Land and Environment Court

New South Wales

Case Name:	Anglican Church Property Trust Diocese of Sydney v Camden Council
Medium Neutral Citation:	[2021] NSWLEC 118
Hearing Date(s):	4, 5 and 12 May, 6 and 8 September (further written submissions) 2021
Date of Orders:	28 October 2021
Decision Date:	28 October 2021
Jurisdiction:	Class 4
Before:	Pepper J
Decision:	See orders at [186].
Catchwords:	JUDICIAL REVIEW: validity of condition of consent imposing developer contributions – relief – power to order a refund if condition invalid – discretion to order a refund if condition invalid – condition valid – no power to order refund.
Legislation Cited:	Camden Growth Areas Contributions Plan 2017, cll 1.8, 1.9, 3,7, 5.2, 5.9 Environmental Planning and Assessment Act 1979, ss 4.16(1)(a), 4.16(4), 4.55, 4.61, 4.62, 7.11, 7.13(1), 7.13(2), 9.45, 9.46, 94, 124 Land and Environment Court Act 1979, ss 16(1A), 25B Recovery of Imposts Act 1963, ss 1A, 2(1), 4 State Environmental Planning Policy (State and Regional Development) 2011, Sch 7, Item 5 State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Leppington Precinct) 2015 State Environmental Planning Policy (Sydney Region Growth Centres) 2006

Uniform Civil Procedure Rules 2005, r 59.10

Cases Cited:

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 254 CLR 1
Bankstown City Council v Bennett [2012] NSWLEC 38; (2012) 187 LGERA 446
Baulkham Hills Shire Council v Wrights Road Pty Ltd [2007] NSWCA 152; (2007) 153 LGERA 219
Bayside Council v Karimbla Properties (No 3) Pty Ltd [2018] NSWCA 257; (2018) 236 LGERA 1
Bayview Gardens Pty Ltd v Mulgrave Shire Council (1987) 65 LGRA 122
Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale [1969] HCA 63; (1969) 121 CLR 137
Bellenger v Randwick City Council [2017] NSWLEC 1
City of Ryde Council v State of New South Wales [2019] NSWLEC 47; (2019) 242 LGERA 211
Clyne v Deputy Federal Commissioner of Taxation [1981] HCA 40; (1981) 150 CLR 1
Cranbrook School v Woollahra Municipal Council [2006] NSWCA 155; (2006) 66 NSWLR 379
David Securities Pty Ltd v Commonwealth Bank of Australia [1992] HCA 48; (1992) 175 CLR 353
Denham Pty Ltd v Manly Council (1995) 89 LGERA 108
Dionisatos v Acrow Formwork & Scaffolding Pty Ltd [2015] NSWCA 281; (2015) 91 NSWLR 34
F Hannan Pty Ltd v Electricity Commission of NSW (No 3) (1985) 66 LGRA 306
Frevcourt Pty Ltd v Wingecarribee Shire Council [2005] NSWCA 107; (2005) 139 LGERA 140
Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2) [2013] NSWLEC 38; (2013) 195 LGERA 229
Hillpalm Pty Ltd v Heaven’s Door Pty Ltd [2004] HCA 59; (2004) 220 CLR 472
Hoxton Park Residents Action Group Inc v Liverpool City Council (No 3) [2012] NSWLEC 43; (2012) 190 LGERA 119
Idameneo (No 9) Pty Ltd v Great Lakes Shire Council (1990) 70 LGRA 27
Karimbla Properties v Council of the City of Sydney [2017] NSWLEC 75; (2017) 222 LGERA 385
Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177; (2021) 248 LGERA 300

	Levadetes v Hawkesbury Shire Council (1988) 67 LGRA 190 Local Democracy Matters Incorporated v Infrastructure NSW [2019] NSWCA 65; (2019) 237 LGERA 74 Mason v State of New South Wales [1959] HCA 5; (1959) 102 CLR 108 Meriton Apartments Pty Limited v Council of the City of Sydney (No 3) [2011] NSWLEC 65; (2011) 80 NSWLR 541 Minister for Immigration and Border Protection v SZMTA [2019] HCA 3; (2019) 264 CLR 421 MZAPC v Minister for Immigration and Border Protection [2021] HCA 17; (2021) 95 ALJR 441 Newcastle City Council v Caverstock Group Pty Ltd [2008] NSWCA 249; (2008) 163 LGERA 83 Parramatta City Council v Hale (1982) 47 LGERA 319 Pioneer Homes Pty Ltd v Liverpool City Council (1992) 77 LGRA 237 Regional Express Holdings Ltd v Australian Federation of Air Pilots [2017] HCA 55; (2017) 262 CLR 456 Rossi v Living Choice Australia Ltd [2015] NSWCA 244 SAS Trustee Corporation v Miles [2018] HCA 55; (2018) 265 CLR 137 Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141; (2019) 99 NSWLR 730 SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362 VAW (Kurri Kurri) Pty Ltd v Scientific Committee [2003] NSWCA 297; (2003) 58 NSWLR 631 Werrin v The Commonwealth [1938] HCA 3; (1938) 59 CLR 150
Category:	Principal judgment
Parties:	Anglican Church Property Trust Diocese of Sydney (Applicant) Camden Council (First Respondent) Sydney Western City Planning Panel (Second Respondent)
Representation:	Counsel: Walker (Applicant) Lazarus SC (First Respondent) Solicitors:

	Pikes & Verekers Lawyers (Applicant) Sparke Helmore Lawyers (First Respondent)
File Number(s):	2020/285018
Publication Restriction:	Nil

JUDGMENT

The Anglican Church Seeks to Set Aside a Condition Imposing Contributions

1 These proceedings concern an application for judicial review in Class 4 of the Court's jurisdiction by the applicant, the Anglican Church Property Trust Diocese of Sydney ("the Church"), challenging the imposition of condition 16 of schedule 2 ("the condition") contained in development consent DA2016/1462/1 for the staged construction of a 500 seat place of worship, ancillary features, and associated site works, issued on 27 July 2018 ("the consent") by the second respondent, the Sydney Western City Planning Panel ("the Planning Panel").

2 If the challenge is successful, the Church seeks an order for a refund in the amount of $598,326 paid by it to the Council in compliance with the condition.

3 Three issues arise:

(a) first, whether the condition is invalid;

(b) second, if it is, whether the Court has the power to order the refund sought; and

(c) third, if such a power exists, whether the Court ought, in the exercise of its discretion, order the refund.

4 In my opinion, the condition is not invalid. However, even if this conclusion is wrong, and the second and third questions fall for determination, the Court's view is that no power exists to order a refund of the contributions already paid by the Church.

The Planning Panel Grants Consent Subject to Conditions

5 The Church is the registered proprietor of Lot 49A DP 8979, known as 30 Heath Road at Leppington ("the land"), which was purchased in August 2014.

6 The land was rezoned for urban purposes on 13 November 2015 by the *State Environmental Planning Policy (Sydney Region Growth Centres) Amendment*

(Leppington Precinct) 2015 ("the 2015 SEPP"). The land is currently zoned R2 Low Density Residential under the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*, Appendix 9 Camden Growth Centres Precinct Plan.

7 On 20 May 2016 the Church lodged development application DA535/2016 with the Council ("the first DA").

8 On 22 September 2016 the first respondent, Camden Council ("the Council"), granted development consent DA535/2016 to the first DA ("the 2016 consent").

9 When the 2016 consent was granted, places of public worship were exempted from the requirement pursuant to the then s 94 of the *Environmental Planning and Assessment Act 1979* ("the EPAA") to pay developer contributions under the Council's contributions plan that applied at that time (*Camden Contributions Plan 2011*).

10 The Statement of Environmental Effects submitted with the first DA ("the first SEE") identified the proposed development in section 3.1 of that document as including the conversion of the existing detached garage into a 75 seat church comprising a kitchen, parents room, two store rooms and amenities. Also proposed was the construction of 25 off-street carparking spaces at the frontage of the site, the erection of bicycle racks for five bicycle spaces, the upgrade and widening of the existing driveway, the erection of a 2.8m high free-standing sign, site landscaping, and the erection of a new fence around the perimeter of an existing pond. The executive summary of the first SEE included the following passage:

> The proposed development is for a new parish centre at the site, to be delivered in three (3) stages across two (2) separate DAs. This initial DA is for the first stage, which will involve the conversion of the existing detached garage on the site to a new parish centre for up to 75 congregants with on-site parking for 25 cars, 5 bicycles, two motorcycles, signage and other associated works. The existing dwelling on the site will be retained and used as a rectory.

11 On 19 December 2016 the Church lodged development application DA1462/2016 with the Council ("the second DA"). The SEE that accompanied the second DA was dated December 2016 ("the second SEE"). It identified in section 3.1 the development for which consent was sought, divided into three stages of construction including the demolition of the parking spaces at the

front of the site approved in the 2016 consent, internal alterations to convert the approved church (formerly a garage) into a youth hall, the construction of a new 250 seat church auditorium with various other amenities, the retention of the existing dwelling house as a rectory, site landscaping works, the demolition of a bridge, and the construction of 20 new parking spaces to the north of the rectory. Other aspects of the development in later stages included the building of a new youth hall, the expansion of the church carpark to accommodate 54 parking spaces, and the addition of 250 seats to the church auditorium.

12 The executive summary of the second SEE stated:

> The proposal is a part of the staged redevelopment of the site noting that the initial DA for the first stage of works has already been approved (reference DA 535/2016 approved on 22 September 2016). The proposed development, the subject of this DA, is for the next three (3) construction stages which will ultimately comprise a parish centre for 500 congregants, a new hall, meeting rooms, administration for the parish centre, a basketball court and an ancillary café for use by congregants and staff. The proposal also includes parking for 54 cars, 5 bicycles, 5 motorcycles, extensive site landscaping and other associated site works. The existing dwelling on the site will be retained and used as a rectory as part of the initial construction works. The subsequent construction works will involve internal alterations to the dwelling and a change of use to administration for the parish centre. The last stage of construction works will include demolition of the existing dwelling and construction of a new hall.

13 The second SEE described the relationship between the first and second DAs as follows:

> The purpose of [DA 535/2016] was to enable the Anglican Church to establish a presence on the site ideally before the end of this year (2016). The subject DA which is for a larger parish centre is the long-term vision for the site, to be undertaken in three (3) construction stages as set out in Section 3 of this SEE.

14 The Planning Panel was the consent authority for the second DA because it was regionally significant development pursuant to the *State Environmental Planning Policy (State and Regional Development) 2011,* Sch 7, Item 5. This was because the capital investment value of the proposed development the subject of the second DA exceeded the $5,000,000 threshold for the Council to determine the proposal.

15 The building works the subject of the first DA were completed by 3 March 2017.

16 The *Camden Growth Areas Contributions Plan 2017* ("the 2017 Contributions Plan") commenced on 15 March 2017. By virtue of cll 1.5 and 5.2 of that Plan, development applications lodged before its commencement but not yet determined were to be determined in accordance with the provisions of the plan that applied at the date of the determination of the development application.

