



Land and Environment Court
New South Wales

Case Name: NCV Enterprises Pty Limited v Tweed Shire Council

Medium Neutral Citation: [2024] NSWLEC 143

Hearing Date(s): 26 July 2024

Date of Orders: 26 July 2024

Decision Date: 26 July 2024

Jurisdiction: Class 1

Before: Robson J

Decision: See orders at [46]

Catchwords: COSTS — Discontinuance — Refusal to discontinue — Where applicant on a notice of motion acted reasonably and incurred costs due to respondent on the motion acting unreasonably — Application for costs of applicant on the motion to be paid on an indemnity basis — Where Class 1 proceedings by respondent on the motion are struck out and dismissed — Orders made that respondent on the motion pay costs of applicant on the motion not on an indemnity basis

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 56, 98
Environmental Planning and Assessment Act 1979 (NSW), s 4.22
Land and Environment Court Rules 2007 (NSW), r 3.7
State Environmental Planning Policy (Primary Production) 2021 (NSW), Sch 5
Tweed Local Environmental Plan 2014
Uniform Civil Procedure Rules 2005 (NSW), rr 13.4, 28.4

Cases Cited: NCV Enterprises Pty Ltd v Tweed Shire Council [2024] NSWLEC 14

Category: Procedural rulings

Parties: NCV Enterprises Pty Limited (Respondent on the motion)
Tweed Shire Council (Applicant on the motion)

Representation: Counsel:
No appearance (Respondent on the motion)
T F Robertson SC (Applicant on the motion)

Solicitors:
No appearance (Respondent on the motion)
Sparke Helmore Lawyers (Applicant on the motion)

File Number(s): 2022/00242095

Publication Restriction: Nil

JUDGMENT - EX TEMPORE

- 1 HIS HONOUR: Before the Court is a notice of motion filed 18 June 2024 by Tweed Shire Council ('Council') seeking relief that Class 1 proceedings commenced by NCV Enterprises Pty Limited ('NCV') be dismissed. As will be seen, as a result of recent events, the remaining issue before the Court is an application by Council that NCV, the respondent on the motion, pay Council's costs (on an indemnity basis) of the motion.
- 2 At the hearing of the present motion before me, there was no appearance on behalf of NCV and Mr T F Robertson SC appeared for Council.
- 3 The background facts, which may be briefly summarised, provide context for consideration of Council's submissions and my findings later in these reasons.
- 4 NCV lodged a development application for a staged concept development on 27 August 2020 pursuant to s 4.22(1) of the *Environmental Planning and Assessment Act 1979* (NSW). Council refused the development application on 26 August 2021.
- 5 NCV commenced these Class 1 proceedings on 16 August 2022 appealing against Council's refusal.
- 6 On 22 March 2023, the Court made an order pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) ('UCPR') that five somewhat overlapping

questions (generally relating to whether NCV's proposed development was prohibited) be decided separately and before any other matter.

- 7 The hearing of the preliminary questions pursuant to r 28.2 of the UCPR were heard over two days before Pepper J. At that time, each of the parties was represented by senior counsel.
- 8 Pepper J delivered judgment on 23 February 2024: *NCV Enterprises Pty Ltd v Tweed Shire Council* [2024] NSWLEC 14. In summary, while dealing with each of the five questions discretely, her Honour found (at [4]), that the development the subject of the development application (and the Class 1 appeal) is prohibited under Sch 5 of the State Environmental Planning Policy (Primary Production) 2021 (NSW). There has been no appeal from that decision. Her Honour made orders that the Class 1 proceedings be listed before the Registrar on 8 March 2024 for further directions.
- 9 On 29 February 2024, Council made an offer to NCV that, as a result of the decision of Pepper J, Council would consent to a discontinuance of the Class 1 appeal on the basis that each party pay its own costs. That offer was expressed to expire at 4pm on 7 March 2024.
- 10 On 7 March 2024, Council extended its offer until 12pm on 21 March 2024. In the meantime, on 8 March 2024, the Class 1 appeal was adjourned to a directions hearing on 22 March 2024. The adjournment was sought by NCV on the basis that it would file either a notice of discontinuance or a notice of appeal from the decision of Pepper J.
- 11 On 21 March 2024, NCV filed in the Court of Appeal a notice of intention to seek leave to appeal. The notice stated that NCV intended to file a summons seeking leave to appeal within three months, that is, on or before 23 May 2024.
- 12 On 22 March 2024, this Court made orders that the Class 1 appeal be stood over until 21 June 2024 to allow NCV to pursue its application in the Court of Appeal.
- 13 On 24 May 2024, and again on 4 June 2024, Council's solicitors requested an update from NCV's solicitors in relation to the conduct of any appeal in the Court of Appeal.

