IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P47 of 2016

B E T W E E N: **WESTERN AUSTRALIAN PLANNING COMMISSION**

Appellant

and

SOUTHREGAL PTY LTD

First Respondent

DAVID STEPHEN WEE

Second Respondent

No. P48 of 2016

B E T W E E N: **WESTERN AUSTRALIAN PLANNING COMMISSION**

Appellant

and

TREVOR NEIL LEITH

Respondent

APPELLANT'S SUBMISSIONS IN REPLY

State Solicitor for Western Australia
Level 25 David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

Telephone: (08) 9264 1888
Fax: (08) 9264 1440
Ref: SSO 1495-16
Contact: Stephen Willey

TENET OF INTERPRETATION, CONTEXT: RS [8], [11], [25]

1. As to the Respondent's Submissions at RS[8], the Appellant's submissions on the "natural meaning" of s 173(1) were not to deny regard for context, but to found its submission that weight must be given to the natural meaning of words in statutes.

CONSISTENCY OF MEANING FOR s 173(1) – RS [14]-[22]

2. The Appellant submitted that s 173(1) must take its natural meaning in respect of the matters in s 174(1)(b) and (c), and that natural meaning should also be preferred in respect of s 174(1)(a) to avoid having two inconsistent meanings for the one provision. The Respondents argue, *first*, that section 174(1)(a) deals with different matters than those in s 174(1)(b) and (c); and *second* that s 174(1)(a) is to be read with other provisions RS[15].

3. Further to the *first* argument, it is not correct to say that reservations do not have immediate effect, simply because they can be revoked (the same is true for any scheme provision). In any event, even if it were correct, the distinction is not relevant to the point.

4. As to the *second* argument, the Respondents have merely reiterated their alleged implications from ss 177, 178 and 179. In the result, while not express, the Respondents appear to submit that s 173(1) has a different meaning for s 174(1)(a) matters than for s 174(1)(b) and (c) matters.

DEFINITION OF "INJURIOUS AFFECTION" RS [13], [34]-[35]

5. The Appellant submitted that the interpretation advanced by the Respondents renders redundant words used in several sections. The Respondents oppose that submission by arguing that the words comprise a defined term.

6. However, s 174 PD Act does not define the expression "injuriously affected by the making or amendment of a planning scheme" for the purposes of s 173(1). First, the expression addressed in s 174(1) is a different expression: "injuriously affected **by reason of** the making or amendment of a planning scheme" (the emphasized words are not in s 173(1)). Hence, s 174(1) addresses, but does not define, the expression used in s 173(1).

7. Second, s 173(1) itself contains words that would be redundant on the Respondents' interpretation. Even if s 174(1) does define the relevant

expression for the purposes of s 173(1), that does not explain the use of redundant words in s 173(1) in the first place.

READING WORDS INTO PROVISIONS: RS [32], [39]-[44], [51]

8. As to RS[40], the Respondents have not addressed the use of "payable" in s 177. Section 177(1) provides that compensation is not "payable" until (a) or (b), which means, by ordinary grammatical construction, it is payable upon the first to occur. In light of the deferral of compensation, "payable" takes the meaning of *becoming* liable to be paid (if claimed within the limitation period and if otherwise meeting statutory criteria).

9. Section 177(2) provides that compensation is "payable" only once. It covers, but is not confined to, providing that compensation is to be *paid* only once. Being "payable" only once under subsection (1) means it is payable only on the first to occur of s 177(1)(a) or (b).

10. Therefore, in neither subsection does the Appellant's interpretation require words be "read in".

11. If, as the Respondents argue, s 177(2) means that compensation is *liable to be paid* more than once, but cannot be *paid* more than once, then the limitation periods under s 178(1)(a) for claims in respect of successive identical development applications would be ineffective. Cf CA[108]. In any event, had the legislature intended the meaning "paid only once", the subsection would have so expressed it.

WHETHER s 173(1) is "CONTROLLING": RS [11], [28]

12. Relying in part on the language used in *Temwood* by Gummow and Hayne JJ, the Appellant characterised s 173(1) as "controlling" in respect of eligibility for compensation, i.e., s 173(1) has a *status* that also resists ambiguous and uncertain implications contrary to its natural meaning.

13. The Respondents oppose that submission by characterising s 173(1) as merely "introductory" or "commencing", with its interpretation dependant on subsequent provisions. That argument begs the question – it *assumes* that s 173(1) lacks any controlling role, but does not address why.

POLICY – NO COMPENSATION UNLESS LOSS: RS [29]-[32], [57]

14. The Appellant submitted that an implicit object of Division 2, devoted to "compensation", is that compensation is confined to persons who need compensation, i.e., persons ***whose*** land suffers a reduction in value.

15. The Respondents resist that submission by arguing, *first*, that such object is not expressed in Division 2: RS[29]. In reply, the Appellant says that the word "compensation" implies the relevant object, as does s 177(3).

16. The Respondents argue, *secondly*, that the PD Act does contain "safeguards" against payments of compensation. But the safeguards identified each goes to a different point:

    (i) Section 177(2) provides that compensation is payable only once, but does not address whether it is payable to a purchaser who did not suffer loss;

    (ii) Section 178(1) is a limitation period and does not address the point; and

    (iii) Section 177(3) addresses a concern that too much compensation might be paid to the original landowner upon sale of reserved land, and a concern that such landowner might seek compensation by way of a development application not made in good faith. These do not address the point.

17. On the contrary, s 177(3)(a) is concerned that compensation on first sale is not paid without justification. There is no corresponding provision under which a purchaser who claims compensation has to satisfy the Arbitrator that the purchaser paid more for the reserved part of purchased land than its worth. This does not suggest that the legislature was indifferent to paying compensation to persons who suffered no loss; it suggests that purchasers are not entitled in the first place.

LOSS BECOMING "APPARENT": RS [45]-[47]

18. The Respondents argue at RS[46] that the reasons of Martin CJ at CA[81] are not novel or heterodox, and "seem sensible". However, this case is concerned with whether those reasons are correct and form a proper basis for the Respondents' interpretation.

19. Contrary to RS[46] (last sentence), the Appellant's criticism (at AS[50]) of CA[81] does address the Chief Justice's alternatives; it is because the extent of injurious affection is apparent *upon first sale* that any purported justification (relating to development approval) cannot apply to a purchaser.

20. The Respondents do not challenge that the primary purpose in postponing entitlement was as stated by Beech J at [62]. Interpretation will be influenced by the primary purpose, not by an incidental, and insubstantial, justification thereof relating to loss becoming "apparent".

Dated this 31th day of October 2016

KM Pettit SC
Francis Burt Chambers

TC Russell
State Solicitor's Office
Telephone: (08) 9264 1888
Facsimile: (08) 9264 1440
Email: t.russell@sso.wa.gov.au