IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S120 of 2011

BETWEEN **CUMERLONG HOLDINGS PTY LTD (ACN 008 484 875)**

Appellant

and

DALCROSS PROPERTIES PTY LTD (ACN 083 792 054)

First Respondent

DALCROSS HOLDINGS PTY LTD (ACN 083 791 931)

Second Respondent

AUSTRALASIAN CONFERENCE ASSOCIATION LIMITED (ACN 000 003 930)

Third Respondent

HIGH COURT OF AUSTRALIA
FILED
06 MAY 2011
THE REGISTRY SYDNEY

THIRD RESPONDENT'S SUBMISSIONS

PART I: Internet publication

1 The third respondent certifies that these submissions are in a form suitable for publication on the Internet.

PART II: Issues

2 Did the *Ku-ring-gai Local Environmental Plan No 194* (NSW) ("**LEP 194**") contain any provisions that required the approval of the Governor for the purposes of sub-section 28(3) of the *Environmental Planning and Assessment Act* 1979 (NSW) ("**EP&A Act**")?

3 Does sub-clause 68(2) of the *Ku-ring-gai Planning Scheme Ordinance* (NSW) ("**KPSO**") suspend the operation of the restrictive covenant contained in DP834629 created pursuant to sub-section 88B(3) of the *Conveyancing Act* 1919 (NSW)?

PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 Consideration has been given to the question whether notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) should be given with the conclusion that it is not necessary.

PART IV: Facts

5 Save for the matters identified below, nothing contained at AS [4]-[14] is contested by the third respondent as being other than a fair reference or summary.

Filed on behalf of the third respondent
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6 The appellant submits ([AS4]) that the "Defendant's lands" included Lot 102 in DP834629. There were two defendants at trial. There are three respondents in this Court, the first two respondents being the defendants at trial. At no stage has any respondent been the registered proprietor or beneficial owner of Lot 102 in DP834629. On 28 June 2010, the third respondent acquired Lots 101 and 103 in DP834629 and Lot B in DP 322493 from the first respondent. The first and second respondents have filed submitting appearances in this Court as the third respondent is now the registered proprietor of the relevant land.

7 The third respondent disagrees with the last sentence of AS [14] and would characterise its content as legal submission going to one of the key issues in dispute rather than fact.

8 Also, under Part IV of its submissions, the appellant gives the citations for the judgment of Smart AJ and of the Court below. The citation given for the judgment of Smart AJ is that of his Honour's first judgment, and not of the second judgment that was the subject of the appeal to the Court below. The citation for that judgment is [2009] NSWSC 1157. Further, the decision of the Court below is reported at (2010) 175 LGERA 433.

PART V: Legislation

9 The third respondent agrees with the appellant's list of applicable statutes and instruments, however it submits that it would be of assistance to this Court to have before it (as the Court below did) more fulsome versions of those statutes and instruments. What was before the Court below is to be reproduced in the Appeal Books.

PART VI: Argument

10 The ultimate issue in these proceedings is whether sub-clause 68(2) of the KPSO operates so as to suspend the operation of the restrictive covenant that benefits the appellant's land.

11 On the appellant's case, the resolution of that issue requires consideration of the terms of sub-sections 28(2) and 28(3) of the EP&A Act as they apply to LEP 194, with the conclusion that sub-section 28(3) of the EP&A Act was engaged because of the "effect" that LEP 194 had on sub-clause 68(2) of the KPSO (AS [15]-[16], [18]).

12 The appellant submits that the "effect" of LEP 194, "coupled" with the operation of sub-clause 68(2) of the KPSO, constitutes a "provision" for the purposes of sub-section 28(3) of the EP&A Act (AS [18], [20]), and therefore LEP 194 required the approval of the Governor, which, it is common ground, it did not receive. According to the orders sought by the appellant, the consequences of the lack of gubernatorial approval is not that LEP 194 is somehow invalid, or that the re-zoning it purported to effect is not valid, or that its words

have no general force, but that LEP 194 cannot work to provide any factum upon which sub-clause 68(2) of the KPSO can operate.

13 The appellant contends that any other conclusion would be to allow form to prevail over substance and would deny a purposive interpretation of section 28 of the EP&A Act (AS [17], [19]).

14 The third respondent submits that the appellant's contentions should not be accepted for three principle reasons, which will be elucidated below. First, the construction given by the appellant to the words used in section 28 of the EP&A Act is inherently strained and contrary to their natural and ordinary meaning, especially when any normal approach to syntax is employed to analyse their connection and relationship to one another.

