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Transport Construction Authority v Parramatta City Council [2010] NSWSC 1168 (18 November 2010)

Last Updated: 24 November 2010

NEW SOUTH WALES SUPREME COURT CITATION: Transport Construction Authority v Parramatta City Council [\[2010\] NSWSC 1168](#) JURISDICTION: FILE NUMBER(S): 2010/282281 HEARING DATE(S): 13 October 2010 JUDGMENT DATE: 18 November 2010 PARTIES: Transport Construction Authority (Plaintiff/Respondent) Parramatta City Council (Defendant/Applicant) JUDGMENT OF: Gzell J LOWER COURT JURISDICTION: Not Applicable LOWER COURT FILE NUMBER(S): Not Applicable LOWER COURT JUDICIAL OFFICER: Not Applicable COUNSEL: B Walker SC with C Withers (Plaintiff/Respondent) A Galasso SC (Defendant/Applicant) SOLICITORS: Clayton Utz (Plaintiff/Respondent) Blake Dawson (Defendant/Applicant) CATCHWORDS: PROCEDURE - Cross-vesting and Transfers - [Civil Procedure Act 2005, s 149B\(2\)](#) - proceedings in the Supreme Court for determination whether a deed between the parties settling earlier proceedings in the Land and Environment Court for compensation for compulsory acquisition by the defendant of portions of the plaintiff's roads that had been determined under the [Roads Act 1993](#) was a bar to current proceedings between the parties in the Land and Environment Court for compensation under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) - whether more appropriate for those proceedings to be heard together with the current proceedings in the Land

and Environment Court - whether a transfer order should be made
LEGISLATION CITED: [Land Acquisition \(Just Terms Compensation\) Act 1991](#)
[Land and Environment Court Act 1979](#)
[Roads Act 1993](#)
[Civil Procedure Act 2005](#)
CASES CITED: Arnold v Minister Administering the [Water Management Act 2000](#) [2008] NSWCA 338; (2008) 73 NSWLR 196
Kostas v HIA Insurance Services Pty Limited [2010] HCA 32; (2010) 84 ALJR 663
Blue Sky Capital Ventures Pty Ltd v Lake Macquarie City Council [2007] NSWLEC 790; (2007) 159 LGERA 374
TEXTS CITED: DECISION: Order made transferring the Supreme Court proceedings to the Land and Environment Court to be heard together with the related proceedings in that court. JUDGMENT:

**IN THE SUPREME COURT OF NEW SOUTH WALES
EQUITABLE DIVISION
GZELL J
THURSDAY 18 NOVEMBER 2010**

**2010/282281 TRANSPORT CONSTRUCTION AUTHORITY v
PARRAMATTA CITY COUNCIL
JUDGMENT**

Background

1 The defendant, Parramatta City Council, commenced proceedings in the Land and Environment Court on 18 March 2010 seeking a determination under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#), s 55 of the compensation to be paid to it for part of the land in Argyle Street and Wentworth Street Parramatta, compulsorily acquired by the plaintiff, Transport Construction Authority, then called Transport Infrastructure Corporation. The application was brought in class 3 of the jurisdiction of the court defined in the [Land and Environment Court Act 1979](#), s 19.

2 The [Roads Act 1993](#), s 204 provides that it applies in substitution for the [Land Acquisition \(Just Terms Compensation\) Act](#) with respect to compensation payable to a council for a public road owned by it and

acquired by the Crown by compulsory process.

3 On 28 June 2004 the Valuer-General valued the portion of the land in Argyle and Wentworth Streets in the nominal amount of \$5,000 under the [Roads Act](#).

4 The Council subsequently took the view that the Authority is not the Crown and it brought the 18 March 2010 proceedings in the Land and Environment Court for compensation for the land in Argyle and Wentworth Streets under the [Land Acquisition \(Just Terms Compensation\) Act](#).

5 That application was accompanied by a notice of motion seeking an order under the [Land Acquisition \(Just Terms Compensation\) Act, s 66\(3\)](#) for leave to proceed with the claim as the application was lodged outside the 90-day period prescribed in [s 45](#) for objection to the amount of compensation offered. That notice of motion has not been determined.

