Case Notes

North Sydney Council v Ligon 302 Pty Ltd (1996) 137 ALR 644

The recent decision of the High Court in *North Sydney Council v Ligon 302 Pty Ltd*[1] deals with the question whether the development of land in NSW which has the benefit of an easement over adjacent land, requires the consent of the owner of that adjacent land under s.77(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"). In doing so, while affirming the decision of the NSW Court of Appeal[2], the High Court has taken the opportunity to correct some aspects of the judgment of the majority in that decision, and arguably to restore an interpretation of s.77 which had previously been adopted by the NSW Land and Environment Court.

The Facts

On 23 May 1994 Ligon 302 Pty Ltd, as developer, lodged a development application with the North Sydney Council for approval to develop a site owned by the North Sydney Club. The development involved the expansion of the Club to the north of its existing building, and, more controversially, the addition of about 10 stories of height to the Club by the erection of some 48 residential units on top of the existing building.

The Club is part of a block in North Sydney bounded to the east by the Warringah Freeway, to the south by Berry Street, to the west by Walker Street, and to the north by Hampden Street (a cul-de-sac). The block of

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1 High Court of Australia: Brennan CJ, Dawson, Toohey, McHugh, and Gummow JJ; 6 August 1996: (1996) 137 ALR 644.

2 *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435.

land on which the Club stands, however, has no direct access to any of these public roads. Access to the Club at the moment is provided by means of four rights of way, one vehicular and three footpaths, over land on the corner of Berry and Walker Streets occupied by the Century Plaza apartment building. One of the rights of footway from Berry Street was already being used by patrons of the club and it was proposed to use this path for residents of the new units, and to use another right of footway from Berry Street for club patrons.

Objections to the proposal were made on a number of grounds. But the issue which went to the High Court was this: could a development application be lodged in relation to the Club land when the land as developed would clearly involve an increased use of the easements across the Century Plaza land, and the owners of that land had not consented to the application?

Legal Issues

The framework for approval of development on land in NSW is provided by the *Environmental Planning and Assessment Act* 1979. The Act controls development by a scheme of "Environmental Planning Instruments" (EPI's). There are three types of such instruments, roughly corresponding to widening geographical factors: Local Environment Plans (LEPs); Regional Environment Plans; and State Environmental Planning Policies.

The basic function of an EPI is to set out what development is permitted on a piece of land. "Development" of land is defined widely in s.4(1), to include not only erection of a building or subdivision of a piece of land but also:

> "(c) the use of that land or of a building or work on that land."

An LEP, which deals with issues concerning a particular local area (usually the area administered by a local council), does this by setting out on a map of a particular area different zones shaded or marked in particular ways. Thus, some areas will be zoned residential, others industrial, etc. Part 4 of the Act sets out the procedures to be followed where an EPI requires "development consent" to be obtained for development on a particular piece of land.

The relevant part of the land in this case was zoned "5(a)- Special Uses (Club)" under the North Sydney Local Environment Plan 1989. In an area of that zoning the redevelopment of the site as proposed was permissible, but only with development consent.

Section 77(1) *EPAA* relevantly provides that application for development consent may be made only by:

"(a) the owner of the land to which that development application relates; or

(b) any person, with the consent in writing of the owner of the land to which the development application relates."

The application must be lodged with the "consent authority" (s.77(3)(a)), which in this case was the local council.

The question which was before the courts was: should the Century Plaza land, over which an easement benefiting the Club land extended, be regarded as "land to which [the] development application relates"? If so, then s.77 would seem to require the consent of the owners of that land to the application, which had not been given.

Decision of the Land and Environment Court

In the Land and Environment Court[3] Bannon J dealt with this issue very briefly, in two paragraphs. His comments came at the end of a judgment in which other issues were of more importance. He rejected the argument that s 77 required the consent of the adjoining owners. His Honour said:

> "A right-of-way ... is appurtenant to land, not to the purposes of user of that land. In this respect it resembles a public road on which citizens may pass and repass about their business. The fact that the user of the dominant tenement may change, does not alter the rights granted by the easement, which are appurtenant to the land, not to its use."

