Land and Environment Court

New South Wales

Case Name:	Bell Quarry Rehabilitation Project Pty Ltd v Lithgow City Council
Medium Neutral Citation:	[2022] NSWLEC 123
Hearing Date(s):	5 October 2022
Date of Orders:	10 October 2022
Decision Date:	10 October 2022
Jurisdiction:	Class 1
Before:	Moore J
Decision:	See orders at [36]
Catchwords:	SEPARATE QUESTION - Class 1 development appeal - applicant for development consent seeks to have separate questions set down for determination - appeal concerning substantial proposed landfill development to rehabilitate former quarry site - haul road for trucks to the proposed development site from a main highway is along a road not constructed entirely within its road reserve - deviations from the road reserve on two private property and National Park - no owners consent to use the road where it deviates from the road reserve onto private property - proposed questions involve mixed matters of fact and law - proposed questions unlikely to result in finalisation of Class 1 proceedings - proposed questions unlikely to significantly narrow the issues in the Class 1 proceedings - risk that determination of separate questions would cause significant delay to hearing and determination of all issues in dispute in the Class 1 appeal - application for separate question hearing refused - costs reserved
Legislation Cited:	Blue Mountains Local Environmental Plan 2015, cl 6.23(1)(e)

	Civil Procedure Act 2005, s 56 Land and Environment Court Act 1979, s 40 Lithgow Local Environmental Plan 2014, cl 7.10(e) Roads Act 1993 Uniform Civil Procedure Rules 2005, r 28.2
Cases Cited:	Fritton v Central Coast Council [2022] NSWLEC 1215 Hallinan and Ors v Transport for NSW [2022] NSWLEC 119
Category:	Procedural rulings
Parties:	Bell Quarry Rehabilitation project Pty Ltd (Applicant) Lithgow City Council (First Respondent) Blue Mountains City Council (Second Respondent)
Representation:	Counsel: Mr T Robertson SC (Applicant on the Motion) Mr A Pickles SC (First and Second Respondents on the Motion) Solicitors: HWL Ebsworth Lawyers (Applicant) Pikes & Verekers (First Respondent) McPhee Kelshaw (Second Respondent)
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Introduction

1 Bell Quarry Rehabilitation project Pty Ltd (the Company) has commenced a Class 1 appeal against the refusal by the Western Joint Regional Planning Panel of its development application for consent to conduct a rehabilitation process of two former quarry pits in Lithgow City Council's local government area at Dargan near the Newnes Plateau.

2 The Statement of Facts and Contentions filed by Blue Mountains City Council describes the Company's proposed development in the following terms:

> A1.1 Development application DA294/19 (as amended), submitted to the First Respondent, Lithgow City Council (**LCC**) seeks to utilise the former Bell Quarry at Sandham Road, Dargan (**Quarry**), mainly located within Lot 23 DP 751631, to accommodate the importation of 1.0 million cubic metres (approximately 1.8 million tonnes) of fill over a 15 year and 9 month period and to rehabilitate the site to a final landform that reflects the original topography prior to quarrying.

3 Access to the former quarry site from Bells Line of Road is proposed to be along a thoroughfare known as Sandham Road. Sandham Road runs, from its intersection with Bells Line of Road, through the Blue Mountains City Council's local government area before entering the Lithgow City Council local government area as it proceeds in a generally north-westerly direction toward the former quarry site.

4 Sandham Road has an identified public road reserve. Unfortunately, Sandham Road is not continuously constructed within that road reserve. It is unnecessary to detail the extent to which Sandham Road deviates onto another property. It is sufficient to note that those deviations are onto several allotments in private ownership and into a number of allotments dedicated as forming part of the Blue Mountains National Park.

5 It appears that, for the portion of Sandham Road that is within Lithgow City Council's local government area, that council is the relevant authority under the *Roads Act 1993* (the Roads Act). However, in the Blue Mountains City Council's local government area, it appears that much of the road (being that portion which is within the road reserve) is a Crown road and Blue Mountains City Council is not the road authority for it under the Roads Act. Although it has been proposed that responsibility for the Crown road be transferred to Blue Mountains City Council, that Council has not (yet, at least) accepted that offer.