6 On 19 October 2004, the Council commenced class 3 proceedings in the Land and Environment Court objecting to the amount of compensation paid in respect of land adjacent to the portions of Argyle and Wentworth Streets that had been resumed. There is a dispute between the parties as to whether the portions of the streets formed part of the subject matter of those proceedings.

7 In November 2006, the parties executed a deed of release and settlement that settled various proceedings then on foot between the parties including the previous Land and Environment Court proceedings of 19 October 2004. The Council discontinued those proceedings in consequence of the execution of the deed.

8 In opposition to the notice of motion for leave in the 18 March 2010 proceedings in the Land and Environment Court, the Authority argued that the deed was a complete answer to the motion and any substantive proceedings. Its intention was to plead the deed in any substantive proceedings. It argues that such proceedings were futile as the matters the subject of the release had already been the subject of class 3 proceedings commercially resolved by the deed. It submitted that the court should refuse leave to the Council to bring the proceedings out of time.

9 On 4 June 2010, the Land and Environment Court ordered the Council to indicate in writing its position regarding the ability of the Authority to rely on the deed, what remedy it sought with respect to the deed and the legal basis for that remedy.

10 The Council provided the Authority with a position paper on these issues on 16 August 2010. It maintained that the deed did not operate to bar the current proceedings in the Land and Environment Court because the deed did not apply to the compulsory acquisition of the portions of Argyle and Wentworth Streets but was limited to the adjacent land. If that was not so, the Council argued that it would submit that equity required the deed to be read down or rectified to give effect to the common intention of the parties to the deed.

11 On 17 August 2010, the solicitors for the Authority wrote to the solicitors for the Council arguing that the Land and Environment Court lacked jurisdiction to grant equitable rectification.

12 The [*Land and Environment Court Act, s 16\(1A\)*](#) provides that the Land and Environment Court has jurisdiction to hear and dispose of any matter

not falling within its jurisdiction, being a matter that is ancillary to a matter that falls within its jurisdiction.

13 In reply, the solicitors for the Council argued that the [*Land and Environment Court Act, s 16\(1A\)*](#) applied as the matters were ancillary to a matter that fell within the jurisdiction of the Land and Environment Court.

14 The solicitors for the Authority raised a further question as to the extent to which rules of evidence would apply in the event that the proceedings were heard in class 3 in their entirety.

15 The Authority commenced these proceedings in the Supreme Court on 25 August 2010. It seeks a declaration that the deed applies to the portions of Argyle and Wentworth Streets that were resumed; the deed operates as a bar to the current proceedings in the Land and Environment Court; and it has the effect of compromising for all time the Council's claims in the earlier Land and Environment Court proceedings. An order is sought enjoining the Council from pursuing or prosecuting its current application in the Land and Environment Court.

Supreme Court Notice of Motion

16 By the notice of motion presently before the Supreme Court, the Council seeks an order pursuant to the [*Civil Procedure Act 2005, s 149B*](#) that these proceedings be transferred to the Land and Environment Court to be heard together with the Council's current proceedings in that Court.

17 [*Section 149B\(1\)*](#) of the [*Civil Procedure Act*](#) was in the following terms:

“If either the Supreme Court or the Land and Environment Court is satisfied, in relation to proceedings before it, that it is more appropriate for the proceedings to be heard in the other court, it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court.”

18 That is a provision in general terms. If it is more appropriate that proceedings in the Supreme Court be heard in the Land and Environment Court or *vice versa*, a transfer order may be made.

19 [Section 149B\(2\)](#) of the [Civil Procedure Act](#) was in the following terms:

“If either the Supreme Court or the Land and Environment Court is satisfied, in relation to proceedings before it, that:

(a) there are related proceedings pending in the other court, and

(b) it is more appropriate for the proceedings to be heard, together with the related proceedings, in the other court,

it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court and heard together with the related proceedings.”

20 The [Civil Procedure Act](#), [s 149A\(2\)](#) provides that proceedings are related if the matters with which they deal are so closely associated as to form part of the same controversy.

21 [Section 149B\(2\)](#) of the [Civil Procedure Act](#) has two specific requirements that are not necessary to the operation of [s 149B\(1\)](#). There must be existing proceedings in the other court together with which the proceedings the subject of a transfer order will be heard. Secondly, the existing proceedings in the other court must be so similar to the

proceedings to be transferred to be regarded as part of the one controversy.

