dealing with a construction certificate and the possibility of modification was *Settlers Estate Pty Ltd v Penrith City Council*.[18] The issue concerned a drainage pipe which, according to the construction certificate was to discharge stormwater into an existing watercourse. As constructed, it crossed the watercourse and required a further channel to bring the stormwater back. The developer submitted that the pipe conformed with the physical dimensions identified in the construction certificate, though not the ultimate destination. The Court held (upholding the judgment of Pepper J) that if there were inconsistency in the requirements of the construction certificate, a modification should have been sought. As the requirements formed part of the development consent, it was not open to the developer to choose which aspects of inconsistent requirements it complied with. It failed to comply with a clear instruction as to the termination of the drain.

Another modification case was *Ku-ring-gai Council v Buyozo*.[19] The respondent had obtained consent to the development of land in Pymble for storage purposes. The consent was subject to a common condition requiring payment of a contribution to cover the increased demand for public amenities and public services caused by the development. The contribution was calculated by reference to the gross floor area of the development. After the amount had been paid (and the development completed) the developer sought to "modify" the consent by varying the amount of the contribution.

---

[18] [2021] NSWCA 13.
[19] *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177.

The basis of the proposed variation was an alleged error in the calculation of the gross floor area.

The definition of "gross floor area" in the Local Environmental Plan excluded areas used for loading or unloading goods, including access to any such space. The developer argued that in a storage facility, the whole building other than the lockers were excluded from the calculation of the gross floor area. That submission was rejected for reasons explained by Justice Preston sitting in the Court of Appeal. However, the judgement in the LEC upholding the developer's attempt to vary the development consent was set aside on a different basis, which turned on the power to modify a consent after it had been complied with and the development completed.

There appeared to have been an assumption that the verb "modify" permitted any kind of change to a document identified as a development consent, and at any time.[20] However, it was the *development* which was to be modified, not the document recording the consent; and it was the development "as modified" which had to be "substantially the same development as the development for which the consent was originally granted".[21] Further, the consent authority was required to take into account the matters referred to in s 4.15(1) as relevant to the development. A proposed modification which had no environmental effects because it did not propose to modify or change the development in any way was not a modification of the consent to which the section applied.[22]

Another planning case, *R.I.G. Consulting*,[23] involved an attempt to subdivide a lot under the *Community Land Development Act 1989* (NSW) into three lots, the average size of which was less than the minimum lot size for the relevant zone, namely 6 hectares. The Council refused consent. A challenge to the refusal in the Land and Environment Court was rejected by Justice Pain and that rejection was upheld by our Court. The attempt by the appellant to avoid what appeared to be a clear outcome, giving the legislation a purposive approach, arose from a poorly drafted clause in the Local Environmental Plan.

---

[20] *Buyozo* at [8].
[21] Planning Act, s 4.56(1)(a).
[22] *Buyozo* at [10]-[11].
[23] RIG Consulting Pty Ltd v Queanbeyan-Palerang Regional Council [2021] NSWCA 130.

Each of these cases, other than *Settlers Estate*, illustrates my present theme: each turned on the proper construction of the relevant provisions in the Planning Act, the Planning Regulation or a local environmental plan. The importance of understanding the general principles of statutory construction cannot be underestimated.

There are two other cases which illustrate the same proposition, but which may be dealt with briefly in the circumstances. The first is *North Parramatta Residents' Action Group v Infrastructure New South Wales*,[24] which involved a community attempt to preserve a house known as "Willow Grove" in central Parramatta from proposed removal in order to construct the Powerhouse Museum at Parramatta. Justice Moore refused to declare the Minister's consent invalid because the EIS failed to comply with essential requirements of the Planning Act and the Planning Regulation. One aspect of the challenge focused on the requirement of the regulations which required that an EIS provide an analysis of "any feasible alternatives to the carrying out of the development … having regard to its objectives". The Group submitted that Moore J had incorrectly had regard to the proponent's objectives in determining whether or not there were feasible alternatives to the proposal. Underlying the challenge was the contention that the proponent should have identified and addressed alternative sites. That challenge was rejected. The Court accepted that the development application sought planning approval for a proposed development on particular land, so that the choice of the land was not part of the proposal.[25]

A second aspect of the challenge concerned a failure to consider an alternative design which would have preserved "Willow Grove" in situ. It was of some importance in this case that the Parramatta Local Environmental Plan required a competitive process to ensure "design excellence". That process having taken place, the proponent could only put forward the chosen design. Although this did not preclude the consent authority refusing consent and might have allowed the imposition of a condition which varied the design, the full ramifications of this apparently beneficial form of planning control have not been fully explored. At some point, a variation of the proposed design by the imposition of a condition must involve consideration of designs which were not the product of the competitive design excellence process. The case is, perhaps, a

[24] [2021] NSWCA 146.
[25] *North Parramatta* at [30].

demonstration of the complexity which can arise from the changing scheme for ensuring good planning, particularly for major projects.

