Recent decisions of the NSW Court of Appeal

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A. Overview

The appendix to this paper identifies – hopefully comprehensively – 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 of those decisions, but even so it is hoped that aspects may be of interest and utility to this audience.

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

Jurisdiction	Number	Number allowed	
Class 1	3	0	
Class 2	1	0	
Class 3	8	4	(*Nelson Bay, Fivex, Golden Mile, Kessly*)
Class 8	2	1	(*Gold & Copper*)
Class 4	13	7	(*Ralan, Jojeni, Trives, Rafailidis, Brown Brothers, De Angelis, Rossi*)
Total	27	12	

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I should explain the methodology immediately. First, the second column only records principal judgments, and excludes interlocutory and procedural judgments (which are, however, included in the appendix). If they are included, the total number of decisions of the Court of Appeal between 10 October 2014 and 9 October 2015 rises to 34. Secondly, the third column includes cases where an appeal is allowed in part but otherwise dismissed. Thirdly (to avoid double counting) cross-appeals have not been counted separately.

B. General themes

As you will see, a few themes emerge. First, appeals from the Land and Environment Court form an appreciable and important component of the work of the Court of Appeal – in the order of 10% of the workload. (The 2014 Supreme Court Annual Report states that, putting to one side 186 applications for leave to appeal, there were 330 "disposals" of proceedings in the Court of Appeal, of which 84% were by a court decision (as opposed to settlement or abandonment): see pages 26 and 46.) Further, some of the appeals are very heavy (for example, *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404; 206 LGERA 40 and *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244 were three day appeals).

Secondly, as a proportion of matters determined by the Land and Environment Court, appeals are relatively scarce. Fewer than 10% of decisions of the Land and Environment Court from which an appeal lies to the Court of Appeal are the subject of an appeal. The exception is Class 4 proceedings, where the percentage is closer to 20%.

Thirdly, 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, 2, 3 and 8 to questions of law results, predictably, in a greater rate of failure. A recurring theme was criticism of the failure to grapple with the need to identify a question of law. Indeed, of the three Class 1 appeals, leave to appeal was refused in one (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248), while in another, scepticism was expressed that leave should be granted in light of the weakness of the appeal, although because there had been a concurrent hearing involving full argument, leave was granted although the appeal was dismissed (*Sertari Pty Ltd v Quakers Hill SPV Pty Ltd* [2014] NSWCA 340). There were similar statements in the Class 2 appeal *Monhem v Shields* [2015] NSWCA 24 and in the cross-appeal in *Fivex* [2015] NSWCA 53; 206 LGERA 450.

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; 322 ALR 254 recently 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].

Similarly, French CJ observed in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [33] of a comparable provision:

> "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 the jurisdiction."

Care should be taken by disappointed litigants in Classes 1, 2 and 3 to be heedful of the statutory restriction on appeals, which reflects a policy choice that the determination of the merits of a proceeding is substantially to be left to the specialist court.

Conversely, much greater rates of success were achieved by appellants from Class 4 proceedings. It is easy to see some of the causes. An appeal lies as of right, and not confined to questions of law. The nature of most Class 4 litigation is that it turns on questions of law arising on often uncontroversial but complex facts, in which the primary judge may have only limited advantage over the appellate court. It will be seen below that there is another contributing cause, turning on the subject matter of Class 4 litigation. However, first I turn to the details of the appeals which were allowed.

C. Successful Class 3 and 8 Appeals

In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (the Nelson Bay Claim) [2014] NSWCA 377; 88 NSWLR 125, the Land Council's appeal was allowed on the basis that the "residential lands" exemption in the definition of "claimable Crown lands" in s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW), required the Minister *personally* to form the opinion that the claimed lands are "needed or are likely to be needed as residential lands". Basten JA, with whom Beazley P and Preston CJ of LEC agreed, reviewed the principle known as "the *Carltona* principle" and, having regard to the beneficial purpose, the nature of the rights conferred by the Act, the subject matter of the opinion (an *essential* public purpose), the contrast with the other provisions in s 36(1) and the absence of an express power of delegation, confirmed that (at [36]):

> "The combination of these factors demonstrate that it was only the opinion of the Minister personally, taken no doubt on the basis of information and advice supplied by departmental officers, which could preclude a successful land claim under s 36(1)(b1)."

The decision will not only be important in any case where the residential lands paragraph is relied upon, but, more generally, will be of assistance where a question arises whether an opinion need be held personally by a Minister or may be held by officers within the department, although in each case it will be a question of considering and construing the particular statutory regimes.