22 It was submitted on behalf of the Authority that the more general provision in the [Civil Procedure Act, s 149B\(1\)](#) should not be invoked to avoid the additional requirements of [s 149B\(2\)](#) and, since there were existing proceedings in the Land and Environment Court, the Council was bound to rely upon [s 149B\(2\)](#).

23 That is a construction of the legislation that may need resolution in the future. It is not necessary for the court to resolve it here as the notice of motion is couched in terms of the [Civil Procedure Act, s 149B\(2\)](#). It not only seeks a transfer order, it seeks an order that the proceedings in the Supreme Court be heard together with the current Land and Environment Court proceedings.

24 The crux of the proceedings in this court is the meaning of the deed and whether it is a bar to the current proceedings for compensation under the [Land Acquisition \(Just Terms Compensation\) Act](#) in the Land and Environment Court.

25 The same issue arises in the current proceedings in the Land and Environment Court. The Authority has indicated that it relies upon the deed as a bar to the notice of motion for leave and will plead the deed in bar to any substantive proceedings, if leave is granted.

26 The proceedings in both courts are, in my judgment, related because the matters with which they deal are so closely associated as to form part of the same controversy.

27 The real question is whether it is more appropriate for the Supreme Court proceedings to be heard in the Land and Environment Court together with the current proceedings in that court.

28 The [*Civil Procedure Act*, s 149B\(3\)](#) provides that no appeal lies against a decision of the transferor court to make, or not to make, an order under that section.

29 It is not within the power of the Land and Environment Court to revoke a transfer order in the interests of case management under [s 149D](#) of the [*Civil Procedure Act*](#). This is made clear by the exception to the right of the transferee court to vary or revoke an order of the transferor court in [s 149C\(3\)](#). It provides that any order made by the transferor court, other than the transfer order, may be varied or revoked by an order of the transferee court.

30 It was submitted that an unappealable transfer order that could not be revoked or varied by the Land and Environment Court should not be made because, it was said, the Authority should not be “vexed” in the Land and Environment Court when the whole point of its proceedings in the Supreme Court was to prevent its involvement in the proceedings for compensation and that would be taken away from it if a transfer order was made.

31 But the Authority is already “vexed” in the Land and Environment Court. It is a party to the current proceedings. With the response by the Council with respect to the effect of the deed, the Land and Environment Court is poised to decide whether or not it will determine whether the deed is a bar to the proceedings before it as a preliminary question.

32 If that matter is to be determined in the Supreme Court in the current proceedings by the Authority the critical point about the deed will be taken away from the Land and Environment Court.

33 The Land and Environment Court has exclusive jurisdiction to determine compensation for compulsory acquisition of land. The [Land and Environment Court Act 1979](#), [s 24\(1\)](#) is in the following terms:

“If:

(a) a claim is made for compensation because of the compulsory acquisition of land in accordance with the [Land Acquisition \(Just Terms Compensation\) Act 1991](#), Division 2 of [Part 12](#) of the [Roads Act 1993](#) or any other Act, and

(b) no agreement is reached between the claimant and the authority required to pay the compensation, the claim is (subject to any such Act) to be heard and disposed of by the Court and not otherwise.”

34 In seeking compensation for the compulsory acquisition of portions of Argyle and Wentworth Streets upon the altered basis that the Authority is not the Crown, the Council had no choice but to commence its current proceedings in the Land and Environment Court.

35 And there are other issues that tend to suggest that the Land and Environment Court is the more appropriate forum.

36 The deed was executed by the Authority and the Council with respect to proceedings in the Land and Environment Court. All the relief sought by the Authority in the Supreme Court is with respect to the current proceedings in the Land and Environment Court. A declaration is sought

that the deed applies in respect of the portions of Argyle and Wentworth Streets acquired by the Authority. A declaration is sought that the deed operates as a bar to the current proceedings in the Land and Environment Court. A declaration is sought that the deed has the effect of compromising for all time the earlier proceedings in the Land and Environment Court. An order is sought enjoining the Council from pursuing or prosecuting the current proceedings in the Land and Environment Court. The issues upon which these claims to relief are based are issues that may, as well, be determined by the Land and Environment Court.

