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Précis Paper

Restrictive Covenants and Developments in Planning Law

An interesting presentation on s 28 of the *Environmental Planning and Assessment Act 1979* (NSW) and recent developments in planning law.

Discussion Includes

- Conflict between private proprietary rights and the public interest
- Application of s 28 of the *Environmental Planning and Assessment Act 1979* (NSW) to restrictive covenants and easements
- Compensation for land rights extinguished by planning legislation
- Drafting considerations for restrictive covenants
- Application of s 28 to lease provisions
- "Negotiating damages": Quantifying compensation for breaches of restrictive covenants

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Restrictive Covenants and Developments in Planning Law

1. In this edition of BenchTV, Craig Leggat SC (Martin Place Chambers, Sydney) and Emma Whitney (Senior Associate, Colin Biggers & Paisley, Sydney) discuss restrictive covenants, easements and lease provisions, and the conflict between private proprietary rights and the public interest that is in play in the application of s 28 of the *Environmental Planning and Assessment Act 1979* (NSW) (the Act).

Restrictive Covenants and Section 28 of the Act

2. Section 28 enables environmental planning instruments to override restrictive covenants. Section 28(2) of the *Environmental Planning and Assessment Act 1979* (NSW) provides:

> *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. The provision can thus affect benefits arising under restrictive covenants or easements. Examples of such benefits include a restriction on the size of a dwelling that can be constructed on a particular piece of land, or a right of way provided by an easement.

4. The application of s 28 was illustrated in the case of *Ludwig v Coshott* (1994) 83 LGERA 22 in the NSW Supreme Court. In that case, a restrictive covenant had the effect of limiting development on a particular piece of land to one storey. The local Council's Land and Environment Plan (LEP) contained a clause that picked up on s 28 and provide that any agreement, covenant or instrument that imposed restrictions on the erection or use of buildings did not apply to certain developments.

5. The plaintiffs argued that they had the benefit of a restrictive covenant that would prevent any development above one storey and sought relief preventing any development beyond this restriction. The Council, however, had examined the planning merits of a second storey and considered that it was appropriate for a second storey to be constructed, despite the terms of the restrictive covenant.

6. Bryson J considered the clause of the LEP and the terms of s 28 of the Act, and determined that Parliament had intended that private rights could be derogated in favour of the

controls that had been imposed in the public interest. The Council's determination that the second storey development was in the public interest thus trumped private rights.

7. On appeal, the Court of Appeal upheld the decision of Bryson J in *Coshott v Ludwig* (1997) NSW ConvR 55-810. Meagher JA, with whom Giles JA and Simos AJA agreed, held that the self-evident purpose of s 28 and cl 32 of the LEP was to nullify and remove all obstacles to the planning principles decided on by the Council or the Minister. Thus, once planning principles had been determined by the Council or the Minister, as Bryson J considered at first instance, those principles will trump private proprietary rights.

8. In *Doyle v Phillips* (1997) 8 BPR 15, Young J also considered the application of s 28 of the Act to restrictive covenants, as well as the question of whether a person who has lost the benefit of proprietary rights ought to be compensated. As Mr Leggat SC explained, rights that may be protected by restrictive covenants can be highly valuable. A covenant restricting the height of development on a neighbouring plot of land, for example, may protect the view or outlook of another property and therefore affect the value of the property.

9. Justice Young addressed the issue of compensation in *obiter*, stating:

> *I should note in passing that it is unclear whether compensation is payable to a person whose land rights are extinguished by virtue of a planning scheme. Although the policy of the Parliament clearly is that people's property should not be acquired without just terms, see the Land Acquisition (Just Terms Compensation) Act 1991, the extinguishment of a person's title by government action does not appear to be an acquisition.*

<u>Application of Section 28 of the Act to Easements</u>

10. *Doe v Cogente* [1997] NSWLEC 115 was the first case that determined that s 28 also applies to easements. In that case, Cogente had been granted development approval to build 17 home units. Doe had the benefit of a right of way over part of the land which would be affected by the proposed development and argued that the council's development consent could not affect their rights under the easement.

11. Cowdroy AJ (as he then was) pointed to s 28 of the Act, and held that any restriction imposed by the right of way would be suspended to the extent necessary to allow the proposed development to take place. This extended the principles laid down by Bryson J in of *Ludwig v Coshott* to easements.

<u>Application of Section 28 of the Act to Lease Provisions</u>

12. In *Jobson v The Owners – Strata Plan No. 66870* [2015] NSWSC 776, Darke J considered a dispute concerning provisions of a sub-lease relating to the use of carpark spaces. The Owners of the Strata Plan contended that the provisions of the sub-lease were inconsistent with the development consent granted by council and did not apply to the development. Until this case, this area of law had not been applied in relation to a lease provision. Justice Darke held that the provisions of the sub-lease would, if enforced, prevent the intended operation of the development consent, and therefore could not be enforced, adopting the orthodox approach of *Ludwig v Coshott.*

Compensation for Land Rights Extinguished by Planning Legislation

13. Given the value that can attach to restrictive covenants, Mr Leggat SC's view was that a person who loses rights under a restrictive covenant or easement due to a council's determination of planning principles or the public interest should be compensated.