6 Sandham Road is proposed to be the main haul road from Bells Line of Road to the former quarry for the purposes of the rehabilitation project. Although described as a rehabilitation project (and the eventual outcome, if approved and operational, will be to effect the rehabilitation of the two pits located on the site of the former quarry), in effect, those pits are to act as landfills for waste disposal during the life of the rehabilitation project.

7 Finally, in noting background matters, one of the private landholders (onto whose land Sandham Road deviates from its road reserve) is an objector to the Company's proposed development and has declined to give owner's consent to use the element of Sandham Road that deviates onto his property. Consent for that purpose is necessary if Sandham Road, on its present alignment, is to be utilised as the haul road for the Company's proposed development.

The relevant local environmental plan provisions

The Lithgow Local Environmental Plan 2014

8 For the purposes of this separate questions application, the questions proposed by the Company relate to the interpretation of a provision of the Lithgow Local Environmental Plan 2014.

9 Clause 7.10 Essential Services, of the Lithgow Local Environmental Plan 2014, sets out five factual jurisdictional prerequisites that must be satisfied before consent to the Company's proposed development could be given. One of those, cl 7.10(e), arises for consideration because of the wandering nature of Sandham Road, with respect to its being constructed within or partially without its road reserve. The relevant terms of cl 7.10 are reproduced below:

7.10 Essential services

Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required—

(a) …,

(b) …,

(c) …,

(d) …,

(e) suitable vehicular access.

The Blue Mountains Local Environmental Plan 2015

10 The Blue Mountains Local Environmental Plan 2015 contains a provision, in cl 6.23(1)(e), to the same effect as that reproduced above in cl 7.10(e) of the Lithgow Local Environmental Plan 2014. It is unnecessary to set out this provision.

The proposed separate questions

11 The proposed separate questions were set out in an Amended Notice of Motion for which leave was granted by Pepper J on 29 September 2022. As a consequence, the proposed questions are now in the following terms:

> (a) On a proper construction of clause 7.10(e) of the Lithgow LEP 2014, and in the circumstances of the case, does the availability of suitable vehicular access refer only to access across the boundary of the development site to a public road, or does it extend to access along a public road that is likely to be traversed by vehicles to and from the site.
>
> (b) If the answer to question (a) is that suitable vehicular access within the meaning of clause 7.10(e) does extend to access along a public road that is likely to be traversed by vehicles to and from the site, is it reasonably open on a proper construction of that clause to the consent authority to be satisfied that suitable vehicular access will not be available to the site merely because the haul road traverses a public road that has been constructed in part outside its road reserve.

The source of power

12 The power to order a question to be determined separately is given by r 28.2 of the Uniform Civil Procedure Rules 2005, which provides that:

> 28.2 Order for decision

> The court may make orders for the decision of any question separately from any other question, whether before, at or after any trial or further trial in the proceedings.

Representation

13 The Company was represented by Mr T Robertson SC and, for the purposes of this separate question motion, both councils were represented by Mr A Pickles SC. Both counsel provided helpful written submissions in explaining the position of the parties represented by them.

The hearing

14 The hearing of the Amended Notice of Motion seeking that the questions be set down for separate hearing was conducted efficiently, taking half a day.

Submissions for the Company

15 The written submissions for the Company conveniently summarised the reasons for which the separate questions' hearing was sought:

> 4. The separate determination of these questions is required by the just, quick and cheap imperative as it will be a short argument concerning statutory construction and a decision on two questions of law, the second being decided against a background of an agreed fact that Sandham Road deviates from the road reserve, which if resolved in favour of the Applicant will resolve a question as to whether the Court has jurisdiction to grant consent in this appeal, and if decided against the Applicant will give the Applicant fair notice that it needs to make statutory or curial applications to address the road deviation prior to this matter being heard.
>
> 5. If the concept of "*suitable vehicular access*" extends to deviation of Sandham Road from the road reserve, then clause 7.10(e) raises a jurisdictional bar unless the situation is legally and (apparently) physically remedied prior to the grant of consent: *Fritton v Central Coast Council* [2022] NSWLEC 1215.

16 Mr Robertson expanded on this in his oral submissions.

17 In essence, the position advanced on behalf the Company was that a fully contested Class 1 hearing of all issues in dispute concerning the Company's proposed development would involve contests in a significant variety of expert disciplines and would, as I understood Mr Robertson's submissions, be expected to take a minimum of 10 of the hearing days.