17 The primary purpose of the 2017 Contributions Plan is described in cl 1.6, namely, to authorise the Council or a planning panel, when granting consent to a development application to carry out development to which the Plan applies, to require a contribution to be made towards either or both:

> . the provision, extension or augmentation of public amenities and public services only where development is likely to require the provision of or increase the demand for those amenities and services; and
>
> . the recoupment of the cost of providing existing public amenities and public services within the area to which this plan applies.

18 Clause 1.8 of the 2017 Contributions Plan identified the development to which that Plan applies as follows:

> Except as provided for by section 1.9, this plan applies to the following types of development:
>
> . Residential accommodation development (including the subdivision of land) that would, if approved, result in a net increase in the resident population on the site once the land is developed and occupied…
>
> . Retail, commercial and any other non-residential development (including subdivision of land), where that development is the first development of the land after it has been rezoned for urban purposes.

19 Clause 2.3 of the 2017 Contributions Plan states:

> Other development is generally levied contributions for water cycle management facilities and traffic and transport facilities only, and these contributions are imposed on the first urban development of the land after its rezoning for urban purposes.

20 Clause 1.9 of the 2017 Contributions Plan makes provisions for a number of exceptions to the operation of the Plan including (in the final dot point), "development that in the opinion of the Council would not, if carried out, result in a net increase in demand for the [sic] any of the public amenities or public services addressed by this plan."

21 The term “development” is not defined in the 2017 Contributions Plan and the reference to “DA” in cl 5.9 means no more than “development application”, which is similarly undefined.

22 Clause 3.7 of the 2017 Contributions Plan provides that the Council “retains the right to vary the section 94 contribution amount otherwise calculated in accordance with the provisions of this plan”.

23 Under the 2017 Contributions Plan contributions for economic infrastructure are calculated on the basis of the net developable area (“NDA”) of the land (cl 2.2.2).

24 An occupation certificate was issued for the first DA on 17 March 2017. The land has been occupied and used as a 75 seat place of public worship since then.

Assessment of the Second DA

25 On 27 March 2017 the Planning Panel considered a briefing report prepared by Ryan Pritchard of the Council in relation to the second DA. This process included a site inspection by some members of the Planning Panel.

26 On 10 July 2017 Pritchard referred the second DA to Ian Harvey at the Council for the calculation of the development contributions. On 13 July 2017 Harvey completed a referral calculating contributions for drainage, roads, and plan administration totalling $1,399,095. This was calculated on the NDA of the land.

27 On 14 July 2017 Pritchard sent an email to Stephen Kerr of City Plan Services, the planning consultants engaged by the Church, attaching a draft deferred commencement consent for the second DA. This included a condition that required the payment of developer contributions totalling $1,399,095, as calculated by Harvey above.

28 On 2 August 2017 Kerr lodged a submission with the Council seeking a reduction in the developer contributions payable in relation to the second DA. He stated in response to the draft contributions conditions that, among other things, it would be invalid if imposed because it contravened the requirement for it to be “reasonable” pursuant to s 94(2) of the EPAA.

29 On 11 August 2017 Ron Dowd, the Council's s 94 Planner, presented a report to the Council's Development Contributions Management Committee ("the Contributions Committee") recommending that the second DA be exempted from development contributions. The Contributions Committee deferred its decision on the matter.

30 On 22 September 2017 Dowd presented another report to the Contributions Committee recommending that development contributions totalling $90,198 be levied for transport management and plan administration categories (which excluded drainage) on a "gross floor area" ("GFA") basis rather than on an NDA basis. This recommendation was unanimously endorsed by the Contributions Committee, subject to receiving agreement from Finance.

31 On 28 September 2017 Jacob Hatch of the Council sent an email to the Contributions Committee confirming the endorsement by Finance of Dowd's recommendation.

32 Subsequently, on 6 October 2017 a referral calculating contributions for roads and plan administration (which excluded drainage) totalling $90,866 was completed. This was calculated on the GFA rather than the NDA.

33 On 10 October 2017 the Council completed its report to the Planning Panel in respect of the second DA. The recommended conditions of consent in schedule 2 included the imposition of a requirement in condition 16 to pay development contributions totalling $90,866.

34 Council officers provided an Assessment Report to the Planning Panel on 23 October 2017. The Assessment Report recommended the approval of the second DA subject to conditions. The Report noted that ordinarily the development would attract development contributions in the sum of $1,400,000 if calculated strictly in conformity with the 2017 Contributions Plan. The Assessment Report further noted that the Church had sought an exemption from its obligation to pay contributions on a number of grounds (identified in the Report), and that the Contributions Committee had resolved to reduce the development contributions levied to the sum of $90,866:

> The exemption request was considered by Council's internal Development Contributions Management Committee. The Committee resolved to reduce,

> but not to exempt, the proposed development from Section 94 Contributions. The reduced contribution is $90,866 and was resolved taking into account the merits of this particular development.
>
> The rationale for this includes not levying for drainage given the provision of on-site detention and water quality for the proposed development. In addition, it was considered that road works and plan administration should still be levied but based on the gross floor area (GFA) of the proposed development rather than the net developable area of the entire site. Levying based on GFA was considered more reasonable in this instance as it is the GFA of the development that generates the demand for the remaining CP items, not the entire site.

35 The Assessment Report further stated that:

> The applicant has been informed of the Committee's decision and accepted the reduced Section 94 Contributions.

36 That day, the Planning Panel met to consider the second DA. It noted its support for the development application but decided to defer further consideration of it subject to certain amendments to various conditions. Its Record of Deferral stated:

> …the Panel noted that Condition 2.0(16) reducing the amount of Section 94 Contribution Amount was included as a recommended condition on the advice of Council's internal Development Contributions Management Committee in response to a request by the applicant seeking the contribution be waived. The Panel considered that a matter of this financial significance was one that warranted consideration and a decision by Camden Council and accordingly deferred determination to allow Council's consideration of the applicant's request. It is noted that the applicant at the public meeting agreed to that process.

37 On 23 February 2018 the Contributions Committee considered a confidential report in relation to the second DA and resolved to levy a total amount of $576,103 for development contributions.

38 Pritchard informed Kerr of the Contributions Committee's position by email on 28 March 2018, noting that "the above figure will be reflected in the condition forwarded to the Sydney Western City Planning Panel who will determine the DA." He requested, "can you please advise if you are accepting of this prior to the Panel report being finalised?".

39 Kerr's response on 4 April 2018 referred to the Church's disappointment in the Contributions Committee's failure to propose a contribution amount according to its previous assessment. However, his email proceeded to say:

> For the purpose of enabling the development application to be determined by the Regional Panel, however, the applicant accepts the proposed condition.
>
> The applicant also maintains, however, that the contribution amount is unreasonable for the reasons set out in our letter dated 2 August 2017.

40 On 17 July 2018 the Council provided the Planning Panel with an Addendum Report in relation to the second DA.

41 The Addendum Report referred to the consideration of the proposed contributions by Council officers at a further Contributions Committee meeting, which clarified that cl 1.9 of the 2017 Contributions Plan allowed exemptions to contributions to be granted where a development did not result in a net increase in demand for that particular infrastructure type.

42 The Addendum Report noted that "pursuant to the Camden Growth Areas Contributions Plan (CP), the proposed development would be levied $1,533,673 in Section 7.11 Contributions (contributions). These contributions are to fund road works, drainage and the administration of CP. This is based on the net developable area of the entire site in hectares."

43 It further noted that the exemption requested by the Church was considered by the Contributions Committee in 2017, when it resolved to vary but not exempt the applicable contributions. In particular, the observation was made that the suggested varied contribution would have been $94,207 "which equated to a reduction of $1,439,466 or 93.6%."

44 The Addendum Report was accompanied by recommended conditions of consent which included, in condition 16, the imposition of a requirement to pay development contributions totalling $589,833 (not $1,533,673). The Addendum Report said:

> At a determination meeting on 23 October 2017, the Panel resolved to defer determination of the DA to allow consideration of the applicant's request seeking that the contributions be waived by Council due to the financial significance involved. At that time it was unclear if Council officers had delegation to vary the contributions as recommended.
>
> Following the determination meeting, this matter was reconsidered by Council officers at a further DCMC meeting. Following reconsideration, DCMC has clarified that:
>
> 1. Exemptions to contributions, either entirely or on a per category basis, can be granted where a development does not result in a net increase in demand

> for that infrastructure type. Clause 1.9 of the CP provides for this and such exemptions would be consistent with the CP, and
>
> 2. Council officers have delegated authority to determine DAs where they are consistent with the CP.
>
> Considering the above, Council officers at a DCMC [Contributions Committee] meeting resolved to exempt the proposed development from contributions for on-site water cycle infrastructure. This is because the proposed development will provide its own on-site water cycle infrastructure. However, the full contribution for transport infrastructure will be required in accordance with the CP.
>
> …
>
> Taking into account the above, the applicable contribution for this development is $589,833. Further, council officers (through DCMC) have delegated authority to approve the revised contributions. The applicant has been informed of this contribution and accepted the revised contributions in writing.

45 The reference in the Addendum Report to the acceptance by the Church of the revised contributions in writing appears to be a reference to the email from Kerr to Pritchard dated 4 April 2018.

46 On 27 July 2018 the Planning Panel granted the consent. In relation to the issue of development contributions, the following notation appears in the Planning Panel's Determination and Statement of Reasons:

> The Panel notes that the [Addendum] report clarifies Camden Council's processes for assessment and administration of Sec. 94 contributions in keeping with its adopted Development Contributions Plan and that these processes have been observed in this case.

47 Condition 16 of the consent therefore imposed a requirement to pay development contributions in the sum of $589,833, comprising $79,733 in respect of "Roads Land", $491,949 in respect of "Roads Works", and $18,151 in respect of "Plan Administration Allowance". Each amount comprised the relevant contribution rate for the particular category of infrastructure calculated in accordance with the 2017 Contributions Plan.

48 There is no dispute that at the time of the grant of the consent the 2017 Contributions Plan was in force (it was subsequently amended on 22 October 2019).

The Modification Application

49 On 22 July 2019 the Church lodged an application pursuant to s 4.55(1A) of the EPAA to delete or modify condition 16 to reduce the contribution payable ("the modification application").

50 On 29 August 2019 the Council wrote to the Church requesting its withdrawal of the modification application.

51 On 31 October 2019 a meeting was held at Council offices between officers of the Church and the Council to further discuss the modification application. Kerr then discussed the matter with the Council's Manager Statutory Planning, Jamie Erken, on 29 November 2019.

52 In November 2019 a flier was published seeking donations from parishioners of the Church in relation to the pending building project approved by the consent.

