Remedying breaches of planning legislation in the Land & Environment Court

On 1 July 1980, the *Land and Environment Court Act 1979* ("the Court Act") declared the Land and Environment Court of New South Wales, the world's first specialist environmental "superior court of record", to be open for business[1].

The new Court entered the pantheon of Australian superior jurisdictions as part of a revolution in the development of laws to protect the environment which occurred both nationally with the Protection of the Environment Act of 1975, and at state level in New South Wales with the Environmental Planning & Assessment Act 1979.

The importance of the jurisdiction was recognised from its creation, with the Land & Environment Court given equal standing to the Supreme Court; expressly empowered to exercise the civil jurisdiction of the Supreme Court in matters within its specialist area. Its seven full time judges are vested with the same powers as a Supreme Court judge, and the Court Act provides for Supreme Court proceedings to be transferred to the Land & Environment Court in certain circumstances. Indeed it has been common over recent years for Land & Environment Court judges to sit in the Supreme Court for different periods. The chief judge of the Land & Environment Court often sits on the Court of Appeal for cases concerning environmental matters.

That superior status for the Court was the subject of debate at the time the Court was brought into being with some arguing for a judicial tribunal closer to the Administrative Decisions Tribunal (now within NCAT). The decision in favour of the status the Court was ultimately accorded was made not for its essentially administrative role in providing an expert tribunal to review the merits of decisions concerning development applications and the like, a function often discharged by an expert Commissioners. The status of the Court instead was recognition of the extraordinary judicial review power the Court wields to adjudicate the lawfulness (as opposed to the merits) of government executory decisions; and to enforce environmental and planning laws by declaration and injunction.

It is the exercise of that special jurisdiction of the Court to ensure that environmental laws are obeyed, even by the executive government, and to exercise a wide discretion to decide what should be done when they are not obeyed, that I will be focusing in my presentation.

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[1] See Section 5 of the Land & Environment Court Act 1979. Also *Jurisdiction, Structure and Civil Procedure*, Justice Peter Biscoe Paper delivered to the Australasian Conference of Planning and Environment Courts and Tribunals, 2 September 2010, Sydney.

Consideration of the issues which confront judges of the Land & Environment Court often offers a useful vantage to consider issues that are fundamental the rigour and integrity of our democracy– questions such as what makes for fair decision making?; what rules will best stop a poor, biased or even corrupt decision maker from making bad or environmentally damaging decisions?; and what should a Court do when it finds that a planning or environmental law has been broken?

What follows in this paper is a discussion of some of the key provisions of the EP&A Act and the *Land & Environment Court Act* 1979 relevant to the civil enforcement of planning law with some suggestions as to matters which ought to be carefully considered by the practitioner

Restraining a breach of the Act

Most litigation in the Land & Environment Court involves an allegation or a breach of the Environmental Planning & Assessment Act. That may take the form of a challenge that a Council or sometimes the Department of Planning did not comply with the Act (or the various planning instruments made under it) in making some decision. Alternatively, it may comprise an allegation that the recipient of an approval has failed to comply with its terms when carrying out the relevant approved development – or has not in fact obtained the necessary approval at all.

The principal sections that therefore come into play are Sections 123 and 124 of the EP&A Act. Section 123 reads:

> **Section 123 Restraint etc of breaches of this Act**
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> (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
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> (2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
>
> (3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.

Important aspects of that section are:

(a) It grants open standing to anyone, and does not require a plaintiff to claim its own rights have been infringed.

(b) It also expressly provides for one person or body corporate to bring proceedings on behalf of someone else, with that someone else picking up the bill. That section allows particularly for community groups to be incorporated around an area of interest sometimes with the express purpose of commencing litigation about some vexed political issue concerning town planning or the environment.

(c) What is essential however is an allegation that the Act has been broken. That is, it is not enough to disagree with a planning decision. To enliven the jurisdiction it must be alleged that a requirement of the Act has not been met.

To illustrate some of the issues involved I take the example of proceedings brought by Mr Frank Lowy, resident of Point Piper against the Land & Environment Court itself.