18 Determination of the separate questions, if the results were unfavourable to the Company, would permit the Company to consider whether or not it wished to continue the Class 1 proceedings, or refine its approach to them, in a fashion

which could include the potential for seeking approval of the proposed development subject to a “Grampian condition”. Such a condition would require the Company to seek to carry out unspecified works to resolve the deviations of Sandham Road from its road reserve and/or commence proceedings pursuant to s 40 of the *Land and Environment Court Act 1979* to seek imposition of one or more easements over those elements of Sandham Road that were not within the road reserve. Such a condition can be imposed where the owners of the land over which those deviations were constructed were not prepared to give owner’s consent to the use of the deviations of Sandham Road for the purposes of that road being the haul road for the Company's proposed development. Imposed easements would resolve this difficulty.

19 Determination of the separate questions, he proposed, would enable considerable potential saving of time and money by resolution of the proposed separate questions, leading to the Company being able to make the choice if the questions were answered adversely to the Company.

Submissions for the Councils

20 Determining the two questions as separate proceedings was opposed by Mr Pickles on behalf of both Councils (this joint opposition being stated in his written submissions and subsequently confirmed). This opposition was founded on the proposition that determining the two questions, even if determined favourably to the Company, would not have any, or any sufficient, utility in resolving any of the issues that would arise in a contested Class 1 hearing on the merits of the Company's proposed development.

21 The matters concerning Sandham Road, he proposed, involved mixed matters of fact and law and that resolution of the questions in favour of the Company would not satisfy any of the potential outcomes against which applications for the determination of separate questions were conventionally assessed.

22 He proposed that it would be more appropriate, because of the linkage of the Sandham Road issues being mixed questions of fact and law, that potential alternative appropriate courses for the Company were to seek to split the merit hearing into a two-phase one (with the first phase being determination of all

issues arising concerning the use of Sandham Road as the haul road for the proposed development with a second, subsequent merit hearing phase addressing all remaining issues in dispute) and/or seeking that the hearing of the Class 1 appeal be heard and determined by a judge rather than by one or more commissioners.

Consideration

23 Robson J, recently, helpfully summarised the matters appropriate to be considered in determining whether or not setting down a question for separate judicial determination might be appropriate. In *Hallinan and Ors v Transport for NSW* [2022] NSWLEC 119, at [31], his Honour said (citations omitted):

> (1) It is ordinarily appropriate that all issues in proceedings should be disposed of at one time;
>
> (2) The exercise of the discretion to make an order for the determination of a separate question should be approached with an appropriate degree of care or caution, as "[i]t sometimes happens that they may turn out to be productive of the disadvantages of delay, extra expense, appeals and uncertainty of outcome which they are intended to avoid";
>
> (3) Since the passage of the Civil Procedure Act 2005 (NSW) ('CP Act), it has also been observed that "the Court should take a more interventionist role in identifying and separating important issues which can resolve significant parts of the litigation expeditiously";
>
> (4) An order is likely to be appropriate where it can clearly be seen that it will facilitate the just, quick and cheap resolution of the proceedings or the central issues in the proceedings, so as to give effect to s 56 of the CP Act;
>
> (5) It is for the party seeking the order to show to the Court that a separate decision of a question is appropriate;
>
> (6) The factors that have previously been found to support the making of an order for the resolution of a separate question include where such an order may contribute to first, the prompt disposal of crucial issues in the litigation (or the whole action); second, the saving of time and cost by narrowing the issues in dispute; and third, the potential settlement of the litigation.
>
> (7) By contrast, an order for determination of a separate question is unlikely to be appropriate in circumstances where first, there are intertwined issues of fact or law, and the separate question is likely to result in fragmentation of the proceedings; second, there is likely to be significant overlap between the evidence adduced on the separate question and any residual questions; and third, the determination of a separate question is likely to involve issues as to the credibility of witnesses, whose evidence is likely to be material to the remaining issues in dispute.
>
> (8) One instance where it may be appropriate to determine a separate question even if it will not resolve all the issues in dispute is where there is a strong prospect that the parties will agree upon the result when the core of the

> dispute has been decided or if the decision will obviate unnecessary and expensive hearings of other questions; and
>
> (9) While the decision to order separate questions is ultimately one for the Court, the attitudes of the parties are relevant to the exercise of the discretion to make an order.

