case notes
new south wales

Westfield Management Pty Limited & Anor v Gazcorp Pty Limited & Ors [2004] NSWLEC - the "ORANGE GROVE" – development consent for change of use

By Tracey Lynch – Solicitor Henry Davis York

"Orange Grove is a fairytale of our murky, multicultural, privatising times; a tale of boundaries blurred and lines scratched, a tale where every threshold - legal, planning, cultural - has been tested and stretched beyond recognition. A tale pitting politicians against former political advisers, directors-general against former directors-general, sleazoid type A against sleazoid type B. It makes the convicts versus the redcoats look like child's play." - Elizabeth Farrelly 31 August 2004, Sydney Morning Herald, "Putting the squeeze on Orange Grove"

The Facts

On 15 November 2002, Liverpool City Council granted development consent to change the use of a large warehouse building from a bulky goods warehouse to a warehouse clearance outlet. On 14 November 2003 the Council issued a construction certificate for the internal fit-out; On 24 November 2003 the Council issued an interim occupation certificate. The building had been subdivided into approximately 63 tenancies and was officially opened on 21 November 2003 by the Honourable Craig Knowles.

The applicant (Westfield) sought a declaration that the development consent was unlawful on the grounds that the development was prohibited. They also sought an injunction prohibiting the sale of items which did not satisfy the definition of "bulky goods salesroom or showroom" within the meaning given by the Liverpool Local Environmental Plan 1997. The applicant argued that the use for which the consent was granted was for the purpose of shops; and shops are prohibited in the relevant zone under the LEP.

In determining the question of legality, Lloyd J considered only the LEP and the development consent.

The Arguments

Under the LEP the land is zoned 4(b) industrial - Special. In this zone, bulky goods salesrooms or showrooms and convenience stores are permissible with consent. Gazcorp argued that a warehouse clearance outlet was not referred to in the zoning table and was therefore permissible with consent pursuant to clause 9(3) of the LEP.

Gazcorp made further submissions that the Court should not grant the relief sought by Westfield for the following reasons: the breach was purely technical; Westfield delayed in commencing proceedings; Westfield were trade competitors but claim no harm to themselves; there is an overall public benefit; an amended draft LEP allowing rezoning had been adopted by the Council.

Westfield made the following submissions; the use was prohibited and could not be regarded as a mere technical breach; there was no delay; there was no evidence as to the extent of harm to Gazcorp if the orders were made; public interest is not confined to the presence or absence of economic harm; and there is no certainty when the draft LEP will be made.

The Decision

The Court found that

- Warehouse clearance outlets sell are intended to sell goods by retail directly to the public, this use falls within the definition of "shop" within the LEP The development of the land as a warehouse clearance outlet is a prohibited use, and the development consent granted by council was unlawful and subsequently the use of the land for the purpose of a warehouse clearance outlet was unlawful
- The breach was not merely technical There was no delay There is no public benefit in allowing the development to continue, the public interest was the orderly development and use of the environment The intent of the EP&A Act is that development and use of the environment will comply with the legislation Finally, an unjust result may be avoided by postponing the injunctive relief

The Appeals

- Gazcorp appealed Lloyd J's decision contending that the judge erred in making the declaration or if the development consent was invalid in declining to postpone the operation of restraining orders
- The appeal was dismissed The Court's finding was affirmed with an amendment to the wording of the orders to erase any ambiguity and to stay the operation of the restraining order
- There were a further three appeals seeking stays of the restraining order which was extended up until 25 August 2004 The outlet has since closed

Mahogany Ridge Developments Pty Ltd v Port Stephens Council [2004] NSWLEC 555 - third party rights

By Paul Colagiuri – Solicitor Henry Davis York

On 10 February 2003, the rules relating to the circumstances in which parties can be joined to proceedings in planning appeals to the Land & Environment Court ("Court") were amended Section 39A was included in the *Land & Environment Court Act* as the new rule and is set out in the footnote hereto Previously, the general rule relating to the joinder of parties as set out in Part 8 rule 8 of the *Supreme Court Rules* was applicable and is also set out in the attachment

Past practice - "intervenor"

In the past, the Court has seldom given third parties, such as objectors who don't have a right to appeal under section 98 of the *Environmental Planning & Assessment Act*, the right to be joined as a party to proceedings under the Supreme Court Rules However, the Court has given third parties limited rights to call evidence, cross-examine witnesses and make submissions in which case the party is often referred to as an "intervenor" This type of order is commonly known as a Double Bay Marina order after it was introduced by Cripps J in *Double Bay Marina Pty Ltd v Woollahra Municipal Council* (1985) 54 LGRA 313 at 314

Some of the consequences flowing from a party's status as an intervenor in the Court have been the lack of a right to appeal to the NSW Court of Appeal and the inability to pursue an order for costs These rights are available to a party formally joined to proceedings under the rules of Court