A case handed down only two months ago was *KEPCO*.[26] I will not dwell on it as it involved the proposed development of a new coal mine in the Bylong Valley north-east of Mudgee by a South Korean State entity and should have been addressed in an earlier session. The project was carefully considered by the Independent Planning Commission and consent was refused. A challenge to that refusal was rejected by Pain J in the Land and Environment Court. The appeal from her judgment was dismissed. The significant factors in the IPC's refusal of consent were (i) the failure of KEPCO to provide adequately for declining groundwater levels, (ii) the effect on high grade agricultural land, (iii) the requirements of the Mining SEPP with respect to control of greenhouse gas emissions, and in particular scope 3 emissions created by use of the coal for electricity generation in South Korea, and (iv) application of the New South Wales government's climate change policy framework. An application for special leave to appeal has been filed in the High Court. (Meanwhile South Korea has committed to ending coal-fired electricity generation within the life expectancy of the proposed mine.)

Almost exactly a year ago, but a week after the last conference, the Court handed down a judgment in the matter of *Reysson v Minister Administering the Planning Act*.[27] Reysson owned land at Tweed Heads which was designated as coastal wetlands and littoral rainforests on the Coastal Management SEPP. In what might have been thought a bold move, Reysson sought a declaration that the SEPP was invalid or at least invalid to the extent that it applied to its land. The *Coastal Management Act 2016* (NSW) defines the area as "the land identified by a [SEPP] for the purposes of this Act, being land which displays the hydrological and floristic characteristics of coastal wetlands or littoral rainforests and land adjoining those features." Reysson contended that the definition identified a jurisdictional fact upon which the validity of the SEPP depended. Thus, to the extent that it could demonstrate by evidence to the satisfaction of a judge that land identified by the SEPP did not display the specified characteristics

---

26 *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216.

27 *Reysson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* [2020] NSWCA 281.

and was not land adjoining such land, the SEPP was invalid. The question is one of statutory construction which, in the absence of clear words inevitably requires consideration of a range of factors to determine in whom the power of specification is vested. Justice Tony Payne's judgment in the Court of Appeal contains a comprehensive identification and application of criteria relevant to considering whether a particular "fact" is a jurisdictional fact. The judgment will provide a useful guidepost for future consideration of this issue, though I suspect that none of it is controversial.

Dincel Construction System Pty Ltd v Penrith City Council[28] involved a challenge to a remediation order made by Justice Robson in the LEC. Subject to a factual issue in relation to a mound created by deposited fill along a boundary of the land in question, which the evidence did not establish had been created by the appellant, the appeal against the remediation orders was dismissed. The thrust of the appeal sought to confine the discretionary power conferred on the LEC in a way which found no support in the broad terms in which the power was conferred.

The written version of this paper will include a handful of other judgments which I have not addressed. One was a rating case, *Mangoola Coal Operations v Muswellbrook Shire Council*;[29] others dealt with procedural issues. I have also not dealt with the criminal cases which are the next topic.

In conclusion may I return to my opening theme. Most if not all of the cases I have discussed involved issues of statutory construction of some complexity. That is not to suggest that all statutory construction is complex or difficult, but some is. In those cases it is necessary to apply general principles which may be easy to state (have regard to the words, the purpose and statutory context) but harder to apply. The difficult cases are unusual, even though they constitute a majority of the cases I have discussed. That is simply an artefact of the appellate system working properly. Nor is the fact that such questions can be difficult necessarily a criticism of those responsible for drafting the legislation or subsidiary instruments.

---

[28] [2021] NSWCA 133.
[29] [2021] NSWCA 46.