24 The Company's proposed questions do not fit precisely within any of the categories that his Honour identified as I have set out above. That which, to some extent, arises (as submitted by Mr Robertson) is that, if the questions were decided adversely to the Company, the Company might (only might) contemplate whether it wished to pursue to finality its Class 1 appeal, with there being no certainty that such a result would occur.

25 I am satisfied that, given the nature of the Company's proposed development and the scope of what would be involved in the operation of the landfill for the lengthy period of time before rehabilitation of the former quarry pits was achieved, the likelihood of the Company not seeking to resolve the issues of Sandham Road in some fashion that would permit the Company's proposed development to go ahead (if all other considerations were resolved) is fanciful. I am not satisfied there is any realistic prospect that the answering of the questions would lead to resolution of the proceedings. This, in itself, is a sufficient basis to decline to set these questions down for separate determination.

26 Quite separately, that the matters requiring to be addressed, if the questions were so set down, would require consideration of matters of both fact and law (although the questions have been crafted in a fashion seeking to avoid that being the position). Setting matters of such a combined legal and factual nature down as a separate question is contrary to (7) of the principles earlier set out as summarised by Robson J. This is also a separate basis upon which it is appropriate to reject the proposition of separate determination of the proposed questions.

27 Finally, I am not satisfied that setting the questions down for separate determination would be consistent with the overriding objection for civil litigation set by s 56 of the *Civil Procedure Act 2005*, that being the conduct of such litigation so that the just, quick and cheap resolution of all of the issues in dispute between the parties can be achieved.

28 These proceedings arise from a development application lodged with Lithgow City Council on 27 November 2018.

29 Although I accept that setting the questions down for separate determination (if it was otherwise appropriate to do so - which it is not) might only take a single day, present listings pressures in the Court's diary make it unlikely that such separate questions could be heard and a decision given with respect to them prior to the end of the current Law Term on 16 December 2022. If the Chief Judge was minded, now, to accede to any request that the Class 1 appeal be heard by a judge, on the present state of listings before judges the likelihood of a 10-day hearing being listed before the third quarter of 2023 is remote.

30 If such a listing was to await determination of the separate questions, there is a significant potential that, was such a listing to be sought early in 2023, such a hearing might not occur until 2024. Such a position is quite clearly highly undesirable (in making these timing observations, I am not to be taken as suggesting that it would be appropriate for any merit hearing of the Company's proposed development should be allocated to a judge, that is entirely a matter for the Chief Judge to consider if such a proposal was advanced to him).

31 On the other hand, it is not unusual for commissioners to consider and determine mixed questions of fact and law as part of the ordinary course of their Class 1 development merit proceedings.

32 Indeed, in this regard it is to be noted that the case cited in paragraph 5 of Mr Robertson's written submissions, earlier set out (at [15]), as providing support for the Company's position on the need for determination of its proposed separate questions, is a Class 1 appeal heard and determined by Commissioner Dickson (*Fritton v Central Coast Council* [2022] NSWLEC 1215). The relevant clause in the local environmental plan considered by the Commissioner in those proceedings was to identical effect to that which appears in the relevant clauses of the Lithgow Local Environmental Plan and the Blue Mountains Local Environmental Plan earlier set out.

33 The difference between the Company's proposed development and that which requires consideration in these proceedings is a matter of economic and

operational scale and lifespan, these not being matters giving rise to any imperative for separate determination of the questions pressed on behalf of the Company - given that the result of such determination, however resolved, will not necessarily provide any of the beneficial effects which would ordinarily be expected to arise from such separate determination.

34 The appropriate outcome for the above reasons, therefore, is that the Company's application to have its proposed questions set down for separate determination must be refused.

Costs

35 It is appropriate, these being Class 1 proceedings, that costs be reserved.

Orders

36 The orders, the Court, therefore, are:

(1) The application for a hearing of separate questions is refused;

(2) The Notice of Motion is dismissed;

(3) Costs of the Notice of Motion are reserved;

(4) The matter is set down for further directions before the Registrar on 12 October 2022; and

(5) The exhibits on the motion are returned.

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