In *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53; 206 LGERA 450, the question of law concerned the correct approach in determining the unimproved value of the "fee-simple", as qualified by s 6A(2) of the *Valuation of Land Act 1916* (NSW). The land owner had obtained development consent to achieve a floor space ratio of greater than that imposed by the LEP (having incurred additional costs including those associated with incorporating "green initiatives" within the building). The question was whether the valuation methodology ought have regard to the actual gross floor area of the building, or the maximum permitted under the LEP. The Court (Basten, Gleeson and Leeming JJA) had regard to the text of s 6A(2)(b), which pointed to a consideration of improvements in the real world on the land, rather than merely ensuring that the valuation exercise should have regard to any existing use. This accorded with what had been held in *Valuer-General v Commonwealth Custodial Services Ltd* [2009] NSWCA 143; 74 NSWLR 700, and with the reservations expressed by Spigelman CJ and Santow JA in the earlier *Commonwealth Custodial Services* case, departing from what Tobias JA had said.

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2015] NSWCA 100; 319 ALR 151 illustrates a recurring phenomenon where there are multiple interests in land which is compulsorily acquired. The facts were especially complex. The registered proprietor had been deregistered at the time of the resumption, and Cudgegong had entered into a contract to purchase the land with a mortgagee exercising a power of sale; it was also alleged that the mortgagee was in breach of duty. It is fair to say that the case turns on its own facts.

Finally, because it is of general application, there was the successful cross-appeal on costs in *Tempe Recreation Reserve Trust v Sydney Water Corporation* [2014] NSWCA 437; 88 NSWLR 449. The question was the impact of an offer of compromise in Class 3 proceedings made to a dispossessed plaintiff. The ordinary position under the rules (r 42.15) is for an indemnity costs order when the offer is better than the actual result. But the premise of that rule is that the offer is made in proceedings where costs follow the event. The problem that arose was expressed as follows (at [103]):

> "There is a difficulty in applying offers of compromise to compensation proceedings in Class 3 of the jurisdiction of the Land and Environment Court. The ordinary rule that costs follow the event, which underlies the making and acceptance of offers of compromise in most proceedings, does not apply. Instead, an applicant will have been dispossessed of an interest in land, and ordinarily, if he, she or it acts reasonably, is entitled to a favourable costs order. Because the starting point is different, it is necessary to consider whether a different approach ought to be taken to effectuate the purpose of an offer of compromise. For it would distort the ordinary operation of offers of compromise to permit the acquiring authority to make a low offer of compromise and cause the applicant to have to run the risk of a large adverse costs order, especially where as here there was essentially a binary issue as to construction."

The solution was stated thus at [104]:

> "[T]he appropriate way to give force to the evident purpose of an offer of compromise, in a jurisdiction where the dispossessed plaintiff who litigates reasonably is ordinarily entitled to costs, is in the present case for the Trust to obtain its costs of the proceedings up to and including 13 February 2013, but that there be no order thereafter, with the intention that the parties bear their own costs."

Kessly v Hasapaki [2015] NSWCA 316 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, Macfarlan, Sackville JJA) 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.

There was also one successful mining appeal, *Minister for Resources and Energy v Gold and Copper Resources Pty Ltd* [2015] NSWCA 113; 208 LGERA 228, but I pass over it because it turns on its own facts, and was a case where the respondent did not appear to defend the decision.

D. Successful Class 4 appeals

In *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404; 206 LGERA 40, the Court (McColl, Barrett, Sackville JJA) dismissed an appeal, although for different reasons than those given by the primary judge, essentially on the basis that even if construction certificates were inconsistent with the development approval and had been issued in breach of s 109F(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act"), they were nonetheless valid, such that the development was not in breach. The decision is most notable for the application of the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [154]-[193].

In *Jojeni Investments Pty Ltd v Mosman Municipal Council* [2015] NSWCA 147; 208 LGERA 54, the question was the appropriate characterisation of existing use rights of a house in Mosman which had been converted into *two* flats in 1933 and used for that purpose ever since. It was common ground that the land had the benefit of existing use rights; the question was how narrowly or broadly were those rights to be expressed. The practical consequences was whether there was power to approve development involving *three* flats on the land.