53 On 14 January 2020 the Church engaged Pikes & Verekers Lawyers to advise on the modification application.

54 Between 31 January and 30 June 2020, the parties entered into various communications concerning the appropriateness of the modification application.

55 On 30 June 2020 Pikes & Verekers Lawyers instructed Josie Walker of counsel to advise on the matter.

56 The Church received initial advice from Walker on 22 July 2020. As a result of that advice, the Church became aware for the first time of the potential to seek judicial review of the condition. Up until that time, the Church had been pursuing the modification application as the best method of addressing its dissatisfaction with the condition.

57 On 23 July 2020 the Church held a video conference with the Council regarding the modification application.

58 On 4 August 2020 Naomi Simmons of Sparke Helmore sent an email to Pikes & Verekers Lawyers advising of the Council's instructions to discuss the matter further. The discussion took place on 5 August 2020, and resulted in a letter being sent by Pikes & Verekers Lawyers to Sparke Helmore later that day

setting out the Church's position regarding the modification application. This was, in effect, that, first, the Council should change the contributions amount "to an amount in the order of $94,207, based on the gross floor area" as originally recommended, and second, that if this occurred the Church would forgo bringing Class 1 or Class 4 proceedings.

59 On 11 August 2020 Pikes & Verekers Lawyers sent another letter to Sparke Helmore. A memorandum of advice from Walker was enclosed with the letter. The advice outlined many of the submissions made to the Court during the course of these proceedings.

60 On 14 August 2020 Kerr distributed to Council staff a summary of the Walker advice. Later that day, Sparke Helmore sent a letter to Pikes & Verekers Lawyers responding to the letters of 5 and 11 August 2020, stating that the Council would proceed to determine the modification application undeterred from any threat of legal proceedings, this being an irrelevant consideration to the determination under s 4.55 of the EPAA.

Payment of Contributions, Refusal of the Modification Application

61 A "sod-turning" ceremony in respect of the second DA was presided over by the Archbishop of the Sydney Diocese and conducted on the land on 23 August 2020.

62 The modification application was determined by refusal by the Council on 1 September 2020. The basis of the refusal was that the Church had failed to provide an adequate justification for the modification.

63 The Church paid $589,833 to the Council on 4 September 2020 as the principal amount of the contribution required by condition 16. The letter accompanying the cheque was from Scott Lincoln, the manager of the Church. He made it plain that in the Church's opinion the amount was unreasonable:

> On the basis set out in the above correspondence from our solicitors and counsel, we contend that the Condition was imposed unlawfully and is liable to be declared void and of no effect by the Land and Environment Court. In any event, the amount of the Contribution is unreasonable in the circumstances of the case and should be reduced on the basis set out in the [modification] Application.
>
> Unfortunately we are now in a position where the only condition of the Consent yet to be complied with prior to the issue of a construction certificate is

> [condition 16], and the commencement of building work in accordance with the Consent cannot be delayed any further without risking substantial loss. Accordingly, we enclose our cheque for $589,833 in payment of the Contribution (indexed in accordance with the Contributions Plan as referred to in the Condition).
>
> This payment is made under protest, and without any admission that the Contribution was validly charged. The payment is made merely so that we can obtain a construction certificate and commence building work in accordance with the Consent.
>
> All rights to seek recovery of the amount now paid to Council (including interest) are expressly reserved.

64 In his affidavit sworn on 3 February 2021, Lincoln stated that:

> The Council's unfavourable view of the Contributions Application thus left ACPT with a choice between delaying commencement of the project under the 2018 Consent until the dispute regarding Condition 16 was resolved, or paying the Contribution under protest in order to obtain the construction certificate. Due to the projected need for better parish facilities at Leppington as restrictions on public gatherings started to ease, ACPT decided to proceed with the project forthwith and thus avoid further delays in the project, and to commence these proceedings to recover the payment.
>
> …
>
> The payments made to the Council on 4 and 10 September 2020 remain paid under protest.

65 On 9 September 2020 the Church received the Council's notice of determination refusing the modification application.

66 The Church paid $8,493 to the Council on 10 September 2020, which was the indexation component of the contribution required by the condition.

67 The Coordinator, Contributions Planning at the Council, Ben Richards, swore two affidavits on 9 and 21 April 2020. In his first affidavit, Richards deposed that as at 30 September 2020, the Camden Growth Areas Contributions Plan 2019 ("the 2019 Contributions Plan") was in deficit by $73,034.71, and accordingly, the contributions paid by the Church on 4 and 30 September 2020 in satisfaction of condition 16 had already been spent by the Council.

68 In his later affidavit, Richards explained the pooling of funds received by the Council under the 2017 and 2019 Contributions Plans. Specifically, the Council forward funds the provision of public amenities and services in order to facilitate growth within the area to which the plans apply. In doing so, the Council pools developer contributions received under a number of different

contributions plans and borrows funds against those plans. This occurred in respect of the 2017 and 2019 Contributions Plans which was the reason for the deficit as at 30 September 2020.

69 A construction certificate for the second DA was issued on 24 September 2020. Since then, the works proposed in the construction certificate have commenced.

70 As at the commencement of these proceedings, it was not in dispute that the consent has not been publicly notified for the purposes of s 4.59 of the EPAA.

Issues for Determination

71 It should be noted from the outset that an extension of time is required to bring these proceedings, the commencement of which is outside the three month period from the date upon which the consent was granted (see s 4.59 of the EPAA and r 59.10(1) of the *Uniform Civil Procedure Rules 2005* ("UCPR")). The length of the delay is not insignificant, namely, approximately two years.

72 The Church initially submitted that time had not commenced to run because the consent had not been publicly notified. The submission was abandoned upon the Council withdrawing its objection to the Court exercising its discretion to extend time to commence the proceedings pursuant to r 59.10(2) of the UCPR.

73 Because there was no prejudice to the Council if time were extended but considerable prejudice to the Church if it was not, and in light of the evidence of Lincoln about the steps taken by the Church to alleviate the effect of condition 16, having regard to the factors contained in r 59.10(3) of the UCPR, the Court determined that it was appropriate that time be extended to commence the proceedings to the date of the filing of the summons.

74 The Church's arguments against the validity of condition 16 were essentially four-fold:

(a) first, the 2017 Contributions Plan did not apply to the consent because the development was not the "first development of the land after it has been rezoned for urban purposes", it was the second; the first development comprising the subject-matter of the 2016 consent;

(b) second, cl 3.7 of the 2017 Contributions Plan gave the consent authority the power to vary the contribution amount in response to a written request from the proponent (the Church) and the Planning Panel failed to exercise that power;

(c) third, although the Planning Panel was at liberty to impose a contribution which was not determined in accordance with the 2017 Contributions Plan pursuant to s 7.13(2) of the EPAA, the Planning Panel considered that it was bound to apply the full contribution as recommended by the Council and calculated in accordance with that Plan; and

(d) fourth, as a consequence, the Planning Panel failed to exercise its jurisdiction under s 7.11(2) of the EPAA by not considering whether the proposed contributions were reasonable.

75 If the Church was successful in its challenge to the validity of condition 16, the next issue for determination was whether the Court could, and should, order that the contributions paid by the Church be refunded to it by the Council. In particular:

(a) had the Church acquiesced to the imposition of the condition or waived any right to contest the condition by its conduct;

(b) did the Court have the power to order a refund of the contributions; and

(c) if it did, should, as a matter of discretion, the Court grant relief in that form.

Condition 16 of the Consent is Valid

The Proper Construction of cl 1.8 of the 2017 Contributions Plan

76 The success or otherwise of the first of the Church's arguments depends on the proper construction of cl 1.8 of the 2017 Contributions Plan with respect to, first, what is the "first development", and second, what is the "land" to which cl 1.8 of the 2017 Contributions Plan applies.

77 As a statutory instrument made under the EPAA, the 2017 Contributions Plan is construed according to the ordinary principles of statutory construction (*ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 at [28]; and *Cranbrook School v Woollahra Municipal Council* [2006] NSWCA 155; (2006) 66 NSWLR 379 at [36]-[43]). Accordingly, the clause must be construed having regard to its text and context, which includes it purpose (*SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34;

(2017) 262 CLR 362 at [14], [37]-[39]; and *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 265 CLR 137 at [20]).

78 As submitted by the parties, one of the purposes of cl 1.8 of the 2017 Contributions Plan is to prevent the Council effectively double-dipping by only permitting the levying of contributions for economic infrastructure once, calculated by reference to the NDA of the site. This intention is manifested by the reference to "first development of the land after it has been rezoned for urban purposes" in the second dot point of that clause. In other words, levies are imposed once on the development of the relevant land.

79 That said, both the text and context of the clause support a practical, and therefore, expansive construction being attributed to the expression "the first development", a corollary of which is that where a development application is part of the overall development of a site, the 2017 Contributions Plan applies to the entirety of the proposed development. Were it otherwise, any minor development on land the subject of anticipated future development proposals (for example, staged development) could be used to minimise contribution liability and subsequent larger developments on the land would be wholly immunised against the payment of future contributions.

80 The Church argued that because the 2016 consent was an approval of the first DA relating to development on the land after it was rezoned in November 2015 by the 2015 SEPP, contributions could only be levied in respect of that development, it being "the first development". According to the Church, the expression "first development" in cl 1.8 of the 2017 Contributions Plan means the first identifiable and discrete proposal for development on the land, however minimal, and irrespective of the size and scope of the total proposed development of the land.

81 I do not agree. Clause 1.8 does not refer to the first "development application" (which is separately identified in the definition of "DA" in cl 5.9 of the 2017 Contributions Plan), or first "development consent"; it refers to the first "development". The first and second DAs, the 2016 consent, and the consent are part of the same continuous staged "development" of the entirety of the land for the purpose of public worship, as both the first and second SEEs make

plain. The purpose of the first DA was to enable the Church to establish temporary facilities pending the planned construction of larger permanent facilities on the land. It is all part of the same development.

82 The Church submitted that when the identified works the subject of the first and second SEEs were compared, it became apparent that the proposals the subject of the first and second DAs were not the same "development" within the meaning of cl 1.8 because there was no continuity between the works that would warrant them being characterised as comprising a single development of the land.

83 I disagree. In my opinion, the comparison revealed that the works – or the "development" – the subject of the second DA was in reality a continuation of the works the subject of the first DA and the 2016 consent. For example, both the first and second SEEs described the development the subject of the first DA as for a "temporary church at the site". The 75 seat church approved under the 2016 consent was to be converted into a youth hall and meeting rooms to support the youth ministry under the second DA. A new church was to be constructed, however, the rectory would continue to be used throughout until its demolition during stage 3 of the second DA. The carpark constructed under the 2016 consent would be demolished but rebuilt to double its capacity. It was therefore not correct to state, as the Church did, that the second DA did not build upon or was not relevantly connected to the works proposed and carried out under the 2016 consent. While it is true that the second DA involved the construction of additional buildings and a greater intensification of use than the development the subject of the 2016 consent, the second DA and the consent were for the same use, namely, the establishment of a place of public worship, albeit on a much larger scale.