Mr Paino who lived at 106 Wolseley Road had lodged a development application to extend his balcony. Mr Lowy lived at number 102 but at the two properties are neighbours. The balcony extended into a foreshore building line in which no building could be constructed. Mr Paino had applied to vary the standard. An issue arose as to whether the foreshore building line was a development standard which the EP&A Act allowed to be varied; or whether instead it was a prohibition which could not be.

Mr Lowy had lodged an objection to the DA lodged with the Woollahra Council (the Council) which lead the Council to refuse the application. Mr Paino commenced a merit appeal to the Land and Environment Court, and Mr Lowy filed a motion applying for an order to be joined as a party, but that application was rejected by The Land & Environment Court because it "necessarily gives rise to appeal rights". However he was given leave for him at the hearing by counsel and solicitor and to call evidence, cross-examine witnesses and make submissions.

Despite that assistance, the Council lost before Justice Lloyd and the DA was approved with the building line found to be a development standard.

The case then brought by Mr Lowy in the Court of Appeal asserted that the Land & Environment Court had breached the EP&A Act, and relied upon the open standing granted by

Section 123 to retrain a breach of the Act. The Court of Appeal agreed with Mr Lowy that the foreshore building line was an immutable prohibition, and Mr Paino did not get his balcony.

Power of the Court

While Section 123 proscribes the right of a person to commence litigation to bring proceedings claiming a breach of the Act has occurred (or is about to occur), Section 124 describes what the Court is empowered to do if the alleged breach is proven. That power could not be broader. The section relevantly reads:

> **124 Orders of the Court**
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> (1) Where the Court is satisfied that a breach of this Act has been committed or that a breach of this Act will, unless restrained by order of the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.
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> (2) Without limiting the powers of the Court under subsection (1), an order made under that subsection may:
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> (a) where the breach of this Act comprises a use of any building, work or land—restrain that use,
>
> (b) where the breach of this Act comprises the erection of a building or the carrying out of a work—require the demolition or removal of that building or work, or
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> (c) where the breach of this Act has the effect of altering the condition or state of any building, work or land—require the reinstatement, so far as is practicable, of that building, work or land to the condition or state the building, work or land was in immediately before the breach was committed.

The effect of that Section is that even if a breach of the Act is proven, the Court has a lot of latitude to work out what to do about it.

That discretion is very broad.

Section 124 then continues on to state that the Court can adjourn proceedings brought to restrain a breach of the Act if an application is made to obtain an approval which will remedy the breach, until that application is determined.

In the commonest case, if I am alleging that my next door neighbour is carrying out building work which is illegal because he does not hold the necessary approvals, my neighbour can apply to adjourn the proceedings sometimes for a significant period, to allow that neighbour to apply to the Council for a development consent (or a modification of an existing consent) which will address that absence.

The Court's jurisdiction in such matters is statutory arising under Section 20 of the *Land & Environment Court Act* 1979, an enactment which now empowers the Court to "hear and dispose of" proceedings under a large number of environmental and planning style laws including particularly proceedings to remedy or restrain breaches of those laws pursuant to powers described in provisions similar to Sections 123 and 124 of the EP&A Act discussed above (such as 673 and 674 of the *Local Government Act 1993*).

The breadth of the discretion available to the Court can be seen from the case of *Grace v Thomas Street Cafe Pty Ltd* (2007) 159 LGERA 57 in which a couple who lived across from their local café in Blues Point decided after it had traded for at least 20 years that it was illegal because it had no development consent, and could not get one because it was in a neighbourhood residential zone.

The Court of Appeal ultimately held she was right, but declined to order that the café close (referring it back to the trial judge for a hearing on that point). Importantly, the Court of Appeal held not only that Land & Environment Court could decide to do nothing because of the delay, it said the Court could alternatively make orders which provided in effect a consent for the business to keep operating by imposing set of conditions under which the business could continue to run.

Adjournment to allow a consent to be obtained

However the price of that adjournment may be an injunction that the illegal development cease until the approval is obtained. The portion of the Section reads:

> 124(3) Where a breach of this Act would not have been committed but for the failure to obtain a consent under Part 4, the Court, upon application being made by the defendant, may:
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> (a) adjourn the proceedings to enable a development application to be made under Part 4 to obtain that consent, and

(b) in its discretion, by interlocutory order, restrain the continuance of the commission of the breach while the proceedings are adjourned.