In other words, the fact that the rights of way would be used by residents of the new flats as well as by patrons of the club was not relevant to the easements: they would still be functioning as rights of way. It is a little unclear, with respect, whether his Honour's remarks were directed to the question of whether changed usage could of itself constitute "development" of the easement (viewed as "land"), or development of the servient land as such (ie the Century Plaza land). In any event, he held that the changed user of the easement would not amount to development.

Decision of the Court of Appeal

In the Court of Appeal[4] the Council's appeal succeeded, primarily on the basis that Bannon J had not referred in his reasons for decision to a

[3] *Ligon 302 Pty Ltd v North Sydney Council* (No 10481 of 1994; decision handed down 16 December 1994).

[4] *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435.

document called a Development Control Plan which was required by the Act to be considered. But the members of the Court, Kirby ACJ and Sheller JA (with whose decision Clarke JA concurred) went on to consider the question whether the consent of the Century Plaza owners was necessary in light of the easement over their land. On this issue, the Court divided, Kirby ACJ finding that such consent was necessary, and the other two judges that it was not needed.

Perhaps the key to the Acting Chief Justice's decision was the following remark:

> "[The] development undoubtedly "related", in the generality of that word, to the land owned by the proprietors of the Century Plaza building."[5]

As his Honour commented, the argument is "beguilingly simple".[6] In light of the difficulties that the issue presented, perhaps emphasis should be placed on the adjective "beguilingly". It will not surprise anyone familiar with his Honour's judgments to note that one of his starting points was the fundamental human right to private property, found in the *Universal Declaration of Human Rights*, Article 17.1[7]. He concluded by saying:

> "If there is a doubt in the construction of s 77(1) I consider that the approach which I favour is one defensive of private property rights in land which the law will normally uphold."[8]

As his Honour regarded the interest which the Century Plaza owners had in a development which "related to" their land to be one of their property rights, his Honour concluded that s.77(1) should be interpreted to require their consent to such a development. He characterised the purpose of s.77(1) in this way:

> "It is to ensure that owners of land affected by a development application are notified of the application and afforded the opportunity of protecting their ownership rights by the requirement to signify, in writing, their consent."[9]

Sheller JA came to a different view. After discussing common law principles relating to permitted user of a right of way, his Honour said:

> "No one proposes to carry out any development, as the Act defines that word, on the Century Plaza land...The fact that the Century Plaza land is subject to easements in favour of the land the subject of a development application is of

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5 At 87 LGERA 444.
6 At 444.
7 At 445.
8 At 448.
9 At 447.

itself of no significance...If the development on the Club land involved a different or excessive use of the rights of footway it would be outside the permit of the easements and may well amount to a proposed development of the servient tenement for which the consent of the owner of that land...would be required. In the absence of any evidence that it is proposed to use the easements in a way not permitted by their terms...there is not, nor is there any need for, a development application which relates to the servient tenement."[10]

His Honour's reasoning involves the following propositions:

(i) Use of an easement over land which is in accord with existing use does not amount to "development" of that (servient) land.

(ii) Excessive user of an easement[11] may amount to "development" of the servient tenement, and would require a development application in relation to that land.

(iii) On the facts there was no evidence of excessive user and hence no need for a development application relating to the Century Plaza land.

His Honour did not, however, address the question which had been crucial for the Acting Chief Justice's decision: did the application for development of the Club land, involving as it did a use of the easements over the Century Plaza land, "relate to" the Century Plaza land for the purposes of s.77(1)?

The Decision of the High Court

While the Council had succeeded in its appeal on the Development Control Plan issue, it appealed the judgment of the Court of Appeal on the basis that the majority decision on the "right of way" issue was wrong. The High Court, while agreeing with the Court of Appeal that no consent from the owners of the Century Plaza land was necessary, did so in a way which effectively corrected what it perceived as an erroneous approach in the Court of Appeal.[12] The Court rejected the approach taken by Sheller JA which would have determined whether development consent was required for use of an easement over servient land by the question of "excessive" user. The Court also clarified the operation of the word "relates"

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[10] At 450-451.