84 For example, the second SEE stated:

> The first proposal is part of the staged development of the site noting that the initial DA for the first stage of works has already been approved… The proposed development the subject of this [second] DA, is for the next three (3) construction stages which will ultimately comprise a parish centre for 500 congregants, a new hall, meeting rooms, administration for the parish centre, a basketball court and an ancillary café for use by congregants and staff.
>
> …

> …the proposal is part of the staged development of the site noting that the initial DA for the first stage of works has already been approved. …The purpose of this initial DA was to enable the Anglican Church to establish a presence on the site ideally before the end of this year (2016). The subject DA which is for a larger parish centre is the long-term vision for the site, to be undertaken in three (3) construction stages as set out in Section 3 of this SEE.

85 Thus, as the development application material makes plain, the first DA was for temporary works that were part of the same staged development in respect of which the second DA comprised the permanent church and ancillary facilities.

86 While there were multiple development applications over the land, there was only one "development" of the land as a place of public worship. Consequently, cl 1.8 of the 2017 Contributions Plan applies and the imposition of condition 16 of the consent pursuant to it is not invalid.

87 The Council further, and in the alternative, submitted that the Church's assumption that the word "land" in cl 1.8 of the 2017 Contributions Plan is a reference to the whole of the cadastral lot, and not merely the area of land to be developed the subject of the development application, was erroneous.

88 It is almost trite to say that the meaning of the word "land" will vary according to its statutory context. For example, the area of land to which a development application relates will not necessarily equate to the area of land described by reference to title particulars (see, for example, *Stamford Property Services Pty Ltd v Mulpha Australia Ltd* [2019] NSWCA 141; (2019) 99 NSWLR 730 at [62]-[63], [71] and [94]).

89 The Council therefore argued that even if the first DA and the second DA were not part of the same "development" for the purpose of cl 1.8, the 2017 Contributions Plan nevertheless applied to those aspects of the second DA that were to be carried out on land not the subject of the first DA and the 2016 consent. Put another way, the development on the land the subject of the second DA was the "first development" on that land, satisfying cl 1.8.

90 I cannot accept this submission. When regard is had to the text and context of the term "land" in cl 1.8 the preferable meaning of the term is the area defined by its cadastral boundary, in this instance Lot 49A DP 8979. This interpretation is more harmonious with other references to the word "land" in cl 1.8 (*Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2017] HCA 55;

(2017) 262 CLR 456 at [21]; and *Clyne v Deputy Federal Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1 at 15-16 per Mason J, as he then was), for example, the reference to the "subdivision of the land" earlier in the clause. This suggests that the word "land" in cl 1.8 refers to the whole of the lot and not some part thereof. There is nothing in the language of the clause that supports a different construction of the term "land" within the same clause (*Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* [2015] NSWCA 281; (2015) 91 NSWLR 34 at [23]).

91 Even if this conclusion is wrong, when a comparison is made between the approved plans for the two consents it becomes apparent that although a portion of the land proposed to be developed under the 2016 consent was not the subject of any proposed development under the consent, there is nevertheless a sufficient overlap in the areas of development the subject of the two consents. Moreover, consistent with the second DA and the consent, the works approved under the first DA had the effect that almost the whole of the land was used as a place of public worship. In addition, while the first DA left the northern third of the land relatively undeveloped, this was also true of the second DA. Therefore, as the Church submitted, even if the "land" in cl 1.8 does not equate to the cadastral allotment, the development the subject of the first and second DAs were relevantly on the same "land" for the purpose of that clause.

Clause 3.7 of the 2017 Contributions Plan

92 Clause 3.7 of the 2017 Contributions Plan was in the following terms:

> Council retains the right to vary the section 94 contribution amount otherwise calculated in accordance with the provisions of this plan.
>
> A developer's request for variation to a contribution calculated in accordance with this plan must be supported by written justification included with the DA. Such request will be considered as part of the assessment of the DA.
>
> An accredited certifier other than the Council cannot vary a section 94 contribution calculated in accordance with this plan, without Council's written approval.

93 The Church contended that it lodged a written justification for the variation of the contributions calculated thereby enlivening cl 3.7. The Council's Assessment Report responded to this request for a variation by recommending

reduced contributions in the amount of $90,866. However, the Addendum Report revisited the recommendation on the grounds that "it was unclear if Council officers had delegation to vary the contributions recommended", and expressed the view that Council officers had delegated authority to determine development applications only if they were consistent with the 2017 Contributions Plan and not where they were inconsistent. In accepting the advice that it would not be consistent with the 2017 Contributions Plan to reduce the contribution amount in response to a written request from the Church, the Planning Panel failed to have regard to cl 3.7 of the Plan thereby breaching s 7.13(2)(b) of the EPAA.

94 Leaving aside (because it is unnecessary to determine it) the unpleaded assertion by the Council that cl 3.7 of the 2017 Contributions Plan is invalid in circumstances where the Council's power to impose a condition under ss 7.11 or 7.12 is constrained by the terms of s 7.13(1) of the EPAA (which requires the condition imposing the relevant contribution to be determined in accordance with the 2017 Contributions Plan), cl 3.7 is clear and unambiguous in its terms. That is, it only permits the "Council" – not the Planning Panel – to vary the contribution amount otherwise payable in conformity with that Plan. This is confirmed by the last paragraph of the clause that expressly eschews the notion that a certifier can vary a contribution calculated in accordance with the 2017 Contributions Plan without the Council's written approval. The Planning Panel's assessment of its power to vary contributions, correct or otherwise, was therefore immaterial. In short, the Planning Panel, not being "the Council", had no discretion under cl 3.7 to vary the contribution amount pursuant to the written request from the Church. This is so irrespective of the fact that the Planning Panel was the consent authority.

Section 7.13(2) of the EPAA

95 Section 7.13(2) of the EPAA is another source of the Planning Panel's power to impose condition 16. Section 7.13 relevantly provides that:

> **7.13 Section 7.11 or 7.12 conditions subject to contributions plan**
>
> (1) A consent authority may impose a condition under section 7.11 or 7.12 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (subject to any direction of the Minister under this Division).

(2) However, in the case of a consent authority other than a council –

(a) the consent authority may impose a condition under section 7.11 or 7.12 even though it is not authorised (or of a kind allowed) by, or is not determined in accordance with, a contributions plan, but

(b) the consent authority must, before imposing the condition, have regard to any contributions plan that applies to the whole or any part of the area in which development is to be carried out.

96 Section 7.11 of the EPAA states:

7.11 Contribution towards provision or improvement of amenities or services

(1) If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant the development consent subject to a condition requiring –

(a) the dedication of land free of cost, or

(b) the payment of a monetary contribution,

or both.

(2) A condition referred to in subsection (1) may be imposed only to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned.

97 The Council argued that even if the 2017 Contributions Plan did not apply to the development the subject of the second DA, s 7.13(2) of the EPAA authorised the Planning Panel to impose condition 16 pursuant to s 7.11 of that Act, provided that it had regard to the 2017 Contributions Plan because it was a contributions plan that "applies to the whole or any part of the area in which development is carried out". The Council submitted that the Planning Panel clearly had regard to the 2017 Contributions Plan because it expressly referred to it when recommending a condition that was not calculated strictly in accordance with the Plan.

98 The Church accepted that because the 2017 Contributions Plan applied to the area in which the works the subject of the second DA were to be carried out the Plan was a mandatory relevant consideration. However, the Church further argued that the Planning Panel nevertheless retained a discretion to impose a contributions condition that either conformed to the 2017 Contributions Plan or departed from it. But when regard was had to the decision-making documents and to the conduct of the Planning Panel, it was clear that the Panel did not

consider that it had any discretion to vary the contribution amount that would otherwise be calculated under the 2017 Contributions Plan. In other words, the Planning Panel considered itself bound to impose the contribution amount calculated strictly in accordance with the 2017 Contributions Plan without having regard to the power contained in s 7.13(2) of the EPAA to impose some lesser sum.

99 The Church noted, for example, that no advice was given in the Assessment Report that the Planning Panel could impose a contribution that was not calculated in accordance with the 2017 Contributions Plan pursuant to s 7.13(2) of the EPAA. Likewise, no mention of this discretion was made in the Planning Panel's Record of Deferral.

100 The Church submitted that the inference to be drawn from the Assessment Report was that the Council instead had in its contemplation the power to vary contributions under cl 3.7 of the 2017 Contributions Plan (and not s 7.13(2) of the EPAA) because the Report referred specifically to the Church's written request for a variation, which was a requirement of cl 3.7. The erroneous understanding inherent in the Assessment Report was that there was limited power to depart from the 2017 Contributions Plan. This misunderstanding was repeated, in a different form, in the Addendum Report. After referencing cl 1.9 of the 2017 Contributions Plan, the Addendum Report suggested that no power of dispensation from the 2017 Contributions Plan was available due to an absence of delegated authority on the part of the Contributions Committee in circumstances where the development application was inconsistent with the Plan.

101 Therefore, because the Planning Panel did not demur from the content of the Council reports, having regard to the decision-making documents considered by the Planning Panel, the Church contended that the Panel had misconceived its power insofar as it believed that it could not levy a contribution different to that calculated in conformity with the 2017 Contributions Plan.

102 The Church's contentions ought not, in my view, be accepted. On any objective analysis of the documents it is obvious that the Planning Panel was aware of its power to depart from the calculation of contributions under the 2017

Contributions Plan. For example, the Panel was told by the Council in the Assessment Report that a reduced contribution of $90,866 would be appropriate having regard to the merits of the particular development, including a calculation based on GFA rather than NDA. Subsequently, in the Addendum Report the Panel was advised that applicable contributions should be $589,833. In determining to grant the consent subject to a contribution in this latter amount (and not, for example, $1,533,673 as initially suggested in the Addendum Report), the Planning Panel noted that the Addendum Report had clarified the Council's processes for the assessment of contributions and further noted that they were consistent with those contained in the 2017 Contributions Plan. In other words, the Planning Panel had specifically considered the calculation of the contributions and satisfied itself as to the appropriateness – or reasonableness – of the recommended sum. While both the Council and the Planning Panel were silent as to the source of this discretionary power and did not expressly refer to s 7.13(2) of the EPAA, neither could have been relying on cl 1.9 of the 2017 Contributions Plan alone given that the mooted basis of the calculation of the contributions was on GFA and not NDA.

103 That the Planning Panel was cognisant of its position and power was evident by its conduct on 23 October 2017, when it deferred the determination of the second DA to permit the Council to further consider the Church's request for a waiver of the contributions. Moreover, the Planning Panel accepted the recommendation in the Addendum Report that it impose a condition requiring contributions be payable in the "full" amount of $589,833 for transport infrastructure after it had been told that the proposed development would provide its own water cycle infrastructure and after it was informed that the Church had accepted the revised contributions in writing. These were matters that went to the reasonableness of the contribution sum to be levied.