That is an important weapon for a Respondent in a dispute over a planning approval. Where a consent authority has approved a development once, but with the approval infected by a procedural error, there is every chance that the consent authority will approve the development again if it is given a chance to repeat the process while alerted to the legal requirement in issue.

Limitations

Also important to remember is the limitation provision applying under Section 101 of the EP&A Act (with comparable sections found in other planning legislation) which imposes a strict limit to the commencement of proceedings to ensure they are commenced only within 3 months of the date on which public notice of the granting of the relevant approval. Importantly, the 3 months is not measured from the date of the consent, but from the date of the public notice. Accordingly, when instructed it is often important to conduct an urgent search of the local paper which generally includes a weekly publication by the relevant Council of the consents recently issued.

A separate privative clause applying to challenges to the validity of planning instruments applies from 3 months from publication in the government gazette.

A series of cases has considered how much of a locked door the expiry of that 3 month period actually is. Reference is often made to what is known as the Hickman Principles deriving from the High Court decision in *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598. Cripp CJ fleshed out those principles in a case in the NSW Supreme Court which challenged a development consent for a shopping centre in *Woolworths Ltd and Kenlida Pty Ltd v Bathurst City Council* (1987) 63 LGRA 55. The complaint of the objector was that owners consent for the development had not been obtained. That was not held to be sufficient to get around the privative clause, but the Court did identify what kind of cases would with reference to the Hickman decision (see Cripps CJ at 63-64 in particular). Known now as the Hickman principles they include:

- Bad faith.
- Denial of natural justice.
- Perhaps manifest excess of jurisdiction.

In *Maitland City Council v Anambah Homes Pty Ltd (2005) NSWCA 455*, the Court of Appeal put it a different way, determining that provisions such as Section 35 and 101 would not protect against "manifest error" which revealed that the decision under review was not a "bona fide attempt to exercise the statutory power" involved. It also recognised that a challenge could be brought outside the 3 month limit if it the requirement of an environmental law involved was "*essential, imperative, or inviolable*" (see comments of Spigelman CJ at [18] in particular).

Allowing a consent authority to fix its mistakes

Another important aspect to environmental litigation aimed at enforcing planning laws in NSW and that is Part 3 Division 3 of the Court Act. Section 25B in that Division allows the Court to suspend the operation of a development consent in whole or in part to allow the decision maker in effect to correct a legal error found to have been made in its decision making. It is in the following terms:

> **25B Orders for conditional validity of development consents**
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> (1) The Court may, instead of declaring or determining that a development consent to which this Division applies is invalid, whether in whole or in part, make an order:
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> (a) suspending the operation of the consent in whole or in part, and
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> (b) specifying terms compliance with which will validate the consent (whether without alterations or on being regranted with alterations).
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> (2) Terms may include (without limitation):
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> (a) terms requiring the carrying out again of steps already carried out, or
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> (b) terms requiring the carrying out of steps not already commenced or carried out, or
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> (c) terms requiring acts, matters or things to be done or omitted that are different from acts, matters or things required to be done or omitted by or under this Act or any other Act.

The Section presents a number of conceptual difficulties with which the Courts have wrestled in that it envisages a Court exercising a power to suspend rather than quash an instrument which (as a precondition to the exercise of the power) it has must have held to have been unlawfully

issued. Nonetheless, Section 25E makes it clear that it is not just a power available to the Court, but a power which the Court has a duty to consider. It reads:

> **25E Duty of Court**
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> It is the duty of the Court to consider making an order under this Division instead of declaring or determining that a development consent to which this Division applies is invalid, whether in whole or in part.

The facility the Section offers to the unsuccessful Respondents a chance to fix up a consent found by the Court to be invalid through some procedural error. That opportunity is significant when deciding whether expensive judicial review proceedings will ultimately deliver to an Applicant the result it is after.