The Court (Macfarlan, Gleeson, Leeming JJA) was assisted by a deal of evidence and historical materials relating to building controls applicable in 1933 – which, critically, predated more modern controls upon the erection of residential flat buildings in 1937. The consequence was that the 1933 approval did not disclose any limitation upon the number of flats on the land, because, at that time, there was no such restriction. The decision also addresses the approach taken where the formal terms of building approval are no longer available and must be inferred from secondary materials, and the proper approach to determining the characterisation of an existing use.

Finally, *Jojeni* resolved a conflict in decisions at first instance as to the effect of s 109B of the EPA Act. Local councils had repeatedly maintained that s 109B overrode the preserving provisions of ss 107 and 109, with some success (see *Caltex Australia Petroleum Pty Ltd v Manly Council* [2007] NSWLEC 105; 155 LGERA 255), but against the weight of authority, notably the fully reasoned decision of Biscoe J in *Currency Corporation Pty Limited v Wyong Shire Council* [2006] NSWLEC 692; 155 LGERA 230. The Court confirmed the latter.

In *Trives v Hornsby Shire Council* [2015] NSWCA 158; 208 LGERA 361 the Council had commenced proceedings seeking declarations that three "complying development certificates" issued by Mr Trives, acting as an accredited certifier, were invalid. That was, perhaps, an unlikely vehicle for a helpful consideration of the role of jurisdictional facts by the Court (Basten, Macfarlan and Meagher JJA).

Perhaps the key is in [52], where Basten JA observed that "the phrase 'jurisdictional fact' is a potentially confusing label for what is better described as a precondition to the engagement of a statutory power". Relying on *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707, where the "characterisation" of a proposed development – said to be a "drive-in take-away establishment" – was "jurisdictional", it was said by Council that the same applied to the characterisation of the complying development certificates issued by Mr Trives. The Court relied upon the different statutory regime with respect to "complying development", which squarely identified, as the first question to be determined, whether the certifier considered that the proposed development was a complying development, without any discretion (the question being a binary one), and without an appeal. It followed that *Pallas Newco* was distinguishable and that the approach adopted by the primary judge was erroneous, although that did not mean that the certificates were beyond challenge. As it was put at [14]:

> "If it were thought that the validity of the certificate turned on the state of satisfaction of the accredited certifier, that would not place the certificate beyond challenge. The certifier must act according to the law, and must act rationally and not unreasonably. Whether these requirements permit close scrutiny of the certifier's decision, or whether a challenger will bear a heavy burden in seeking to establish unreasonableness, is not a matter which needs to be considered in this case. It may, however, be noted that the certifier does not give reasons and, accordingly, any inference of unreasonableness will need to be drawn from an

> objective consideration of the matters in issue before the certifier and the actual decision reached" (footnotes omitted).

Thus, although, in a sense, a "jurisdictional fact" can include the formation of an opinion which is the prerequisite to the exercise of power, quite different approaches to judicial review apply in relation to jurisdictional facts which are facts in the real world, as opposed to opinions held by the donees of power.

Rafailidis v Camden Council [2015] NSWCA 185 was a case of contempt by unrepresented litigants. Many of the submissions advanced both at first instance and on appeal by Mr and Mrs Rafailidis were baseless (including absence of jurisdiction and bias). That did not prevent Mr and Mrs Rafailidis' success on appeal, on a point not advanced at first instance, but submitted by counsel appointed as amicus on the appeal.

The facts are complex – which, ultimately, was the source of the problem with the contempt conviction secured by Council. It suffices to say that Council's development consent was conditional upon the demolition of a single storey fibro clad dwelling on the property within 28 days of the completion of the proposed dwelling. This did not occur. Council commenced enforcement proceedings and obtained an order that the dwelling be demolished within 90 days. That order was stayed, pending the determination of a Class 1 appeal in respect of Council's refusal of a subsequent development application which sought to retain the existing dwelling. Council sought and obtained a discharge of the stay, varying it by extending the 90 day period to a year from the date of the 2012 consent. There was further noncompliance, and ultimately both Mr and Mrs Rafailidis were convicted and sentenced.

The significance of the appeal is twofold. First, the fact that the ultimately successful submissions had not been advanced below did not prevent their success on appeal. McColl JA, with whom Gleeson JA and Bergin CJ in Eq agreed, accepted the submission that this was a case like *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* [2001] NSWCA 243 where the appellants were not raising a new point contrary to *Suttor v Gundowda*, but instead were "contending that the case pleaded and proved by the Council at trial (to which they had effectively pleaded "not guilty") did not establish that they were guilty of contempt of court": at [41].