104 The fact that the Planning Panel was silent in its reasons as to the statutory basis for imposing the agreed sum of contributions is, in my view, insufficient to give rise to an inference that it was not aware of its discretionary power under s 7.13(2) of the EPAA to impose some other amount not determined in accordance with the 2017 Contributions Plan (*Local Democracy Matters*

Incorporated v Infrastructure NSW [2019] NSWCA 65; (2019) 237 LGERA 74 at [73]-[86]; *Bellenger v Randwick City Council* [2017] NSWLEC 1 at [28]-[33]; and *Parramatta City Council v Hale* (1982) 47 LGERA 319 at 345). This is because it is legitimate to assume that, absent any indication to the contrary, consent authorities bring to bear their general knowledge of planning law and environmental planning instruments in their consideration of development applications. As Preston J observed in *City of Ryde Council v State of New South Wales* [2019] NSWLEC 47; (2019) 242 LGERA 211 (at [98]):

> 98 Consent authorities under the EPA Act have been held to have brought to bear their general knowledge of the planning law and environmental planning instruments in their consideration and determination of development applications: see *Parramatta City Council v Hale* (1982) 47 LGERA 319 at 346 (general knowledge); *Somerville v Dalby* (1990) 69 LGRA 422 at 429 (individual expertise and local knowledge); *Clifford v Wyong Shire Council* (1996) 89 LGERA 240 at 249 (local knowledge); *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 at 373 (general knowledge of their principal planning instrument); *Franklins Ltd v Penrith City Council* [1999] NSWCA 134 at [26] (general knowledge of their principal planning instrument); *Manly Council v Hortis* (2001) 113 LGERA 321 at 333 (general awareness of the LEP) and *Gee v Sydney City Council* (2004) 137 LGERA 157 at 170-171 (local knowledge and understanding of the obligations under a particular provision of the LEP).

105 In any event, merely because the Addendum Report referred only to cl 1.9 of the 2017 Contributions Plan as the source of the power to grant exemptions from the full amount of contributions calculated pursuant to that Plan does not invalidate the condition if there was another source of power (such as s 7.13(2) of the EPAA) to make it (*VAW (Kurri Kurri) Pty Ltd v Scientific Committee* [2003] NSWCA 297; (2003) 58 NSWLR 631 at [17]-[55]).

106 The Church has also failed to demonstrate that, even if infected by error, this error was material to the ultimate decision; that is, that there is a realistic probability that a different decision could have been made (*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 at [45] and [46]; and *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 95 ALJR 441 at [39] and [60]). No attempt whatsoever was undertaken by the Church to discharge its onus in this regard.

Section 7.11(2) of the EPAA

107 The Church submitted that the Planning Panel failed to consider whether the $589,833 contribution to be imposed was “reasonable” as mandated by s 7.11(2) of the EPAA, and in doing so constructively failed to exercise its jurisdiction. It should be noted that unlawful unreasonableness was not pleaded as a ground of review in the amended summons.

108 However, in my view, the evidence does not support this proposition and the Church has not discharged its burden of demonstrating that it does. The Planning Panel can be assumed to have been aware of the requirements of s 7.11(2) of the EPAA notwithstanding that the dispensing power in s 7.13(2) of that Act was not expressly brought to its attention. There is nothing in the decision-making documents to indicate that the Planning Panel failed to consider the question of the reasonableness of the quantum of the contributions proposed to be levied. An explanation was provided to the Planning Panel in the Addendum Report as to why the amount of contributions recommended should be levied. As discussed above, in its Determination and Statement of Reasons the Planning Panel alluded to this explanation when it ‘noted’ that the Addendum Report had clarified the assessment of the contributions. While the language of ‘reasonableness’ was not used by the Planning Panel, in my opinion, it may be reasonably inferred that in the absence of anything more the Planning Panel was aware of, and did not ignore, the burden of its statutory power in imposing condition 16.

109 Reinforcing this conclusion is the fact that the Church accepted the contribution amount recommended in the Addendum Report. While this did not relieve the Planning Panel of its obligation to consider the reasonableness of the sum, it is a matter that the Planning Panel would, it can be inferred, have taken into account in forming its own view of whether it would be reasonable to impose the contribution sum recommended in the Addendum Report.

110 The obligation on the Council was to determine if the contribution imposed was reasonable, not, contrary to the suggestion of the Church, to assess whether it would be more reasonable to impose the figure recommended in the

Assessment Report or the Addendum Report. Such a comparison was not required pursuant to s 7.11(2) of the EPAA.

111 For the reasons given above, I therefore find that condition 16 was validly imposed by the Council as a condition of the consent.

The Power of the Court to Order the Planning Panel to Redetermine the Appropriate Contributions to be Paid

112 If the Court were to find condition 16 invalid, and assuming that it was inclined to grant some relief beyond mere declaratory relief, then the Council's position was that the Court should exercise its power pursuant to either s 9.46 of the EPAA or s 25B of the *Land and Environment Court Act 1979* ("LEC Act"), to require the Planning Panel to redetermine the issue of the appropriate contributions to be paid according to law.

113 I agree with the Church that there is no power under s 9.46 of the EPAA to require the Planning Panel to redetermine the issue of the appropriate contributions in the manner suggested by the Council. To require the Planning Panel to consider the issue of conditions separately from the grant of consent would be to confer upon it a power to re-exercise its functions in a manner not contemplated by s 9.46 of the EPAA. The Planning Panel, having made its determination, is now *functus officio*, the imposition of conditions being an intrinsic part of the determination of the development application under s 4.16(1)(a) of that Act.

114 Turning to the question of whether the Court could, or should, make an order under s 25B of the LEC Act, upon being given a further opportunity to comment on the issue after oral argument from the parties, the Planning Panel declined to make any submissions concerning s 25B of the LEC Act.

115 Section 25B of the LEC Act confers upon the Court the power to suspend the operation of a consent in part. The provision is in the following terms:

> **25B Orders for conditional validity of development consents**
>
> (1) The Court may, instead of declaring or determining that a development consent to which this Division applies is invalid, whether in whole or in part, make an order—
>
> (a) suspending the operation of the consent in whole or in part, and

(b) specifying terms compliance with which will validate the consent (whether without alterations or on being regranted with alterations).

(2) Terms may include (without limitation)—

(a) terms requiring the carrying out again of steps already carried out, or

(b) terms requiring the carrying out of steps not already commenced or carried out, or

(c) terms requiring acts, matters or things to be done or omitted that are different from acts, matters or things required to be done or omitted by or under this Act or any other Act.

116 The Church submitted that s 25B did not give the Court the power to suspend an individual condition of consent. Rather, the words "in part'' in that provision should be read in the context of s 4.16(4) of the EPAA which allows a consent authority to grant consent to a whole development application or part thereof. This meant, according to the Church, that the Court could suspend a consent only insofar as it related to a specific part of a development, for example, a building; and not an individual condition that related to the whole of the development.

117 The Church also referred to ss 4.61 and 4.62 of the EPAA in aid of its construction of s 25B of the LEC Act. These provisions, it argued, did not sit comfortably with the interpretation posited by the Council because individual conditions could not be "regranted", only imposed. By contrast, a consent, or part of a consent, could be regranted. Thus, it was "difficult" to see how s 4.62 of the EPAA could apply to specific conditions because an individual condition cannot be subject to Pt 8 of the EPAA separate from the remainder of the consent.

118 In *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 3)* [2012] NSWLEC 43; (2012) 190 LGERA 119, Biscoe J surveyed the jurisprudence and principles applicable to the operation of s 25B of the LEC Act. They are worth repeating here (at [37]-[42] and [46]):

> 37 In the s 25B context, there is a distinction between a discrete technical breach, on the one hand, and a breach of a mandatory consideration requirement in s 79C of the EPA Act requiring reconsideration of the whole development application, on the other. In *Kindimindi Investments Pty Ltd v Lane Cove Council* (2007) 150 LGERA 333 (*Kindimindi*) at [21], Hodgson JA said when speaking of Div 3 of Pt 4 of the LEC Act: "The general intention was

that technical breaches should be capable of being rectified." This squarely reflects the legislative aim expressed in the Minister's Second Reading Speech quoted at [33]. The sole issue in *Kindimindi* was a technical breach: a council requirement was contained in a private deed when it should have been imposed by a condition of the consent. This was clearly an appropriate case for a s 25B order and one was made. At first instance, *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 147 LGERA 118, the primary judge, Lloyd J, whose decision was upheld on appeal, said at [25]:

> In the present case the error of the council amounts to a discrete matter of a technical nature which can be considered in isolation from other matters. As I have said before, this was a simple failure to impose a condition to give effect to the council's intention. This is an appropriate case for the application of s 25B and I do so.

38 This was noted and approved in *Belmore Residents' Action Group Inc v Canterbury City Council* (2006) 147 LGERA 226 at [32]-[34] by Talbot J when declining to make a s 25B order in a s 79C of the EPA Act case.

39 However, in *Kindimindi* Tobias JA went further than Hodgson JA by saying in obiter dicta that s 25B would authorise the imposition of a term requiring a consent authority to consider or reconsider a matter required to be considered by, for instance, s 79C of the EPA Act: at [32]-[33]. His Honour hastened to add that that does not mean that in every s 79C of the EPA Act case of invalidity, the Court would exercise its discretion under s 25B. He gave as an example *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 where McClellan CJ declined to exercise the s 25B discretion in a s 79C of the EPA Act case.

40 Assuming that s 25B is available in a s 79C of the EPA Act case, this Court has generally found it inappropriate to make s 25B orders in cases of failure to consider a mandatory matter under s 79C of the EPA Act because balancing and weighing the s 79C matters against all other matters relevant to the consent authority's consideration would necessitate a re-opening of the whole process: *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 at [85] per McClellan CJ (approved in *Kindimindi* at [33] by Tobias JA); *Centro Properties Ltd v Hurstville City Council* [2006] NSWLEC 78 at [58] per Talbot J; *Belmore Residents' Action Group Inc v Canterbury City Council* (2006) 147 LGERA 226 at [33]-[34] per Talbot J; *Bungendore Residents Group Inc v Palerang Council (No 4)* [2007] NSWLEC 536 at [41]-[42] per Pain J; *Hastings Point Progress Association Inc v Tweed Shire Council* [2008] NSWLEC 219 at [7]-[10] per Pain J; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13 at [100] per Biscoe J; *Cemex Australia Pty Ltd v Clarence Valley Council (No 2)* [2009] NSWLEC 133 at [22]-[31] per Pain J; *Nambucca Valley Conservation Association v Nambucca Shire Council* [2010] NSWLEC 38 at [242] per Biscoe J; *Reid's Farms Pty Ltd v Murray Shire Council* (2010) 182 LGERA 1 at [130]-[131] per Pepper J.