[11] This occurred, for example, in *Jelbert v Davis* [1968] 1 WLR 589; [1968] 1 All ER 1182 (CA) where a right of way originally granted for the benefit of agricultural land was to be used for access to a caravan park.

[12] *North Sydney Council v Ligon 302 Pty Ltd* (1996) 137 ALR 644.

in s.77(1). It pointed out that s.77 is part of a scheme which is also set out in s.76, which relevantly provides:

> "(2) Subject to this Act, where an [EPI] provides that development specified therein may not be carried out except with consent under this Act being obtained therefor, a person shall not carry out that development on land to which that provision applies unless:
> (a) that consent has been obtained and is in force under this Act."

As the Court pointed out, "land to which that provision applies" is not land at large, but a specific parcel, and the development application is in relation to a specific development:

> "Thus the prohibition is against the carrying out of a specific development on a particular parcel. When a development application is made for consent to a specified development, the land to which the application "relates" must therefore be the land on which the specified development is proposed to be carried out."[13]

With respect, the Court is clearly correct. The phrase used in s.77(1) is not "the owner of *land* to which *a* development application relates"; it is, "the owner of *the* land to which *that* development application relates". The word "relates" is not being used "at large"; it is simply being used to tie the parcel of land in question to the specific development application. There should never have been any question that the Club land application was in the relevant sense "related to" the Century Plaza land; in the scheme of the Act the only land it "related to" was the Club land.

The Court went on to consider the wider issues of the way in which owners affected by developments on nearby land could have their point of view heard by the relevant authority. For example, s 90 (1) (h) requires a Council when considering development to take into account:

> "(h) the relationship of that development to development on adjoining land or on other land in the locality."

The very fact that the Act makes provision for this supported their Honours' view that s.77(1) was not the place to read such a provision. They pointed out the dramatic consequences that would result (given the wide definition of "development") if an adjoining landowner, the mere use of whose land was affected in some way by a development, could effectively veto the development. This would undermine other parts of the scheme set up by the Act, including the "existing use" provisions.[14] In particular their Honours referred to the "designated development"

[13] 137 ALR at 647.
[14] At 648-649.

procedures under s.84, which contains detailed provisions relating to notice to adjoining owners. By implication, the Act defines situations in which adjoining owners may object, and further rights need not be read into s.77.[15]

Given reference to the High Court's earlier decision in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council*,[16] by Kirby ACJ in the Court of Appeal,[17] the High Court obviously felt they needed to consider the effect of that decision.

Pioneer Concrete involved an application for development approval for use of certain land as a quarry. It was proposed that after the material had been extracted it would removed from the site by an access road. No application for development approval was made in relation to the access road. The Court by majority held that the application was invalid for this reason.

On the facts, the situation was somewhat similar to this case, and it would be easy to take *dicta* from the earlier case in support of the Council's position that Century Plaza approval was necessary. But the Court distinguished the *Pioneer Concrete* decision on two grounds. First, the Court said that it was crucial to the earlier decision that the relevant Queensland legislation requiring approval of the "use" of land, defined "use" to include "any use which is incidental to and necessarily associated with the lawful use of the land in question", whereas the NSW legislation was not so wide.[18] Secondly, on the facts, the "use" for which approval was being sought in *Pioneer Concrete* was the one use of "carrying out of quarry operations", which the majority concluded necessarily involved an access road to transport the material quarried. In this case, however, the only activity for which approval was being sought was the erection of a building. Issues of access and egress, if necessary, could be considered separately.

Finally, the Court considered a submission from Ligon in further support of its right to use the easements over the Century Plaza land without specific permission. The argument was that easements over land were "incorporeal hereditaments", and that as such they fell within the definition of "land" in s.21(1) of the *Interpretation Act* 1987 (NSW). Since the easements were "land", and the owners of the Club land were the "owners" of the easements, then the requirement of s.77(1) that the consent of the "owners of the land" be obtained to development was satisfied!

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[15] See the comment at the top of 651.

[16] (1980) 145 CLR 485 at 514.

[17] (1995) 87 LGERA 434, at 448.