15 Secondly, the appellant relies on an incorrect understanding of the statutory basis for sub-clause 68(2) of the KPSO and its purported relationship to section 28 of the EP&A Act (AS [16], [19]).

16 Thirdly, lest it be considered, notwithstanding the legitimacy of the third respondent's reliance on the clear meaning of the text used by Parliament in accordance with accepted canons of construction (which it says is determinative), that it somehow seeks to avail itself of some "technical" argument that is "unmeritorious", an understanding of some of the consequences of the appellant's argument will indicate why the words in section 28 should not bear anything other than their natural or ordinary meaning. The textual approach of the third respondent has the effect of preferring substance over form in the present case.

17 Before embarking on an analysis of section 28 of the EP&A Act, it is convenient to commence with an analysis of the statutory footing of sub-clause 68(2) of the KPSO and therefore identify with precision the source of the power relied upon as suspending the restrictive covenant.

18 The KPSO was an ordinance made in 1971 pursuant to Part XIIA of the LG Act. Specifically, it was sub-section 342G(4) of the LG Act that provided the power to make the KPSO. The appellant claims at AS [12] that "the requirement in sub-section 28(3) for the Governor's approval was new, it not being a requirement under the previous sub-section 342G(4)" and at AS [19] that "...the purpose of section 28 of the EP&A Act in replacing sub-section 342G(2) (sic) of the 1990 (sic) LG Act was to provide a further brake on the power to suspend the operation of covenants, by requiring the approval of the Governor...".

19 These claims overlook the fact that pursuant to the LG Act it was in fact the Governor that made the ordinance in its entirety after proposal from a local council or the State Planning Authority on the direction of the Minister. If it is relevant, any "brake" that may have existed

from this deployment of a feature of responsible government was in fact previously more extensive.

20 In any event, sub-section 342G(4) of the LG Act provided:

> A scheme may suspend either generally or in any particular case or class of cases the operation of any provision of this or any other Act, or of any rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made, to the extent to which that provision is inconsistent with any of the provisions of the scheme

21 Sub-clause 68(2) of the KPSO provides:

> In respect of any land which is comprised within any zone, other than within Zone No 2(a), 2(b), 2(c), 2(d), 2(e), 2(f) or 2(g) the operation of any covenant agreement or instrument imposing restrictions as to the erection or use of buildings for certain purposes or as to the use of land for certain purposes is hereby suspended to the extent to which any such covenant, agreement or instrument is inconsistent with any provision of this Ordinance or with any consent given thereunder

22 The LG Act was repealed on 1 September 1980 when the EP&A Act came into force. The KPSO was, however, saved pursuant to clause 2 of Schedule 3 to the *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 (NSW) ("**MAPRA Act**") which provided:

> **Former planning instruments**
>
> (1) A former planning instrument, as in force immediately before the appointed day, shall, subject to this Act have full force and effect according to its tenor and shall be deemed to be a deemed environmental planning instrument.
>
> (2) Where, in the opinion of the Minister administering the *Environmental Planning and Assessment Act 1979*, a provision of a former planning instrument is inconsistent with or contains a provision that deals with the same or like matter which is dealt with by any provision of the *Environmental Planning and Assessment Act 1979*, or the regulations thereunder, the Minister administering the *Environmental Planning and Assessment Act 1979* may, by order published in the Gazette, amend the former planning instrument in such a manner as, in his opinion, will remove the inconsistency or the provision dealing with the same or like matter, as the case may be, but no such order shall take effect before the appointed day.

23 Therefore, the KPSO was a deemed environmental planning instrument for the purposes of the EP&A Act. The MAPRA Act was, in turn, repealed by the *Environmental Planning and Assessment Amendment Act* 2008 (NSW) with effect from 1 July 2009. That Act inserted into Schedule 6 of the EP&A Act a new savings provision. It provides:

> **123 Continuation in force of deemed environmental planning instruments**
>
> (1) All deemed environmental planning instruments that are in force immediately before the relevant commencement day continue in force and have effect according to their tenor
>
> (2) Any such instrument may be amended or repealed by an environmental planning instrument made under Part 3 of the Act

24 Three points should be made at this stage. First, the validity of sub-clause 68(2) of the KPSO continues to depend on section 342G of the LG Act, notwithstanding the repeal of the LG Act: *Bird v John Sharp & Sons Pty Ltd* (1942) 66 CLR 233 at 239-240; *Craven v City of Richmond* [1930] VLR 153; *Leaney v Sandland* [1933] SASR 285. Therefore, the scope of the sub-clause must be construed by reference to the relevant terms of the LG Act, especially sub-section 342G(4). Pursuant to those provisions, whether a restrictive covenant is within or outside the class of suspended covenants depends upon the zoning of the land which it affects.