Costs

The last consideration for a potential litigant in the civil enforcement jurisdiction of the Land & Environment Court is that of costs.

In the ordinary case, the general rule that costs follow the event applies, unless it has engaged in some sort of disentitling conduct relating or leading up to the litigation: ***Oshlack v Richmond River Council*** (1998) 193 CLR 72 at 96-98 [65-70] per McHugh J. There are however a number of special considerations that must be taken into account.

The first of these is the recognition of the special position of public interest litigants.

In *Oshlack v Richmond River Council* (1998) 193 CLR 72, the High Court first recognised the special category of proceedings that are brought in the public interest deserving of a special costs order. In that case the Applicant, Mr Oshlack, was excused being subject to a costs order despite being ultimately failing in a judicial review challenge.

As Justice Biscoe of the Land and Environment Court said recently in another public interest case (***Friends of King Edward Park v Newcastle City Council***):

> ***"There is little point in the legislature opening the door to public participation in this way if the doorway is then blocked by a menacing costs hound which threatens to savage the responsible public interest litigant who dares to enter and loses."***

In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, (2010) 173 LGERA 280 at [13], Preston CJ of the Land & Environment Court identified a three step approach to identifying when the exemption ought to apply. He said:

> "What principles or guidelines have courts formulated for exercising the costs discretion in public interest litigation which has been unsuccessful? A review of the decisions on costs reveals that courts have used, in effect, a three step approach in determining whether to depart from the usual costs rule: first, can the litigation be characterised as having been brought in the public interest?; secondly, if so, is there "something more" than the mere characterisation of the litigation as being brought in the public interest?; and thirdly, are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?"

There are also special rules which exempt judicial review proceedings security for costs:

> **59.11 Security for costs**
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> (1) A plaintiff is not to be required to provide security for costs in respect of judicial review proceedings except in exceptional circumstances.
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> (2) Where a plaintiff:
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> (a) invokes an open standing provision, or
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> (b) commences representative proceedings,
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> the court is not to treat the plaintiff as bringing proceedings for the benefit of a third party for the purposes of considering whether exceptional circumstances exist.

The Policy of that Rule is supported by Rule 4.2(2) of the Land and Environment Court Rules 2007 (see discussion in *Save Little Beach Manly Foreshore Inc v Manly Council* [2013] NSWLEC 155; (2013) 198 LGERA 304), which provides:

> 4.2 (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.

There are also special cost considerations where an Applicant challenges a development consent and the issue arises as to whether the beneficiary of the consent or the consent authority ought to defend the case.

In judicial review proceedings it has been observed that the role of the decision maker ought to be passive one where there are two opposing litigants with interests in the result of the case who can stand as the proper contra dicta. In the joint judgment of Gaudron and Gummow JJ in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 90:

> In a significant number of such litigious disputes, it will, in accordance with the reasoning in R v Australian Broadcasting Tribunal; Ex parte Hardiman [(1980) 144 CLR 13], be entirely appropriate for, if not incumbent upon, the local government body not to assume the position of a protagonist and to avoid incurring substantial costs. The position of protagonist will be filled by the party against which injunctive relief is sought and which is the real contradictor in respect of the application for declaratory relief.

That does not mean however that the Council is out of the firing line in relation to costs even if it submits to orders. If its decision is declared invalid it may still be ordered to pay costs as

recognition that its own error lead to the litigation (See Biscoe J in *Cutcliffe v Lithgow City Council* (2006) 147 LGERA 330)

Of course where an applicant succeeds against both a council and the beneficiary of a consent who have both actively defended proceedings, the costs order is made against both. (*Proprietors of SP 13318 and SP 13555 v Lavender View Regency Pty Ltd and North Sydney Council* (unreported, 6 June 1997, LEC/NSW, Talbot J).

The Court has held that where the holder of an environmental approval is subjected to judicial review proceedings, and it chooses to submit to orders and leave it to the consent authority to defend its approval, it is none-the-less entitled to "submitting costs" to the extent it is reasonable to monitor the case and assist the Court. (*Hurstville City Council v Minister for Planning & Infrastructure* (2012) Pain J unreported). Those costs can be significant.

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