[18] A distinction already made (though apparently not noticed by either the High Court or the present Court of Appeal) by the NSW Court of Appeal in *Grace Bros Pty Ltd v Willoughby Municipal Council* (1981) 44 LGRA 422, at 425. See the decision of Bignold J in *Hua Ma* referred to below, n. 21, for mention of other cases previously dealing with these issues but not noticed in the Court of Appeal or the High Court.

The very fact that the word "owners" when used in connection with the word "easements" is unnatural reveals a problem with the argument.[19] The person concerned may be the owner of dominant land which has the benefit of an easement, but is not normally spoken of as the "owner" of an easement.

In any event, the Court pointed out that the *Interpretation Act* provision must give way to a contrary intention in specific legislation, and in this case the EPA Act contained its own definition of "land" in s.4, which, while not conclusively excluding "incorporeal" rights, very much focusses on land as a physical feature rather than a "bundle of rights". The Court concluded:

> "As the Act is not concerned with the regulation of private rights of ownership but with the physical use made of, or affecting, the topographical entity of land, the term "land" in ss 76 and 77 of the Act and perhaps in the Act generally is not defined by s.21(1) of the Interpretation Act."[20]

In the event the High Court affirmed the decision of the Court of Appeal that the application was not invalid for want of consent by the owners of the Century Plaza land, but for different reasons than those offered by the Court of Appeal. The basis of the High Court's decision was that that land was not "the" land to which the application related. Their Honours did refer, in concluding, to the question of intensification of the use of the easements on the Century Plaza land. But they clearly indicated that such intensification, while it might amount to "development" of the Century Plaza land, and might be a factor relevant to the decision whether or not to approve the application for development on the Club land, did not invalidate that application for want of consent of the owners of the servient land.

Evaluation

The decision of the High Court on the interpretation of s.77(1) is, with respect, to be welcomed. The difficulties facing lower courts after the decision in the Court of Appeal can be illustrated by a case decided after the Court of Appeal decision but before the High Court decisions.

In *Hua Ma v Ku-ring-gai Council*[21] Bignold J was faced with a situation very similar to the facts in the *Ligon* case. A proposal was made to develop

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[19] Only after having first myself written "owners" in this way in discussing the issue, did I notice that the High Court felt constrained to use the same technique in summarising the argument: see p.651, line 8.

[20] At p.651.

[21] Land and Environment Court, Bignold J; No 10636 of 1994; 9 August 1995.

a block of land in Killara to provide dual occupancy housing. The only access to the main road, the Eastern Arterial Road, was a right of way over other land created upon subdivision of the land by an instrument under s.88B of the *Conveyancing Act* 1919. The owner of the servient land, however, objected to the development and would not give consent to the development application. Did s.77(1) of the *Environmental Planning and Assessment Act* 1979 require that owner's consent?

Bignold J referred to a number of previous decisions which, in his opinion, clearly established the principle that a development application was not invalid because it did not deal with other land the use of which was necessary for the development being applied for. He cited the unreported decision in *Gamkrelidge & Partners Pty Ltd v Randwick Municipal Council*,[22] which in turn relied on the decision of the Court of Appeal in *Grace Bros Pty Ltd v Willoughby Municipal Council*[23] distinguishing the *Pioneer Concrete* case, and on subsequent decisions of the Land and Environment Court in *King v Great Lakes Shire Council*[24] and *Woolworths Ltd v Bathurst City Council*.[25] Perhaps the quote from Cripps CJ (Land and Environment Court) in the last-mentioned case summarizes all the decisions best:

> "[A]n application is not incompetent or a consent invalid by reason of the circumstance that there is not included in the application land the use of which is necessarily involved in the use of the land the subject of the application."[26]

Bignold J regarded these decisions as establishing a "settled line of authority" before the Court, and expressed some surprise that none of these were cited to the Court of Appeal in a situation where the question was thought to be "difficult."[27]

In fact, the decision in *King v Great Lakes Shire Council* is mentioned in the course of Kirby ACJ's judgment[28], but only as quoted in another judgment, and the quote given does not touch on the issue in question.