25 Secondly, sub-clause 68(2) of the KPSO is necessarily, by its nature and terms, ambulatory. Its particular application may vary over time. It is "always speaking" to events, covenants and consents that may not have existed when it was made: see section 68 of the *Interpretation Act* 1987 (NSW).

26 Thirdly, the savings provisions (and sub-section 28(3) of the EP&A Act) speak of instruments having effect "according to its/their tenor". The use of the word "tenor" in that phrase, when used in legislative drafting, can only possibly mean the actual words of the document, and not its non-legal definition of "a general sense or meaning of a document"[1]. At [32] of his reasons for judgment below, Tobias JA gave some references to dictionaries as to why the "exact words" meaning was the preferred meaning. However, one need not rely on dictionaries alone. The particular phrase "according to its/their tenor" is a phrase that has been consistently used as a matter of course in legal use to refer to "exact words": see e.g. *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 54-55 [15]; *Raftland Pty Ltd v FCT* (2008) 238 CLR 516 at 538 [56]; *Banque Nationale De Paris v Falkirk Developments Ltd* (1977) 136 CLR 177 at 185 per Mason J. Of course, in legislative drafting terms it can be used deliberately to imply that other provisions in an Act may not apply according to their exact terms: *MIMIA v B* (2003) 219 CLR 365 at 389-390 [49] per Gleeson CJ and McHugh J; at 407 [111] per Gummow, Hayne and Heydon JJ. When used in respect of negotiable instruments, such as bills of exchange, "according to its tenor"

[1] "tenor, n.1 and adj.", *OED Online*, March 2011, Oxford University Press.

always meant strict compliance with the exact words: see e.g. *Bills of Exchange Act* 1909 (Cth), sec 94; *Jolley v Mainka* (1933) 49 CLR 242 at 260 per Dixon J. Scots law has maintained for centuries, and continues to maintain, the action of proving the tenor, in which a pursuer seeks to prove the exact words of a lost or destroyed deed or other document by reference to parol evidence, copies or other means.

27 When a statute speaks of something having effect according to its tenor, it can only mean the express words of a particular provision. It is directing attention to a precise formulation of operative words to give effect to. It would be nonsensical to expect a provision such as sub-section 3(2) of the *Statute of Westminster Adoption Act* 1947 (NZ) which applied and extended "according to its tenor" every Act of the United Kingdom Parliament that purported to apply to New Zealand between 1931 and 1947 as meaning anything other than a reference to the exact words. These matters are relevant to the construction of sub-clause 68(2) and sub-section 28(3) of the EP&A Act for which the appellant contends.

28 The tenor, i.e. the words, of sub-clause 68(2) of the KPSO are clear. The appellant does not challenge the operative effect of that sub-clause or its meaning. What it denies is that LEP 194 can have any "effect" for the purposes of sub-clause 68(2). It is important to understand what LEP 194 did.

29 LEP 194 did not amend, or purport to amend, the terms of sub-clause 68(2) of the KPSO. LEP 194 otherwise amended the KPSO by creating a new Zone 2d(3) and altering the existing zoning of various land, including the land in question. LEP 194 supplied a differing factum, upon which sub-clause 68(2) operated according to its tenor. LEP 194 and sub-clause 68(2) are to be read together: *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463. The Governor in 1971 made an ordinance that was drafted to extend to then unknown matters that would fall within its field of operation see [25] above. The Governor made an ordinance that suspended the operation of restrictive covenants according to their land zoning. The interests of those who considered themselves benefited by restrictive covenants, were by the legislative regulatory scheme established by the KPSO inherently susceptible to suspension according to the zoning of land. Nothing could be clearer from the terms of sub-clause 68(2). Such planning legislation is concerned with preventing the sterilisation of land, and must, by needs, change over time. The whole purpose of the provision is to suspend or render inapplicable private covenants: see Tobias JA at [40]-[41] by reference to Meagher JA in *Coshott v Ludwig* (1997) 8 BPR 15,519. As this Court said in *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 476, the EP&A Act

"...is concerned with the environment and amenities of the various areas of the State (see the objects of the Act stated in s 5). The statutory powers to control planning of those areas are not qualified or affected by private rights except in so far as the Act fastens on the holders of interests in land to impose certain restrictions or duties". Sub-clause 68(2) cannot have been intended to be frozen in time as applying to zoning and facts as they stood in 1971, especially after having been saved twice, without amendment, by the Parliament.

