



Précis Paper

Statutory Construction and the NSW Heritage Act

A discussion of *Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141* which concerned statutory construction and the NSW Heritage Act.

Discussion Includes

- Background to the case
- First Instance
- The Court of Appeal decision
- Reasoning of McCallum J
- Conclusion

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1. In this edition of BenchTV, Michael Astill (Barrister, Greenway Chambers) and Clifford Ireland (Barrister, 13 Wentworth Selborne Chambers) discuss *Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141* which concerned statutory construction and the NSW Heritage Act.

Background to the case

2. Stamford proposed a redevelopment of a heritage listed building under the *Environmental Planning and Assessment Act 1979 No 203 (NSW)*.
3. Sydney Council referred the development application to the Heritage Council and the Heritage Council said that it was prepared to approve alterations to the old building, however it negatives comments about a new tower that was proposed on the same block of land.
4. Mulpha said that the Heritage Council has misapprehended its powers under the *Heritage Act 1977 (NSW)* and said that approval was required for the whole site.

First Instance

5. At first instance it was found that the proposed new development did trigger the approval requirement posed by *s57 Heritage Act 1977 (NSW)*.

The Court of Appeal Decision

6. None of the judges at the Court of Appeal upheld the primary judgment.

The Reasoning of McCallum J

7. There was a minority judgment by McCallum J which supported Mulpha's alternate argument that the word 'land' in the *Heritage Act* means the whole title.
8. It was said that the text must be considered in the light of its context and purpose.

Conclusion

9. *Section 57* is less clear cut than other references to land in the *Heritage Act*. This is a contestable issue but one which gave rise to a fascinating set of judgments in an interesting context.

BIOGRAPHY

Michael Astill

Barrister, Greenway Chambers, Sydney

In 2013, Michael came to the Bar, where he has continued to build on his reputation as advocate and advisor in many high-profile cases and projects.

He was admitted as a solicitor in NSW in 1980, and became a partner with Sly & Russell (now Norton Rose Fulbright). In 1992, he moved as a partner to Blake Dawson Waldron (now Ashurst). As a solicitor, Michael practiced as both an advisor and advocate and built an outstanding reputation across his chosen practice areas.

Between July 2003 and November 2004, Michael was seconded to the NSW Department of Infrastructure Planning and Natural Resources (DIPNR) as Corporate Counsel. This involved supervising the litigation of the Department and also legislation, including the creation of State Water, the commencement of the Water Management Act 2000 via the passage of the 2004 Amending Act, and (as instructing counsel in Parliament) the 2003 natural resources cognate legislation - the Native Vegetation Act, Natural Resource Commission Act and the Catchment Management Authorities Act.

Listed by Doyles as a Leading Planning & Environment Lawyer since 2013, Michael is also recognised in Best Lawyers in Australia (2017) under the categories of:

Construction/Infrastructure Law

Energy Law

Government Practice

Natural Resources Law, and

Planning & Environmental Law, for which he is the current 'Lawyer of the Year' 2017.

Clifford Ireland

Barrister, 13 Wentworth Selborne, Sydney

With over 11 years of experience at the Bar, and a total of 23 years as a specialist in environmental, planning, mining and associated areas of property law, and also more generally in related areas of commercial law, Clifford has been listed as either a leading or recommended barrister in the environmental and planning area in the "Doyle's Guide" for the past six years. Complementing his specialist practice in environmental and planning law (including environmental crime), he also practises in related areas including mining law, property, building and construction, commercial tenancy, administrative law and judicial review, local government, and in related areas of commercial law.

Clifford has advised on and/or appeared in relation to many major projects across the State from large mining developments (the Donaldson Coal Mine open cut, the Gloucester Open Cut coal mine, the Ashton Open Cut coal mine, the Lake Cowal Gold Mine, the Anvil Hill Coal mine, Peabody open cut at Mudgee), and large urban developments, for example, Barangaroo and the proposed Crown Casino. He appears both for proponents and objectors. He regularly appears in both contested environmental crime or Class 5 cases in the Land and Environment Court and at sentencing hearing, and has appeared for both defendants and the Environment Protection Authority.

He appears across the range of cases in the Land and Environment Court's jurisdiction including in merits appeals, resumption and compensation, judicial review, and environmental crime.

Clifford appears regularly in the real property list and Equity Division in the Supreme Court in relation to easement and other property law disputes.

BIBLIOGRAPHY

Focus Case

Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_business/benchmark_21-06-2019_weekly_business_law.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5d0719f4e4b08c5b85d8a3cd>

Cases

Commissioner for Railways (NSW) v Agalinos (1955) 92 CLR 390
Scully v Leichhardt Council (1994) 85 LGERA 109
Z v C

Legislation

Environmental Planning and Assessment Act 1979 No 203 (NSW)
Heritage Act 1977 (NSW)
SAS Trustee Corporation v Miles [2018] HCA 55