The decision of Cripps CJ (Land and Environment Court) in *King* was direct authority (though not, of course, binding on the Court of Appeal) that a development application, to be valid, did not need to extend to the whole of the land intended to be used by the development. The Council in that case had granted development approval for a caravan park near Myall National Park at Seal Rocks. It was proposed by the developer that

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22 LEC, 7 Dec 1988.
23 (1981) 44 LGRA 422.
24 (1986) 58 LGRA 366.
25 (1987) 63 LGRA 55.
26 (1987) 63 LGRA 55, at 62.
27 See (1995) 87 LGERA at 436 per Kirby ACJ (the question "presents difficulties"), and 445 ("I have not found the resolution of this question easy"); at 449 per Sheller JA ("I have found the separate question... a difficult one").
28 87 LGERA at 447.

effluent disposal from the caravan park be dealt with by construction of a pipeline to evaporative ponds which would be on other land, some distance away from the caravan park. The development application, however, did not include the land on which the ponds were to be sited. The applicant who was challenging the approval of the project relied in part on *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council*[29] for the proposition that a development application would be defective if it did not include land the use of which was essential to the proposed use of the land the subject of the application. As noted previously, in the *Pioneer Concrete* case the "auxiliary" land was an access road.

His Honour the Chief Judge referred to the decision in *Grace Bros Pty Ltd v Willoughby Municipal Council*,[30] in which the Court of Appeal had referred to but distinguished the *Pioneer Concrete* case. His Honour concluded fairly briefly:

> "It would seem therefore that *Grace Bros* is authority for the proposition that the jurisdiction of a council in New South Wales to entertain a development application is not dependent upon there being included in the application land the use of which is necessarily involved in the use the subject of the application. Accordingly, and notwithstanding that the evaporative ponds are a necessary part of the caravan park, I reject the submission that the development application is defective because it did not include in it land intended to be used for the ponds."[31]

Bignold J, however, had to wrestle with the fact of the Court of Appeal decision in *Ligon*, which had been handed down on 28 July 1995. (Neither of the parties' legal representatives in *Hua Ma* had been aware of the decision.) His Honour saw the *ratio* of the decision as expressed by Sheller JA, and as at least representing the proposition that where no development was to be carried out on a right of way, no consent was required from the owner of the servient land. He regarded as *dicta* (although no doubt to be given great weight by a first instance judge) the two other propositions derived previously in this note: that if development of the easement had been proposed, consent might have been required; and that different or excessive use of the easement might have amounted to such development.

In the event Bignold J found that the situation in *Hua Ma* was factually indistinguishable from *Ligon*, in that no development of the easement requiring development consent was proposed, nor was there any evidence of excessive user of the easement. As a result the consent of the owner of the servient tenement was not necessary.

However, it is fairly clear that his Honour would have preferred to

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[29] (1980) 145 CLR 485
[30] (1981) 44 LGRA 422
[31] 58 LGRA 366, at 380.

resolve the case on the basis of the "settled line of authority", which he regarded as having decided that no such consent would have been necessary in any case. The decision of the High Court seems to have restored that line of authority to full force. Interestingly, the High Court decision seems also to have been reached without the benefit of the decisions referred to by Bignold J in *Hua Ma*.

The result of the decision of the High Court in *North Sydney Council v Ligon 302 Pty Ltd*, then, is to restore the understanding of s.77(1) of the *Environmental Planning and Assessment Act* 1979 to the situation acted on by the Land and Environment Court for a number of years. The "land to which that development application relates" is, as Bignold J comments in *Hua Ma*, no more and no less than "the land in respect of which the application is in fact made". If the proposed development will necessarily involve the use of other land, the Council may take that into account in a number of ways, including in particular pursuant to s.90(1)(h). But the consent of the owner of that "ancillary" land will not need to be obtained before the application will be regarded as valid. The decision seems to accord both with a natural understanding of the legislation and sensible policy, whereby adjoining owners are given certain rights but not a blanket veto over development.

The other point, minor in this case but possibly of wider significance in the future, is the guarded but fairly definite indication that the word "land" in the *Environmental Planning and Assessment Act* 1979 means the "geographical" or "topographical" entity, rather than having the wider sense including a range of "messuages", "hereditaments" and "tenures". What impact this has on the interpretation of the Act outside sections 76 and 77 remains to be seen.

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