30 The pertinent question then is what is it about the operation of sub-sections 28(2) and 28(3) of the EP&A Act that gainsays that explicit and sensible operation of sub-clause 68(2) of the KPSO? The subsections provide:

> (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.
>
> (3) A provision referred to in sub-section (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.

31 The appellant submits that this Court should consider the purpose of section 28, which the third respondent accepts must be done, but as this Court said in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 47 [47] "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention".

32 It is common ground between the parties that LEP 194 contains no express words that answer the description in sub-s 28(2). There is no such express "provision" in LEP 194 for the purposes of sub-s 28(3). Sub-clause 68(2) of the KPSO, made by a Governor and valid, is a provision that directly answers the description. However, it is LEP 194 that must be impeached.

33 There was a recognition by all the judges in the Court below that the words "provide" and "provision" can have a varied meaning according to their context. So much can be accepted for almost any word in the English language. However, the words that presently arise for consideration are structured in such a way that their syntax allows for only the most conventional legal meaning – their natural and ordinary meaning in a legislative drafting context.

34 In sub-s (2), an environmental planning instrument must "provide" in "that" instrument that a "specified" regulatory instrument shall not apply. The *Oxford English Dictionary* uses "provide" in its main sense (I, 1, (a)) to mean "to stipulate in a will, statute etc; to lay down as a provision or arrangement". This leads to the meaning of the word "provision" used in that context. The same source gives the meaning for that as "each of the clauses of divisions of a legal or formal statement, or such a statement itself, providing for some particular matter; also, a clause in such a statement which makes an express stipulation or condition; a proviso".

35 The sub-section requires that such a provision has been laid down in "that" instrument. Nothing has been stipulated, however, in LEP 194. The requirement is unambiguous.

36 Given the avowed purpose of the sub-section, surely such a provision would be distinctly and plainly identifiable on its face, as opposed to Her Excellency being forced to hunt elsewhere to "approve" it by reference to a further, and operative, "provision".

37 Sub-section (3) clearly reinforces the natural and ordinary meaning. The "provision" referred to in "that" instrument in sub-section (2) "shall have effect according to its tenor". However, there are no express words that fit the bill upon which that phrase can fasten. That collocation of words is concerned with finding a provision, the express words to which it can give effect, that answers the description in sub-section (2). LEP 194 is concerned solely with provisions which address the zoning of certain lands – the only provision which answers the description is sub-clause 68(2).

38 In his dissent, Handley AJA was at [78] "fortified" by the reasoning of Lord Reid in *Inland Revenue Commissioners v Jamieson* [1964] AC 1445 which gave a particular meaning to the word "provide". With respect, his Honour was right in his initial thought that the case was an "uncompromising source of assistance on the construction of s 28": [73]. Of course when a taxation statute is inquiring into what the settlors of a trust "provided" for, one is not going to construe the terms of the settlement in a manner that promotes "evasion" when the powers of the trustees clearly encompass the matter spoken of. It is not clear how in the present case the "door is open wide for evasion" as Handley JA asserts: [79]. It can't seriously be thought that the EP&A Act has as its primary concern and purpose the protection of individual proprietary rights. What is unclear about the fact that no landowner could not have expected zoning to change from 1971?

39 The orders sought by the appellant explicitly confirm the validity of LEP 194. That produces a surprising result in that, notwithstanding direct legislative prescription, sub-clause 68(2) will no longer apply according to its tenor. Therefore, section 28 of the EP&A Act is to

be interpreted according a results based approached, divorced largely from its text, but sub-clause 68(2), which is specifically drafted to apply to certain zones and to have such an effect, is eviscerated.

40 As Handley JA accepts, it is "fanciful" to suggest that a Minister has particular Lots in mind when re-zoning in this fashion: [57]. So what then is the purpose of this "double gubernatorial approval" required by the appellant. Is the Governor meant to consider those matters? The argument would be the same if sub-clause 68(2) had been made under the EP&A Act. Assume that the KPSO had been originally made under the EP&A Act, and sub-clause 68(2) had received the Governor's approval. If one assumes that the position would be no different than the valid provision under the LG Act - (although the third respondent maintains that sub-clause 68(2) is to be evaluated according to the LG Act) - what if the Minister proposed an LEP that moved one of the Zones 50 or so metres so that covenants in the Lots therein would now be suspended? Did the legislature intend for the Governor to approve that extension, knowing first, that the Governor had approved the operative provision and secondly, that land zoning changes over time? In the third respondent's submission it serves no relevant purpose that where throughout the State of New South Wales, the Governor throughout various Local Government Areas has approved a provision suspending restrictive covenants according to certain zoning categories (where those zoning categories are now uniform by virtue of the Standard Instrument (Local Environmental Plans) Order 2006 (NSW)) that where a Minister determines that with time certain areas are now to be re-zoned, that the Governor should have to give further approval. Is the Governor meant to consider that approval by reference to the matters that Handley JA described as fanciful viz individual circumstances? They would otherwise be irrelevant. Once a Governor has sanctioned that certain Zones in an area operate to suspend covenants, the Minister's decision as to whether areas are to fall within a Zone does not seem to be something that was intended to be constantly approved by the Governor.