- 14 On 12 June 2024, Council's solicitors advised NCV's solicitors that Council would file a notice of motion for summary dismissal of the Class 1 proceedings and seek an order for costs of the motion if a notice of discontinuance in the Class 1 appeal was not filed by NCV.
- 15 On 18 June 2024, Council filed the notice of motion for dismissal which is the matter otherwise set down for hearing before me.
- 16 On 17 July 2024, Council again wrote to NCV, inviting it to file a notice of discontinuance of the Class 1 appeal and making an offer that Council would not seek any order for its costs of the motion filed 18 June 2024 if the notice of discontinuance was filed by NCV by 4pm on Friday, 19 July 2024.
- 17 The matter was listed before me (as List Judge) on 12 July 2024. At that time, NCV's solicitors, Messrs Storey and Gough, had filed a notice of intention of ceasing to act, and Mark McMurtrie, a director of NCV, sought leave to appear as agent for NCV. Mr McMurtrie stated that he was a director of NCV and had earlier been granted leave to appear as agent for NCV by the Registrar of the Court at an earlier directions hearing. At that time, senior counsel for Council indicated that Council opposed Mr McMurtrie being granted leave without a formal resolution of NCV to that effect. In any event, at that time – that is, 12 July 2024, further directions were made for the present hearing of Council's on 26 July 2024. Mr McMurtrie indicated to the Court at that time that he was not "fully aware" of the matters, however, informed the Court that NCV was considering an application to the High Court of Australia in relation to a "constitutional" matter.
- 18 In accordance with the directions made, Council filed and served its evidence and prepared a court book for the notice of motion hearing before me on 26 July 2024.
- 19 Council reads two affidavits of Dianna Elizabeth Grant sworn 18 June 2024 and 24 July 2024, and an affidavit of Stephanie Miller affirmed 11 July 2024. As will be seen, while a number of the matters in Ms Miller's first affidavit are no longer relevant to the matters before the Court, it does set out a detailed history of the Class 1 proceedings and other matters, and annexes correspondence between Council's solicitors and NCV's solicitors. Ms Grant's

more recent affidavit contains the more recent correspondence with both NCV and Mr McMurtrie.

20 I do not intend to summarise the detailed background set out in the affidavits except to note that I have taken those into account in my above summary of the background matters.

21 At 2.15pm on Thursday 25 July 2024 – that is, yesterday, Mr McMurtrie forwarded to Council's solicitors and to the Court, an email with an attachment. For clarity, I set out the content of the email in its original form as follows:

“To all parties:

(Details here)

Notice of constitutional motion;

Please be advised that as of 2.30pm today NCVE enterprises Pty Ltd has taken the formal decision to withdraw from the Appeal proceedings in the Land and Environment Court of NSW.

We give Notice that documents have been lodged with the High Court in respect of an Application for Special Leave to Appeal the matter on constitutional and other grounds.

As soon as the documents are formally accepted and filed in the High Court registry a copy of the relevant HC documentation will be forwarded to the parties.

Despite having settled our accounts with previous legal counsel, the Applicant is still not in receipt of our file from our previous legal counsel and therefore remain entirely unable to prepare a competent set of documents to complete the appeal process in the LEC.

I attach a copy of the authority to act on behalf of the Applicant, dated 19th July 2024.

This notice has been made out of courtesy to all concerned and ‘so as to save as to costs.’

Mark McMurtrie

Director

NCVE Pty Ltd”

22 The email attached a minute of an extraordinary director's meeting signed by both Mr McMurtrie and Philip Dickson as directors of the company. That minute and the email of 25 July 2024 became Exhibit B in the notice of motion hearing before me today.