41 Similarly, where there has been a successful challenge to a development consent on the basis of denial of procedural fairness, it has been held to be inappropriate to make s 25B orders because the whole merit assessment process had miscarried and would have to be redone: *Clark v Wollongong City Council (No 2)* [2008] NSWLEC 226 at [26]-[29] per Sheahan J. This Court has also held that s 25B is not available where there has been a complete absence of power to grant a development consent: *GPT Re Ltd v Wollongong City Council (No 2)* (2006) 151 LGERA 158 at [53] per Biscoe J; *NRS Group Pty*

> *Ltd v Cowra Shire Council* [2008] NSWLEC 156 at [150] per Sheahan J; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13 at [101] per Biscoe J.
>
> 42 The framing of a s 25B order in a s 79C EPA Act case is challenging. And difficult obstacles can arise if and when the necessary s 25C application is subsequently made. Both these matters are illustrated by the *Mid Western case*: *Mid Western Community Action Group Inc v Mid-Western Regional Council* [2007] NSWLEC 411 (*Mid Western No 1*) and *Mid Western Community Action Group Inc v Mid-Western Regional Council (No 2)* [2008] NSWLEC 143 (*Mid Western No 2*).
>
> …
>
> 46 So far as I am aware, *Mid Western* is one of only two cases in which the Court has made s 25B orders in a s 79C EPA Act case. The other is *Western Sydney Conservation Alliance Inc v Penrith City Council* [2011] NSWLEC 244 at [109]-[111] per Moore AJ. His Honour appears to have been influenced by the fact that the matter which had not been considered in the context of the relevant development applications had nevertheless been considered as a planning matter for over two decades, and therefore there was a real prospect that, upon reconsidering it, the council would reach the same result, approval on the same basis as before. The consequential s 25B orders were to the effect, first, that the consents be suspended in part and, second, that the consents be validated upon consideration of that matter. The form of the latter order would not, I think, have been accepted by Jagot J in *Mid Western*, having regard to her Honour's quoted dicta at [43], and, with respect, I would side with Jagot J. However, the orders made by Jagot J were not drawn to the attention of Moore AJ.

119 Ultimately, his Honour declined to make a s 25B order (at [51]).

120 The scope of s 25B of the LEC Act was examined in *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244, where Basten JA endorsed the reasoning in *Hoxton Park* and emphasised that (at [45]):

> 45 It follows from this analysis that even a determination which has failed to take into account a mandatory consideration is not void or invalid until declared to be so by the court. Nevertheless, as Biscoe J said in *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 3)*, it has been noted on more than one occasion that "there is a distinction between a discrete technical breach, on the one hand, and a breach of a mandatory consideration requirement in s 79C of the [EP&A Act] requiring reconsideration of the whole development application, on the other."

121 His Honour went on to observe that (at [46]):

> 46 The breach in the present case did not, in a practical sense, affect the whole of the determination of the regional panel. Rather, it directly affected seven villas constructed near the boundary with Mr Rossi's land. Further, the adverse impacts on Mr Rossi's land were not uniform, even across that part of the boundary. Thus, even if the seven villas were to be removed, the effect on the whole development, constituting some 97 villas and accompanying infrastructure, would be quite limited.

122 Emmett JA expressed a similar sentiment to that of Basten JA (at [365]):

> 365 In the circumstances, notwithstanding that there was a contravention of s 79C on the part of the Panel, as a consequence of a defect in the assessment function on the part of the Council, I would not declare the Stage 2 Consent void or invalid. Rather, I would make an order under s 25B of the L & E Court Act suspending the Stage 2 Consent in so far as it relates to the construction of villa units 206 to 210 and specifying that landscaping work be carried out to mask the Development along the Rossi Boundary.

123 Having regard to the text of s 25B of the LEC Act it is at least arguable that the Court can suspend the "part thereof" of the consent that imposed condition 16. Less certain, however, is whether a "term" of any suspension could include a direction that the Planning Panel redetermine the amount to be levied, if any, by way of contributions. Again, the Church submitted that no such order could be made because the Planning Panel's powers were now spent. It is not apparent why, having regard to the broad scope and purpose of s 25B of the LEC Act, the Court could not suspend that part of the consent pending the redetermination by the Planning Panel of an appropriate amount of contributions to be imposed.

124 The Church also submitted, having regard to the analysis in *Hoxton Park* and *Rossi* that if condition 16 is voidable on the grounds asserted by it, the contravention of the EPAA constituted no mere "discrete technical breach" but amounted to jurisdictional error by the Planning Panel rendering it unamenable to an order under s 25B of the LEC Act.

125 While it cannot be the case that all jurisdictional error precludes the operation of s 25B of the LEC Act (as the Council correctly submitted, the power contained in s 25B assumes the existence of jurisdictional error), I agree with the Church that the nature of the asserted breaches of the EPAA by the Planning Panel render the making of a s 25B order inapposite in all of the circumstances. The Court has, as Biscoe J observed in *Hoxton Park*, generally held it inappropriate to make s 25B orders in cases of a failure to consider mandatory matters under s 79C (as it then was) of the EPAA, or a failure to afford procedural fairness, because to do so would necessitate a substantial part of the decision-making process having to be redone. This would similarly be the case here in any reconsideration of the contribution to be levied.

126 More fundamentally, however, an order suspending condition 16 while the Planning Panel redetermined the appropriateness of the amount of contributions to be levied would, as the Church correctly observed, be pyrrhic in circumstances where, for the reasons given below, it would be unable to recover the difference between what it had already paid and any revised amount payable under a regranted condition 16. Put another way, there would be no utility in making a s 25B order because whatever the Planning Panel determines is an appropriate amount to levy in its reconsideration of condition 16, the Church will not be able to recover the difference.

127 In my opinion, the force of this submission is overwhelming and would compel the Court to decline to make a s 25B order.

The Church is Not Entitled to a Refund

128 Because of the conclusion reached above concerning the validity of condition 16, it is strictly not necessary to decide what relief is available to the Church to remedy or restrain a breach of the EPAA. However, given that this issue occupied a substantial proportion of the hearing time, the Court has nevertheless dealt with the matter below.

129 As alluded to above, the Court plainly has the discretion to grant declaratory relief and would do so in all the circumstances were condition 16 found to be invalid. There was also no dispute that condition 16 could be severed from the consent without affecting the validity of the remainder of that instrument.

130 Rather, the debate centred upon the power, if any, of the Court to order the Council to repay the Church the amount of $598,326 that was paid in compliance with condition 16 of the consent, together with interest up to the date of the judgment.

131 In summary, it is my opinion that the Court has, as is explained below, no power to order a refund of the contributions paid by the Church to the Council.

132 Curiously the Church elected not to deal with this important question in its written submissions in chief, rather, the burden fell at first instance upon the Council to deal with the matter. This may explain why, as is discussed in more detail below, the Church failed to adduce the evidence necessary to, even

assuming that the Court had the power to make such an order (which it does not), establish the factual basis for any exercise by the Court of its discretion to grant the specific relief sought.

There is No Power to Order a Refund

133 The amended summons filed in Court on 4 May 2021 was silent as to the source of the Court's power to make the order for a refund sought by the Church.

134 In its submissions in reply, the Church relied upon ss 9.45 and 9.46 of the EPAA as the source of the jurisdictional basis for the order to remedy the alleged breaches of the EPAA. Those provisions relevantly provide as follows:

> **9.45 Restraint etc of breaches of this Act**
>
> (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
>
> …
>
> **9.46 Orders of the Court**
>
> (1) Where the Court is satisfied that a breach of this Act has been committed or that a breach of this Act will, unless restrained by order of the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.
>
> (2) Without limiting the powers of the Court under subsection (1), an order made under that subsection may—
>
> (a) where the breach of this Act comprises a use of any building, work or land—restrain that use,
>
> (b) where the breach of this Act comprises the erection of a building or the carrying out of a work—require the demolition or removal of that building or work, or
>
> (c) where the breach of this Act has the effect of altering the condition or state of any building, work or land—require the reinstatement, so far as is practicable, of that building, work or land to the condition or state the building, work or land was in immediately before the breach was committed.

135 What constitutes a "breach" of the EPAA is defined in s 9.44:

> **9.44 Definitions**
>
> In this Division—
>
> (a) a reference to a breach of this Act is a reference to—
>
> (i) a contravention of or failure to comply with this Act, and

(ii) a threatened or an apprehended contravention of or a threatened or apprehended failure to comply with this Act, and

(b) a reference to this Act includes a reference to the following—

(i) the regulations,

(ii) an environmental planning instrument,

(iii) a consent granted under this Act, including a condition subject to which a consent is granted,

(iv) a complying development certificate, including a condition subject to which a complying development certificate is granted,

(v) a development control order,

(vi) a planning agreement referred to in section 7.4.

136 In particular, relying on *F Hannan Pty Ltd v Electricity Commission of NSW (No 3)* (1985) 66 LGRA 306 (at 311), the Church submitted that s 9.46 of the EPAA was sufficiently broad in scope that the available remedies falling within its purview included the refund of moneys paid pursuant to an invalid condition in the consent.

137 I remain unpersuaded that s 9.46 of the EPAA has the plenary scope attributed to it by the Church. The power conferred by that provision upon the Court to craft a remedy upon a finding of breach is not as unlimited as the plain words of that section seemingly indicate. Were it otherwise, s 9.46(2) of the EPAA would be rendered otiose.

138 Having said this, there is authority in this Court that has held or assumed that there was power pursuant to the then s 124 of the EPAA to make the kind of order sought by the Church (*Pioneer Homes Pty Ltd v Liverpool City Council* (1992) 77 LGRA 237 at 242-244; *Denham Pty Ltd v Manly Council* (1995) 89 LGERA 108 at 111-112 and 115; *Levadetes v Hawkesbury Shire Council* (1988) 67 LGRA 190 at 196-197; and *Idameneo (No 9) Pty Ltd v Great Lakes Shire Council* (1990) 70 LGRA 27 at 32).

139 However, this authority can no longer be viewed as good law in light of the decision in *Frevcourt Pty Ltd v Wingecarribee Shire Council* [2005] NSWCA 107; (2005) 139 LGERA 140. Not dissimilar to the present case, at issue there was whether a developer was entitled to a refund in respect of s 94 (as it then was) contributions paid in circumstances where a council had failed to expend all of the monies for specified road works, which was contended to be a breach

of the EPAA. The Court of Appeal held that there was no breach of the EPAA but nonetheless went on to consider the issue of whether the unused contributions were required to be refunded to the developer (at [95]-[114]).