OTHER CASES

In a judgment delivered in March 2021, the Court allowed an appeal in a rating case, *Mangoola Coal Operations v Muswellbrook Shire Council*.[30] The land in question had been recategorised by the Council as mining land, although it had previously been categorised as farmland for rating purposes. It was not in dispute that the land surrounded an open cut coal mine, had not been used for grazing in the two years in question, was subject to an easement for supplying water and electricity to the mine and, as a condition of the mine's approval, was subject to two "off set" areas, one for the purpose of Aboriginal cultural heritage, the other for habitat enhancement. The *Local Government Act 1993* (NSW) required categorisation of the land by reference to its "dominant use".

The Court applied established principle to determine that a particular use did not necessarily terminate because no physical activity was undertaken during a particular period. The reason why the use for grazing ceased was drought; the land was nevertheless subject during that period to an access agreement between the landholder and a grazing company. The primary judge was held to have been in error in accepting that an hiatus in the presence of cattle on the property was determinative of the absence of grazing as a dominant use for that period. In any event, the evidence did not support a conclusion that mining was the dominant use. The easement affected, in a limited sense, less than 1% of the relevant parcel. Further, the two off-set areas, of significant size, were manifestly inconsistent with those parts of the land being used for mining purposes. The fact that the protection of the areas had been a condition of the grant of the mining lease did not mean that they were used for mining. The decision was overturned and the matter was remitted to the LEC.

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces[31] was an appeal from an interlocutory judgment joining the Hunter Thoroughbred Breeders Association to proceedings in the LEC regarding an application to modify a development consent for the Dartbrook underground coal mine. An appeal from the decision of the IPC to grant a limited approval was settled at a conciliation conference.

---

30 [2021] NSWCA 46.
31 [2021] NSWCA 112.

After the decision was published the Association applied to be joined as a party to contend that the decision was not a proper exercise of the Court's powers. The primary judge ordered joinder under s 8.15(2) of the Planning Act. AQC Dartbrook sought leave to appeal, which was granted. Section 8.15(2) in Div 8.3 permits a party to be joined to an appeal "under this Division". However, the right of appeal under s 75W(5) was still in force pursuant to transitional provisions. Therefore, the appellant's right of appeal arose under s 75W(5), which was not part of Div 8.3, and s 8.15(2) was not engaged:

The Court found that the Association was not a "necessary" party under UCPR r 6.24(1) as it had no legal interest affected by the outcome of the litigation. Additionally, the scheme reflected in s 34 of the LEC Act (the same section under which the conciliation conference was held) would be subverted if an objector was entitled to become a party.

Secretary of the Department of Planning, Industry and Environment v Blacktown City Council[32] involved an application to set aside a subpoena for production issued by the respondent Council to the Secretary in relation to proceedings in the LEC, on the basis that it lacked any legitimate or forensic purpose. *ICAP Australia Pty Ltd v BGC Partners (Australia) Pty Ltd*,[33] followed by the primary judge, applied a test of whether a subpoena would materially assist a case. *ICAP* was a decision refusing leave to appeal and was not determinative of the correct approach. The Court held that a subpoena will be presumed to have been issued for a legitimate forensic purpose if the documents sought are "apparently relevant" to the issues in the proceedings, or will materially assist on an identified issue. Leave to appeal was granted, but the appeal was dismissed, with the Court finding that the primary judge was correct in deciding not to set aside the subpoena.

Nadilo v Eagleton[34] concerned costs. The parties were neighbours. The respondents had installed two air conditioning units and a heat pump water heater on the outside of the side wall of their house, facing the applicant's house. The applicant claimed these were in breach of the Exempt Development SEPP and the Protection of the

[32] [2021] NSWCA 145.
[33] [2009] NSWCA 307.
[34] [2021] NSWCA 232.

Environment Operations (Noise Control) Regulation. The parties agreed to consent orders which dismissed the proceedings prior to the final hearing. In the absence of the Court ordering otherwise, the applicant would have been required under UCPR r 42.20(1) to pay the respondents' costs. The applicant therefore sought an order that the respondent pay her costs. The primary judge rejected the application, ordering that the applicant pay the costs of the motion.

The Court was asked to determine whether the costs orders were unreasonable or plainly unjust. The Court allowed the appeal, finding that the applicant had achieved the outcomes she sought and it was unjust not to award the applicant her costs. While the applicant may not have succeeded in the claimed breach of the Noise Control Regulation, it was sufficient that she would have succeeded on the other claim.