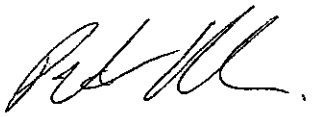
41 To take a more striking example, the Standard Instrument provides in clause 1.3 that LEPs should wherever practicable apply to a whole Local Government Area. Clause 1.7 provides that zoning maps are to be publicly available, may be combined, and may be amended from time to time. What if it is determined that the number of separate maps in a particular Local Government Area has become unwieldy and the Minister decides to draft a fresh map that applies to the whole Area or certain parts thereof, and regularly updates the consolidated map, and puts it on public display to simplify the process for residents. This is an obvious aim of the Standard Instrument. Indeed, for some Local Government Areas, the

NSW Government publishes such maps on the official NSW Government website for online publication of legislation (www.legislation.nsw.gov.au). Assume any new map inserted by an amending LEP is not approved by the Governor, who has only approved the general operative clause in the original LEP. However, such an LEP re-zones the subject area and the appellant's arguments have to be good for all LEPs across the State of New South Wales where the operative suspension clause is contained other than within the LEP, or was contained within an approved LEP but where amending LEPs that amended only zoning maps were not approved, as well as for the appellant's own particular circumstances. What if land falls within a Zone that suspends restrictive covenants, and as a result of a re-zoning on the new updated map in an LEP, continues to fall within such a Zone? According to the appellant, it was the amending LEP that contains the provision that effectuated the suspension. Perhaps less than 10% or even 1% of the entire mapped area has been re-zoned, but the instrument that provided the previous zoning is no longer operative. Therefore, whereas such an LEP was made with the intent that many areas that were previously zoned in areas that suspended covenants were to retain that zoning, the restrictive covenants must now spring back into life, because the provision that had the "effect" of suspending the covenants is contained in the amending, unapproved, LEP.

41 The appellant's submissions, if accepted, mean that none of the Zones in which a provision such as sub-clause 68(2) of the KPSO operates to suspend covenants any longer has any force. Every suspended covenant in the Local Government Area would have sprung back into operation. That is because all zoning has been effectuated by the "provisions" in the new LEP. The appellant's arguments can't just extend to land that was moved out of a "protected" Zone. On such a map, the former zoning no longer exists. A Minister can never consolidate existing maps without approval by the Governor. Any land owes its zoning identity to the Zoning Map in the new LEP. Any landowner can say the "provision" by which an equivalent of sub-clause 68(2) of the KPSO seeks to suspend a restrictive covenant for my benefit is contained in the LEP, because that is the only source of facts for the zoning operation of a provision like sub-clause 68(2). The reasoning of the appellant and Handley JA that LEP 194 "provides a result" when coupled with the operation of sub-clause 68(2) is true for every single piece of zoned land on any LEP map in such a case. And because the LEP was not approved by the Governor, no covenants are any longer suspended. This would leave a clause such as sub-clause 68(2) of the KPSO, whether made under the LG Act or the EP&A Act but not constantly "re-approved", with absolutely no work to do.

42 The majority in the Court of Appeal reached the correct result. The ordinary meaning of section 28 of the EP&A Act is inescapable. The appellant seeks to strain the language to achieve a result that was clearly not intended by the Parliament. LEP 194 was not a "provision" for the purposes of section 28. Sub-clause 68(2) of the KPSO was such a provision. A valid Ordinance is in place, made according to law, that provided for the suspension of covenants based on zoning. That zoning was to change over time – zones are inherently susceptible to change in order to effect the purposes of the legislation. The practical effect of the appellant's arguments would be to necessitate the approval of the Governor for matters clearly not envisaged by section 28, such as the regular and orderly production of consolidated zoning maps for public information purposes. The appellant's argument produces extensive unintended consequences in circumstances where the text of the statute is already against it, therefore LEP 194 did not require the approval of the Governor and sub-clause 68(2) operates to suspend the restrictive covenant that benefits the appellant's land.

Dated: 6 May 2011



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