140 In *Frevcourt*, Beazley JA (as she then was) (Ipp and McColl JJA agreeing) stated as follows (at [103]-[106]):

> 103 The following matters tend to a construction that there is no power to refund contributions. First, I have already expressed the view that the power to amend a Contributions Plan involves the ability to use funds (initially required for a particular amenity or service) for the amenity or service substituted, changed or varied in the amended Plan. In such a case there would be no right to a refund.
>
> 104 A Council is also entitled to repeal a Contributions Plan. It might be expected that the clearest case where there might (and ought to) be an entitlement to a refund is where a Plan is repealed after s 94 contributions have been received and no new Contributions Plan is made. However, in that case, as there is no breach of the Act there is no entitlement to relief under s 124, which is the jurisdictional basis upon which the appellants base their claim for a refund. Further, although s 94 contributions are held for a public purpose, in the case of a repeal of a Contributions Plan there is no longer any public purpose for which the funds are held. The authorities are clear that the statutory trust is not the same as, nor do persons have the rights that flow from moneys being impressed with, a private trust. The same is true of moneys held for a public purpose. There is no correlative private right. A contributor in such a case therefore has no rights of or equivalent to those of a beneficiary. It may be that a contributor would have a general law right to recover the s 94 contribution on a restitutionary basis, for example as money had and received. Such a right, however, is different in nature and concept to the relief that an individual may seek under s 124 of the EP&A Act.
>
> 105 The accounting regulations are also relevant. If there is more than one contributor to the fund for the provision of a particular amenity or service then all s 94 contributions made in respect of that amenity or service, become part of a combined fund. It would seem unlikely that the legislature would have envisaged a right to a refund in circumstances where funds were to be mixed. Although a council is required to record the details of individual s 94 contributions and the particular public service or amenity to which it relates, its accounting obligation relates to the expenditure in respect of the amenity, not to an accounting in respect of the expenditure of the particular s 94 contribution.
>
> 106 If there was a right to a refund, the further question arises as to the basis upon which the right is to be determined. Is it to be based upon the principle that first payments in are to be taken as first payments out? Is it to be on a proportional basis? If so, is any account to be taken of accumulations of interest on the fund. In my opinion, the absence of any enabling provision dealing with these issues would tend to a conclusion that the legislature did not intend there to be an entitlement to a refund.

141 The Church argued that *Frevcourt* was distinguishable because the provisions of the EPAA identified by Beazley JA indicating that there was no power to

order a refund related to the difficulty of identifying the applicant's share in a pool of contributions which had been partly spent. Additionally, in *Frevcourt* there was another remedy which would more directly address the breach, namely, an order compelling the council to use the money for the purpose for which it was collected.

142 In the present case, there may be another remedy available to address the alleged breach, *viz*, a reconsideration of the amount of contributions payable by the Church having explicit regard to the reasonableness of any sum proposed. In this regard it may be noted that the ability of the Church to appeal the refusal of the modification application remained extant as at the date of the hearing. And on any view, the Church would not be entitled to a refund of all the monies paid by it. At the very least it would be liable for a contribution in the amount of $90,866.

143 More problematic, however, as the evidence of Richards demonstrates, not only have the contributions made by the Church been pooled (*Denham* at 115), they have been wholly spent. This was confirmed in cross-examination. While the Church advised the Council in writing that it was considering commencing Class 4 proceedings at the time the monies were paid, it did not in fact do so until a month later. No interim injunctive relief was sought by the Church to prevent the Council from either mixing or expending the contributions and no order was sought for the expedition of the proceedings.

144 As Beazley JA (as she then was) concluded in *Frevcourt* (at [113]):

> 113 If an individual contributor's funds have been expended, the council has fulfilled its statutory duty in respect of those funds. Once a contributor's funds have been expended, and a council's duty satisfied in respect of those specific finds, it is difficult to see any basis upon which that contributor would be entitled to a share of surplus funds contributed by other persons, who logically must have contributed moneys at a later point of time.

145 Although *obiter dicta*, the analysis in *Frevcourt* carries significant persuasive weight given its appellate status (*Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38; (2013) 195 LGERA 229 at [279]).

146 The reasoning in *Frevcourt* was recently endorsed by the Court of Appeal (again, albeit as *obiter dicta*) in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177; (2021) 248 LGERA 300 (at [110] per Preston J):

> 110 I find the primary judge did err in her third reason, for the reasons given by both the Council and Buyozo. In addition, I note that this Court held in *Frevcourt Pty Ltd v Wingecarribee Shire Council* (2005) 139 LGERA 140; [2005] NSWCA 107 at [103]-[106] that there is no power to refund contributions paid. Since that decision, the provisions of the EPA Act dealing with the payment of monetary contributions have been amended but in a way that reinforces the conclusion that there is no right to a refund of contributions paid under a condition of consent, see, for example, s 7.3(1) and (2) of the EPA Act. The Contributions Plan in this case also stated that "no refunds will be provided".

147 Contrary to the Church's submission, the conclusion arrived at in *Frevcourt* was not limited to the facts of that case (contributions not spent), and therefore, the authority is not distinguishable. Neither is the opinion expressed in *Buyozo*.

148 The Church relied upon *Newcastle City Council v Caverstock Group Pty Ltd* [2008] NSWCA 249; (2008) 163 LGERA 83, where Spigelman CJ, referring to *Frevcourt*, opined that (at [50]):

> 50 The situation that has arisen is somewhat unusual in that payment has been made pursuant to a condition before its content has been finally determined. It is clearly desirable, in the interests of avoiding further proceedings, that the Land and Environment Court should be able to determine whether or not a person who has made a payment pursuant to a condition of a consent which is challenged is entitled to a refund and, if so, how much. Although the legal principles involved in such proceedings are not within the usual jurisdiction of that Court, such an issue is so clearly related to the issues before the Court that they should be resolved together. It may be that the requisite jurisdiction is conferred by s 16(1A) of the *Land and Environment Court Act*, but that section was not relied upon in these proceedings. I note that in *Frevcourt* the issue of jurisdiction under s 16(1A) was not raised.

149 In that case, the respondent paid the contribution before seeking a reduction of the amount in Class 1 proceedings. Both parties proceeded, correctly in my view, on the basis that the Court did not have the power to order a refund in its Class 1 jurisdiction.

150 *Caverstock* was followed by Sheahan J in *Karimbla Properties v Council of the City of Sydney* [2017] NSWLEC 75; (2017) 222 LGERA 385 (at [107]-[124]). In *Karimbla* the applicant brought Class 3 proceedings against the rating of land under s 526 of the *Local Government Act 1993*. The disputed rates had already

been paid. His Honour held that the Court had the power to order a refund of the rates as part of its ancillary jurisdiction under s 16(1A) of the LEC Act.

151 Section 16(1A) of the LEC Act provides that:

> **16 Jurisdiction of the Court generally**
>
> …
>
> (1A) The Court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.

152 The Council argued that s 16(1A) could not apply in these Class 4 proceedings because there was no matter within jurisdiction to which the order for a refund sought by the Church was "ancillary to". That is, because there is no jurisdiction under s 9.46 of the EPAA to grant the relief, s 16(1A) of the LEC Act cannot be used to confer jurisdiction where none otherwise exists under the EPAA.

153 Whether the Court has ancillary jurisdiction pursuant to s 16(1A) to order a refund was not fully argued before me by either party (no doubt due to the somewhat perfunctory manner by which it was raised by the Church). Consequently, given the Court's conclusion concerning the validity of condition 16, it would be inappropriate to determine such a large question to finality in these proceedings, especially when there are reasons why, even if the condition was found to be invalid, the Church is not entitled to the relief that it seeks.

154 It suffices to make two observations about the issue. First, both *Caverstock* and *Karimbla* are distinguishable insofar as they involved merits appeals where the power of the Court under s 39(2) of the LEC Act is wider than that conferred by ss 9.45 and 9.46 of the EPAA. Care must therefore be taken in their potential application to Class 4 proceedings. Furthermore, *Karimbla* was overturned on appeal (*Bayside Council v Karimbla Properties (No 3) Pty Ltd* [2018] NSWCA 257; (2018) 236 LGERA 1). Second, having said this, there seems no reason in principle why s 16(1A) of the LEC Act could not be a source of power to order a refund of the contributions paid. Such an order would arguably be ancillary to a matter that falls within the Court's jurisdiction,

namely, the right to a remedy consequent upon a finding of invalidity of condition 16 (*Rossi* at [383] per Emmett JA).

155 But even if the Court does have jurisdiction under the EPAA or the LEC Act to order a refund, the Church is faced with the difficulty that it was the Planning Panel that is alleged to have breached the EPAA by granting the consent subject to the imposition of condition 16 and not the Council. The power of the Court under ss 9.45 and 9.46 of the EPAA is limited to the making of orders against the entity that breached the Act, in this case, the Planning Panel. There is no allegation of breach of the EPAA made by the Church against the Council in the amended summons. As the High Court of Australia plainly stated in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; (2004) 220 CLR 472 (at [47]-[48] (footnotes omitted)):

> 47 There is no doubt that s 123, as a provision conferring powers on a court, should be read giving the words of the provision full amplitude. As was said in the judgment of the Court in *Owners of ''Shin Kobe Maru'' v Empire Shipping Co Inc*:
>
> > ''It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.''
>
> Nonetheless, s 123 of the EPAA is not to be read as conferring power on the Land and Environment Court to make orders to remedy or restrain breaches of the Act against persons who are not themselves in breach of the Act or who, unless restrained, would be in breach of the Act.
>
> 48 So much follows from the description of the kind of order which may be made under s 123, namely, ''an order to remedy or restrain a breach of this Act''. An order directed to a person who is not actually in breach of the Act, and not threatening to act in breach, would neither remedy nor restrain any breach.

156 This latter finding is also a complete answer to the question of whether the Court has ancillary jurisdiction to order a refund under s 16(1A) of the LEC Act. There being no breach of the EPAA by the Council, the repayment of monies by it is not ancillary to any relevant matters.

157 The Church has also failed to confront the fact that the payment of contributions under s 7.11 of the EPAA is a tax for the purpose of ss 1A and 4 of the *Recovery of Imposts Act 1963* ("the Imposts Act") (*Baulkham Hills Shire*

Council v Wrights Road Pty Ltd [2007] NSWCA 152; (2007) 153 LGERA 219 at [21] and *Buyozo* at [108]-[110]).

158 Section 1A of the Imposts Act defines a "tax" to include "a fee, charge or other impost".

159 Section 2(1) of the Act states that:

> **2 Limitation on time for the bringing of proceedings to recover taxes**
>
> (1) No proceedings shall be brought to recover from the Crown or the Government or the State of New South Wales or any Minister of the Crown, or from any corporation, officer or person or out of any fund to whom or which it was paid, the amount or any part of the amount paid by way of tax or purported tax and recoverable on restitutionary grounds (including but not limited to mistake of law or fact):
>
> (a) in the case of a payment made before the commencement of this Act, after the expiration of the time within which such proceedings but for the enactment of this Act might have been brought or the expiration of twelve months after the date of the commencement of this Act, whichever period first expires, or
>
> (b) in the case of a payment made subsequent to the commencement of this Act, after the expiration of twelve months after the date of payment.