14. In *Doe v Cogente*, Cowdroy AJ commented on the scope for compensation, stating:

> *To the extent allowed, the use of the right of way has been, and could be in future, disturbed. This does not bear, however, upon the entitlement of the applicant to claim damages or other appropriate relief from the registered proprietor for the time being of the servient tenement for any future disturbance. Her right of way remains despite the interference to it rendered lawful by the effect of s 28 of the EPA Act.*

15. On appeal, the Court of Appeal upheld Cowdroy AJ's decision: *Cogente Pty Limited v Doe* (1998) 98 LGERA 162. However, the Court made the following, somewhat opaque comment as to compensation:

> *It should not be assumed however, that we endorse the reasoning of Cowdroy AJ on this issue. Rather, the determination of the matter is not relevant to the outcome of the appeal. It follows that no issue, estoppel or res judicata operates in respect of the decision of Cowdroy AJ relating to the issues raised by s 28 of the Environmental Planning and Assessment Act.*

16. Mr Leggat SC noted that it remains unclear what aspects of the decision of Cowdroy AJ the Court of Appeal was referring to, and thus this area of the law is ripe for further development in the future.

17. In *Owens v Longhurst* (1998) 9 BPR 16, Owens had the benefit of a restrictive covenant that restricted the use of the neighbouring property to use as a dwelling house. Longhurst, however, wished to use the house as a preschool. In this appeal from a decision of Master

Macready, Young J noted that an application could be made for an injunction to prevent a breach of the restrictive covenant. Further, if it was not appropriate to grant an injunction, the court could order damages pursuant to s 68 of the *Supreme Court Act 1970* ("*Lord Cairns' Act* damages").

18. However, Young J held that the jurisdiction to grant *Lord Cairns' Act* damages is limited to a case where, at a time when the proceedings are commenced, it was possible for the court to give equitable relief. In this case, at the date when the matter was commenced, there was no power to grant an injunction because the covenant had been nullified by the combined effect of s 28 of the Act and the relevant LEP. As there was no power to grant an injunction at the date on which the proceedings were commenced, no damages could be granted. Justice Young did suggest that there may be other claims for damages that arise in this context, however this point was not developed.

Drafting Considerations for Restrictive Covenants

19. The presenters considered whether, when drafting restrictive covenants, practitioners should include a provision for loss in the event that the restriction is nullified by virtue of s 28 of the Act. This may be relevant, for example, in the case where a person has the benefit of a restrictive covenant that prevents the development of a two storey building on neighbouring land, but by virtue of s 28 of the Act, such a development is permitted, interrupting the amenity of the land and impacting its value. A lawyer could draft a covenant that contained a term to the effect that if a two storey building is constructed on the land, then a pre-estimated amount of damages would be payable.

20. This point is yet to be explored by the courts and the profession does not currently adopt this approach, but Mr Leggat SC considered that courts may be sympathetic to the loss of a proprietary right and may be willing to uphold an agreed pre-estimate of damage provision.

21. Moreover, in some cases, courts have made statements that may be consistent with this approach. In *Goff v Albury Soldier, Sailors and Airmen 's Club Limited* (1995) 6 BPR 14,029, there was a special condition in a contract for the sale of land which gave the plaintiffs a specifically enforceable right to an easement and therefore an equitable interest in land. The easement was not capable of being created because the relevant contractual provision was ineffectual. Hodgson J held that even if there was no ability to create the easement, it would be unconscionable for the defendant club to fail to recognise the plaintiff's equitable interest. This suggests that the Court may be prepared to look at the benefits of contracts and the intentions of parties and possibly provide compensation.

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22. In *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2011] HCA 27; 243 CLR 492, Heydon J also dealt with the issue of compensation, noting that the power to suspend restrictive covenants was potentially capable of interfering with proprietary rights. His Honour was of the view that while this was not, strictly speaking, resumption of land, it was something similar - governmental action pursuant to legislative power which affects proprietary rights in land adversely. These observations are consistent with the suggestion that it may be possible to obtain compensation for the loss of rights.

"Negotiating Damages": Quantifying Compensation for Breaches of Restrictive Covenants

23. In *XR Property Developments Pty Limited v Denning Real Estate Pty Limited (No 2)* [2016] NSWSC 556, Young J considered the question of how compensation should be quantified for the breach of a restrictive covenant. His Honour considered a line of authority that had developed in the United Kingdom known as "negotiating damages", that he had previously made reference to in *Llavero v Shearer* [2014] NSWSC 1336, contemplating that this may provide an appropriate mechanism for compensating for a breach of a restrictive covenant. "Negotiating damages" allow the court to work out what the parties, negotiating at arms' length, would calculate to be an appropriate license fee for a license to retain the encroachment. The term was coined in the UK authority *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430. In *Llavero*, neither party embraced the approach and therefore the approach was not ultimately relied upon.

24. In quantifying damages, what one must value is the loss to the owner. The decision of *Mark Dawkings v A.R.M. Holdings Pty Limited* [1994] NSWLEC 54 suggests that such loss and damage are unconfined, and may be more than just economic loss and damage, including consequential losses and inconvenience.

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BIOGRAPHY

Craig Leggat SC

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Craig Leggat SC was appointed Senior Counsel in 2005. He is a former editor of Butterworth's Australian Federal Court Practice and a former assistant editor of Ritchie's Supreme Court Practice. He has an extensive commercial and appellate practice including property development law and planning law.

Emma Whitney

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Emma Whitney was admitted as a solicitor in 2002 and is a senior associate at Colin Biggers & Paisley. Emma has extensive experience in state and local government, environmental and planning law. She is a member of the Environmental and Planning Law Association of NSW, Women Lawyers Association of NSW and the Law Society of NSW.

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Legislation

Environmental Planning and Assessment Act 1979 (NSW)

Supreme Court Act 1970

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