37 Furthermore, the Authority will be “vexed” in the Land and Environment Court if either the Supreme Court or the Land and Environment Court determines that the deed is not a bar to a claim for compensation for the compulsory acquisition of the portions of Argyle and Wentworth Streets under the [Land Acquisition \(Just Terms Compensation\) Act](#).

38 The Land and Environment Court, being a specialist court with exclusive jurisdiction in the determination of compensation for compulsory acquisition of land tends, on balance, to be the more appropriate court to determine the issue whether the deed is a bar to the current proceedings before it.

39 It was submitted on behalf of the Authority that the Equity Division of the Supreme Court is the appropriate forum in which to determine rectification and a transfer order should not be made for that reason.

40 But it is not clear that the Council will require rectification. It may be sufficient for its purposes that the deed be read down if it purports to deal with the compulsory acquisition of portions of Argyle and Wentworth Streets.

41 Secondly, it may be that rectification is ancillary to the proceedings for compensation, should leave to proceed be granted.

42 In *Arnold v Minister Administering the [Water Management Act 2000](#) [2008] NSWCA 338; (2008) 73 NSWLR 196* at 215 [75], Spigelman CJ with whom Allsop P and Handley AJA agreed, said of the [Land and Environment Court Act, s 16\(1A\)](#):

“For present purposes it is sufficient to state that, where the determination of a legal issue constitutes an essential step in the course of determining an issue that is within the jurisdiction of a court, then the determination of the former will be “ancillary” to the determination of the latter.”

43 If it was the common intention of the Authority and the Council that the deed would not bar proceedings for compensation with respect to the portions of Argyle and Wentworth Streets, but the deed contained a bar, its rectification might constitute an essential step in the course of determining proper compensation.

44 Particularly may this be so when there is a statutory guarantee of market value compensation in the [Land Acquisition \(Just Terms Compensation\) Act, s 3\(1\)\(a\)](#) which provides, as an object of the Act:

“to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition.”

45 But I need not determine that issue. The [Civil Procedure Act, s 149E](#) provides:

“The transferee court has, and may exercise, all of the jurisdiction of the transferor court in relation to any proceedings to which a transfer order relates, including jurisdiction to determine any question arising in any such proceedings.”

46 If a transfer order is made in this case and the Land and Environment Court is called upon to make an order for rectification of the deed, it will have the jurisdiction of the Equity Division of the Supreme Court to do so.

47 It was submitted that a transfer order was inappropriate because the rules of evidence do not apply to class 3 proceedings in the Land and Environment Court. [Section 38](#) of the [Land and Environment Court Act](#) contains the following:

“(1) Proceedings in Class 1, 2 or 3 of the Court’s jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.

(2) In proceedings in Class 1, 2 or 3 of the Court’s jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.”

48 The provision does not exclude or forbid the application of the rules of evidence. They may be applied if thought appropriate. In *Kostas v HIA*

Insurance Services Pty Limited [2010] HCA 32; (2010) 84 ALJR 663 at 667-668 [15], French CJ said of a similar provision in another statute that it did not exclude the discretionary application of the rules of evidence. And Pain J pointed out in *Blue Sky Capital Ventures Pty Ltd v Lake Macquarie City Council* [2007] NSWLEC 790; (2007) 159 LGERA 374 at 380 [15] that relaxation of formality by s 38 of the *Land and Environment Court Act* was not a licence to set aside the requirements of procedural fairness.

49 In my view there is no impediment to the Land and Environment Court deciding the issue raised in the proceedings in this court and it is more appropriate for those proceedings to be heard together with the current proceedings in the Land and Environment Court.

50 The Land and Environment Court is the only forum that can determine the Council's claim to compensation under the statutory guarantee of market value for the portions of Argyle and Wentworth Streets compulsorily acquired if the deed does not bar that relief.

51 Upon transfer of the proceedings to the Land and Environment Court it will have jurisdiction to decide the question of rectification if the proceedings get to that question.

52 The Land and Environment Court is currently poised to decide whether to determine the bar question as a preliminary point.

53 Multiplicity of proceedings is to be avoided. There is the possibility of multiplicity of proceedings if the Supreme Court proceedings were not the subject of a transfer order and the Council was partially successful.

54 In all the circumstances, it is more appropriate in my view that the proceedings in this court be heard together with the related proceedings in the Land and Environment Court and I make the order sought in paragraph 1 of the notice of motion.

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