160 There was no dispute that proceedings for the recovery of the contributions paid under condition 16 were commenced within the 12 month limitation period in s 2(1)(b) of the Imposts Act.

161 However, s 4 of the Imposts Act further relevantly provides that:

> **4 Passing on of tax**
>
> (1) Proceedings referred to in section 2 or 3 (4) to recover an amount paid are however maintainable only to the extent that the person bringing the proceedings (*the claimant*) satisfies the court that the claimant has not charged to or recovered from, and will not charge to or recover from, any other person any amount in respect of the whole or any part of the amount paid. This applies whether or not any such amount has been itemised or otherwise separately identified in any invoice or other documentation.
>
> …
>
> (3) This section has effect despite anything in section 2 or 3, or in any other Act.

162 The onus was on the Church to satisfy the Court that it had not, and would not, pass on the contributions paid by it to third parties (such as parishioners)

(*Meriton Apartments Pty Limited v Council of the City of Sydney (No 3)* [2011] NSWLEC 65; (2011) 80 NSWLR 541 at [148]). No evidence was adduced by the Church during the two day hearing that would have permitted the Court to make the necessary finding under s 4(1) of the Imposts Act to permit a successful claim. If anything, given that the Church sought donations in November 2019 from parishioners to carry out the development, it may be more readily inferred that the contributions would be passed on.

163 A late application for leave to reopen was made seven days after the conclusion of the hearing to rely upon a further affidavit by Lincoln sworn on 11 May 2021. The application was made with almost no notice to the Council, no notice to the Court (the matter had been briefly relisted at the behest of the Court only for the purpose of finalising the list of tendered documents, a matter about which, the parties could not agree by the exchange of email communication) and with no explanation in an appropriate form as to why the evidence had not been adduced earlier. As Walker, counsel for the Church conceded, the issue of the application of s 4 of the Imposts Act had been expressly pleaded by the Council and the Council had given no indication that the matter had been abandoned by it.

164 The application was rejected because of its lateness (exacerbated by the fact that on the first day of the hearing the Court had offered a bifurcation of the proceedings to permit the Church to deal with the issue of relief at a subsequent date if required. This was rejected by the Church, who elected to run the whole case) and the prejudice that its admission would have caused to the Council (the Council would have required the production of further documents from the Church and possibly third parties in order to be in a position to properly cross-examine Lincoln, resulting in additional court time, additional written submissions and additional legal costs).

165 Accordingly, the application of the Imposts Act prevents any repayment of the contributions, even if the Court had jurisdiction to make such an order under the EPAA or the LEC Act.

There is No Legal Entitlement to a Refund

166 In addition to questions of power, the Church must establish a legal entitlement to a refund. To succeed in a recovery action where payment has been exacted as a consequence of a demand made without lawful justification, the party making the claim must show that the payment was made as a result of coercion (*Werrin v The Commonwealth* [1938] HCA 3; (1938) 59 CLR 150 at 157-159; *Mason v State of New South Wales* [1959] HCA 5; (1959) 102 CLR 108 at 117; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] HCA 63; (1969) 121 CLR 137 at 147; *Bayview Gardens Pty Ltd v Mulgrave Shire Council* (1987) 65 LGRA 122; and *Pioneer Homes* at 242-243).

167 In *Mason*, the applicant had paid a charge levied by a State for the carrying out of interstate freight. The charge was held to be unconstitutional and the applicant sought to recover the money. In order to do so, the applicant was required to demonstrate that he had been the subject of coercion by the State insofar as he risked fines and the seizure of his truck if he did not pay the charge. A protest at the time the payment was made was held not to be conclusive but was a factor that had to be assessed in order to determine if the payment was voluntary in the requisite sense (at 143-144 per Windeyer J).

168 In *Bell Bros*, Kitto J distinguished *Mason* on the grounds that the activity of interstate transport was unlawful with or without a licence and went on to say that (at 145):

> But where a person or body having power to grant or withhold a permission for another to pursue a course which he cannot lawfully pursue without that permission has used the power in order to exact a payment which he or it is not authorised to exact, the case is entirely different. The law holds that the involuntariness of the payment is established, because the parties were not on equal terms.

169 The developer in *Pioneer Homes* elected to pay contributions in order for linen plans to be released and then subsequently challenged the determination by the council to impose the contribution. Talbot J held that while the Court had the power to order a refund, the developer's claim should not be upheld because "economic pressure and contractual obligations dictated the actions of the company" (at 243). The developer had decided to pay the money notwithstanding its view that the contribution was not justified. No attempt was

made by the developer to seek interlocutory relief or an expedited hearing in Class 4. Therefore, “the decision to pay the money without a formal challenge or protest meant that in the relevant sense it was voluntary” (at 243).

170 The Church submitted that in the present proceedings because the Planning Panel had imposed condition 16 as a condition of consent to carry out the development, the benefit of the consent would be withheld unless the contribution was paid. The parties were therefore on unequal terms and this was sufficient to establish that the payment was involuntary or coerced, consistent with the authority in *Bell Bros*. To the extent that *Pioneer Homes* mandated a contrary conclusion, it was plainly wrong.

171 Without deciding the correctness or otherwise of *Pioneer Homes*, in the present case, while the payment was ultimately made under protest (see the Church’s letter dated 4 September 2020), no threat or demand was, contrary to the submission made by the Church, made by the Planning Panel or the Council to extract the payment from the Church. Instead, the Church elected not to exercise its right to bring Class 1 proceedings and waited until 1 October 2020 to commence a Class 4 judicial review challenge.

172 I accept the submission of the Council that despite the Church’s protest, as the evidence of Lincoln establishes, the Church accepted the proposed condition to enable the consent to be granted by the Council and paid the monies in order to obtain a construction certificate to avoid any further delays to the development because of a perceived need for church facilities once Covid-19 restrictions were lifted. This imperative was not the product of coercion, rather it was driven by theological and commercial considerations. To the extent that the Church contended that it was incapable of making a commercial decision to pay the funds because it “is not a commercial entity”, the submission was fanciful. If the Church was not, at least in part, conducting itself as a commercial entity it would not have brought these proceedings.

173 I therefore agree with the Council that, viewed objectively, the payment was voluntary, or at the very least, not relevantly coerced.

174 The voluntary nature of the payment also precludes any restitutionary claim put forward by the Church. In the present case, the money was not paid by the

Church under a mistaken belief that it was under a legal obligation to pay the contributions (*David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 at 378). The Church paid the money in order to carry out the development; there was no mistake on its part, nor was the payment involuntary (*Buyozo* at [105]). Furthermore, as the evidence above discloses, the Council changed its position in reliance upon the payment by spending the money.

Discretion

175 Even assuming that the condition is invalid and that there is a legal right to seek a refund of the amount paid by the Church, there are compelling discretionary factors that would militate against such an order being made.

Delay and Acquiescence

176 In exercising its jurisdiction under the EPAA or the LEC Act to grant the relief sought, the Court retains a discretion not to order a refund. There are several reasons why the Court would decline to order the relief sought in the amended summons.

177 First, as explained above, the delay by the Church in commencing proceedings resulted in the funds having been mixed and spent. The explanation by the Church for the delay is, with respect, insufficient. Advice could and should have been sought earlier than it was; legal proceedings could and should have commenced earlier than they were. To order the Council to repay the monies now would cause it considerable prejudice. It should be recalled that it is the Planning Panel, and not the Council, that on the Church's case has breached the EPAA.

178 Second, I agree with the Council that, by its conduct, the Church acquiesced in the imposition of condition 16. The Church, through its town planning consultant, unequivocally accepted the proposed condition. This position continued from 4 April 2018 to at least July 2019 (when the application for the modification of condition 16 was lodged) if not 1 October 2020 (when these proceedings were commenced).

179 From at least 22 July 2020, when initial legal advice was obtained from counsel, the Church was aware of the potential to challenge the validity of

condition 16. To reiterate, it could have commenced proceedings and sought expedition in order to obtain a construction certificate by September 2020. However, neither that opportunity nor any appeal of the deemed or actual refusal by the Council of the Church's modification application were pursued.

180 Both delay and acquiescence are matters relevant to the exercise of the Court's discretion that can result in the refusal to grant relief (*Bankstown City Council v Bennett* [2012] NSWLEC 38; (2012) 187 LGERA 446 at [109]).

181 The Church submitted that the response by Kerr on 4 April 2018 should be construed as meaning no more than that the Church did not seek an opportunity to make further representations on the issue of the quantum of contributions before the determination by the Planning Panel. The response was not intended to convey that the Church accepted that the recommendation referred to therein was reasonable. This was expressly stated in the final paragraph of the email.

182 Whether or not the Church was of the opinion that the sum proposed was reasonable is beside the point. The fact remains that it was accepted and paid by the Church in any event. The email dated 4 April 2018 must be read in the context of the email exchange between the Church and its planning adviser dated 3 April 2018, which was responsive to an email from the Council to Kerr dated 29 March 2018. That email exchange stated that the Contributions Committee considered that a "reduced" contribution of $576,103 should be "paid on the DA" and be reflected in the conditions forwarded to the Planning Panel. It specifically asked the Church (not demanded or threatened as contended by the Church) "can you please advise if you are accepting of this prior to the Panel report being finalised?". The internal Church email communications on 3 April 2018 instructed a response to the effect that, while disappointed, the Church would accept a condition levying this amount, noting that it would seek to reduce it later. This position was unequivocal. There was nothing preventing the Church from refusing to pay the amount and commencing proceedings against the Council. On the contrary, the Church consciously and voluntarily elected not to do so and communicated this decision in plain and unambiguous terms to the Council without any reservation

of its rights (unlike the internal 3 April 2018 emails). It is bound by this choice, especially in circumstances where the Council acted pursuant to this acquiescence and spent the funds. There is nothing in Lincoln's affidavit dated 3 February 2021 that derogates from this expression of the Church's state of mind as at 4 April 2018.

183 The conduct of the Church in this regard would be, in my opinion, sufficient for the Court to decline to exercise its discretion to order a refund of the contributions paid.

184 It is therefore not necessary for the Court to consider the separate issue of waiver, which, it should be noted, was not pleaded by the Council in its response to the amended summons.

Conclusion and Orders

185 In summary, the Court has determined that the imposition by the Planning Panel of condition 16 in the consent was lawful and that the condition is valid. However, if it is wrong in this conclusion, it remains the case that there is no basis, either as a matter of power or discretion, for the Court to order the monies paid by the Church to the Council to be refunded.

186 The orders of the Court are therefore as follows:

(1) the amended summons is dismissed;

(2) the applicant is to pay the costs of the respondents; and

(3) the exhibits are to be returned.

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