- 23 I note that NCV has not filed any further application seeking leave to appeal and has not filed any formal notice of discontinuance in the Class 1 appeal proceedings.
- 24 In the above circumstances, and being satisfied that NCV is well aware of the hearing before me, I consider that, in light of the recent correspondence, the remaining matter is Council's application that its costs of the motion be paid (on an indemnity basis).
- 25 I note, first, that there has been no notice of discontinuance filed by NCV; second, that in relation to the reference in the abovementioned email to "Notice of constitutional motion", there is no further information apart from the email received yesterday; third, that there appears to be no grounds that would otherwise affect Council's application for dismissal of these proceedings for its costs; and fourth, it is clear that NCV has now taken the "formal decision" to "withdraw from" these appeal proceedings.
- 26 Council makes submissions which I briefly summarise in relation to each of the dismissal claim, its claim for costs, and its claim for costs on an indemnity basis.
- 27 In relation to the dismissal claim, Council submits as follows:
- (1) Council's application is made under r 28.4(2)(a) of the UCPR and alternatively, r 13.4 for dismissal of the proceedings.
 - (2) Pepper J's decision that the development the subject of the development application (and now this Class 1 appeal) is prohibited development in the rural zone under the *Tweed Local Environmental Plan 2014 in NCV Enterprises Pty Ltd v Tweed Shire Council* [2024] NSWLEC 14 at [4]-[5], is determinative of both the Class 1 appeal and this costs application.
 - (3) Pepper J's decision has not been appealed (nor has leave to appeal been sought), and the period for any such appeal has expired.
- 28 In relation to the costs of the motion, Council seeks its costs and indicates that Council has acted reasonably by only filing the motion after the expiry of the appeal period, and points to the various correspondence to NCV's solicitors in relation to Council's offer to discontinue the proceedings to avoid incurring costs of the motion. Accepting that r 3.7 of the Land and Environment Court Rules 2007 (NSW) ('Court Rules') applies, Council submits that it is clear that

NCV has not acted reasonably while Council has continued to act reasonably, and that NCV's failure to accept the invitation to discontinue and thereafter attempting to invoke the jurisdiction of the High Court of Australia is decisive of this fact and that further costs have been incurred as a result of NCV acting unreasonably.

29 Council further submits that in its letter of offer of 17 July 2024, Council invited NCV to discontinue the proceedings and warned that indemnity costs would otherwise be sought. In doing so, Council contends it offered a (valuable) compromise (that it would not seek costs of the notice of motion seeking dismissal) if NCV filed a notice of discontinuance of the primary proceedings by 19 July 2024. In those circumstances, on and from 19 July 2024, Council maintains that it should be entitled to its costs on an indemnity basis.

30 I consider that the principles in relation to strikeout are relatively well-known and indeed may be briefly stated. I note that this may be otiose on the basis that NCV's email of 25 July 2024 indicates that NCV has, at least, clearly taken the formal decision to "withdraw".

31 Council seeks relief pursuant to rr 13.4 and/or 28.4 of the UCPR.

32 Rule 13.4 relevantly provides:

(1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings—

- (a) the proceedings are frivolous or vexatious, or
- (b) no reasonable cause of action is disclosed, or
- (c) the proceedings are an abuse of the process of the court,

the court may order that the proceedings be dismissed generally or in relation to that claim.

...

33 Rule 28.4 provides:

(1) This rule applies if the decision of a question under this Division—

- (a) substantially disposes of the proceedings or of the whole or any part of any claim for relief in the proceedings, or

...

(2) In the circumstances referred to in subrule (1), the court may, as the nature of the case requires—

(a) dismiss the proceedings or the whole or any part of any claim for relief in the proceedings, or

...

34 Prudent not to improperly deprive a party of the opportunity to plead its case in the ordinary way, the Court exercises its discretion to deal with matters summarily or to strike out a claim sparingly. However, the principles governing the circumstances where it may be appropriate to take either course of action have been considered to be interchangeable and may be briefly summarised as follows:

(1) The power to dismiss claims or strike out pleadings at an interlocutory stage is only appropriately exercised where it is plain and obvious that there is no issue to be tried.

(2) Caution should be exercised in dismissing summarily a case which ultimately turns on a determination of factual questions.

35 In applying these basic principles, I remain mindful that rr 13.4 and 28.4 of the UCPR must be interpreted and applied in light of the overarching purpose set out in s 56(1) of the *Civil Procedure Act 2005* (NSW) ('CPA') and to facilitate the just, quick and cheap determination of the real issues in the proceedings.