Secondly, her Honour relied at [46] upon familiar principles that "injunctions should be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction": *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259. This has an important consequence for contempt prosecutions. McColl JA said, at [47]:

> "A court order may be enforced 'if it bears a meaning which the Court is satisfied is one which ought fairly to have been in the contemplation of the person to whom the order was directed … as a possible meaning.' However, 'a defendant cannot be committed for contempt on the ground that upon one of two possible

> constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character … the undertaking must be clear and the breach must be clear beyond all question'" (footnotes omitted).

There was sufficient ambiguity in the orders, which contemplated obtaining "appropriate development consent", and which did not expressly specify a time to do so, for those principles to apply.

Brown Brothers Waste Contractors Pty Ltd v Pittwater Council [2015] NSWCA 215 is in some respects similar to *Rafailidis.* A series of challenges to a refusal to grant leave to withdraw guilty pleas to a charge of contempt were advanced on appeal. It was held (McColl, Macfarlan JJA and Tobias AJA) that although the primary judge ought to have recused herself (by reason of views expressed in an earlier contempt judgment), the appellants had waived their right to complain by failing to object at the time. It was further held that there had been no denial of procedural fairness by her Honour taking the course of determining the proper construction of the orders said to have been contravened in the course of determining the withdrawal application. However, this Court reached a different view as to the construction of the orders, and also found that the primary judge had erred in failing to take account of the appellants' solicitor's unchallenged evidence that he had, after advising his clients to plead guilty, appreciated that there was an ambiguity in the orders.

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. Without dealing with all aspects of the appeal (there were 22 grounds) it may suffice to identify 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 EPA Act, 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."

That does not undercut the force of the observation that the broader grant of appellate jurisdiction in Class 4 and 8 proceedings leads to greater success by appellants; rather, it is a consequence of the essentially legal (as opposed to merits) nature of proceedings in Class 4.

E. Contempt and conclusions

Thus a common category of successful appeals concerned prosecutions for contempt. In addition to *Rafailidis*, *Brown Brothers* and *Kessly*, appeals involving contempt were dismissed in *Rumble v Liverpool Shire Council* [2015] NSWCA 125 and *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379.

Tovir was an appeal against findings of contempt against a land owner and its director for breach of orders restraining the latter from using premises in Waverley and Bondi for the purpose of "backpackers' accommodation". Although the appeal was dismissed (Basten, Macfarlan, Leeming JJA), the reasons may be of interest in two respects. The first related to the approach to construction of an infelicitously worded definition within an LEP. Ultimately the Court rejected a rather strict and technical construction, propounded by the contemnors, although undoubtedly available as a literal meaning. The Court relied upon a variety of considerations, including the impossibility neatly of cutting and pasting the definition into the operative provisions in accordance with *Kelly v The Queen* [2004] HCA 12; 218 CLR 216, the consideration that construction involved, in Basten JA's words, that "one must navigate a sea of verbiage" (at [19]), the general imprecision of the provisions of the LEP and their focus on actual as opposed to legal use of premises.

The second matter of interest arose from the fact that evidence was not given by the alleged contemnors. It was common ground that the proceedings were for civil, not criminal, contempt. The primary judge had concluded that "the general criminal trial right to silence rule applies in a trial of civil contempt and not the general civil hearing

rule in *Jones v Dunkel*". Basten JA queried whether an unduly favourable approach to the alleged contemnors had been applied by the primary judge. His Honour said at [43]:

> "It would at least be curious that a party whose civil rights have been breached may more readily obtain a court order restraining a continuation of the breach than enforce the order where a continuation of the conduct is no longer merely a breach of a private right, but an affront to the authority of the court."

That was a matter which, it was noted, might require reconsideration in a case where the point required determination.

It may be observed that at least four factors contribute to the relative frequency of contempt appeals. One is that contemnors who are unrepresented at first instance may secure representation on appeal, and may be permitted to rely on points not raised at first instance (*Rafailidis*). Another is that there are many technical aspects of the law of contempt (*Brown Brothers*). I suspect that a third is that the nature of orders in planning law is that they are apt to be more complex and contestable than injunctions issuing from the Equity Division, giving rise to greater scope for disputation (*Rafailidis, Brown Brothers, Tovir*). A fourth is that the Land and Environment Court serves an important enforcement function by councils and statutory authorities, whereas it is relatively uncommon for a private litigant who has secured an injunction in the Equity Division to seek to enforce it by bringing proceedings for contempt (*Tovir, Brown Brothers, Rafailidis*).