36 In the circumstances, I consider that, despite the email from Mr McMurtrie dated 25 July 2024 on behalf of NCV, it is appropriate to make an order striking out the proceedings for the reasons noted in my above summary of Council's submissions. At the very least, no reasonable cause of action remains. The question then relates to costs.

37 The Court's power to order costs is derived from s 98(1) of the CPA and subject to the Court Rules. The presumptive rule contained within r 3.7(2) of the Court Rules applies, which states:

(2) The Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.

38 Further, r 3.7(3) of the Court Rules provides a non-exhaustive list of circumstances in which an order for costs may be fair and reasonable. I place particular emphasis on subrr (3)(b), (3)(d), (3)(e) and (3)(f), which provide:

(3) Circumstances in which the Court might consider the making of a costs order to be fair and reasonable include (without limitation) the following—

...

(b) that a party has failed to provide, or has unreasonably delayed in providing, information or documents—

(i) that are required by law to be provided in relation to any application the subject of the proceedings, or

(ii) that are necessary to enable a consent authority to gain a proper understanding of, and give proper consideration to, the application,

...

(d) that a party has acted unreasonably in the conduct of the proceedings,

(e) that a party has commenced or defended the proceedings for an improper purpose,

(f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where—

(i) the claim or defence (as appropriate) did not have reasonable prospects of success, or

(ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable.

39 These particular subrules provide that the delayed provision of documents, unreasonable conduct by a party in the conduct of the proceedings, commencement of proceedings for the improper purpose or maintenance of a defence which was without reasonable prospect of success may justify an order for costs. Although the indicia prescribed by r 3.7(3) of the Court Rules provide some assistance to evaluating whether a costs order is fair and reasonable, the power exercised by the Court is not confined to these matters.

40 While the applicable principles are well-known and not repeated, it is apposite to note that the “no discouragement” principle underlies and provides guidance in the application of r 3.7 of the Court Rules. Put simply, a person generally should not be discouraged from making or defending an application by the prospect of an adverse costs order.

- 41 For the following reasons and the reasons noted above in my summary of Council's submissions, I am of the view that it is appropriate, and it is both fair and reasonable, that Council be awarded its costs of the notice of motion filed 18 June 2024.
- 42 First, it is clear that NCV had the benefit of experienced legal representation at the hearing before Pepper J. Clearly, NCV was entitled to take a view in relation to the correctness of that decision and, if necessary, appeal that decision. No appeal was lodged. In those circumstances, Council's conduct in awaiting the expiration of the appeal period was both appropriate and in the interests of the just and quick resolution of the proceedings.
- 43 Second, the conduct of NCV through its solicitors and later through its agent, Mr McMurtrie, was not, in my view, reasonable in the circumstances. Council was, on a number of occasions, informed that NCV was going to appeal the decision of Pepper J. Council was later informed that there was going to be an application to the High Court in circumstances where on the evidence before me, Council was not given any reasonable response to its earlier correspondence in relation to expressing its views regarding the prospects of success in any such action.
- 44 Third, the present motion was brought within an appropriate time and was appropriately conducted by Council. There is no proper explanation of what has led NCV to provide, very late in the day on 25 July 2024, its indication that it no longer desired to progress any appeal but, in any event, NCV has not filed a notice of discontinuance despite it being requested on a number of occasions.
- 45 Despite my view, I do not consider that NCV's conduct in all the circumstances warrants the making of an order for costs on an indemnity basis. These proceedings remain in Class 1 of the Court's jurisdiction, and whilst the Court has wide discretion – again, noting r 3.7 of the Court Rules which I have set out in detail above – I take into account that when the matter was before me, Mr McMurtrie, as NCV's agent, indicated that previous legal representation had been withdrawn and that he was taking further instructions and advice. Further, while I consider Council's conduct was appropriate, I do not

consider that the recalcitrance on behalf of NCV in relation to not accepting the offers (and/or not communicating what its position was) made by Council is, in light of the Class 1 proceedings and the principles that govern the exercise of the discretion, sufficient to lead me to the view that it is appropriate to order costs on an indemnity basis.

Orders

46 The orders of the Court are:

- (1) The proceedings are dismissed.
- (2) NCV Enterprises Pty Limited is to pay Tweed Shire Council's costs of the notice of motion filed 18 June 2024.

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