UNSW PLANNING LAW UPDATE 2016 - OPENING REMARKS[1]

Introduction

1. As you know the Court generally, through one of its judges, takes this opportunity to remind practitioners of what is new in the business of the Court and to make a few observations concerning practices among its users that, from the Court's perspective, require 'correction', or, at the very least, improvement.

2. This year the list is as follows:

    (a) changes in respect of some of the rules and forms in respect of Classes 4 to 8;

    (b) the advent of JusticeLink;

    (c) the use and abuse of lists of authorities;

    (d) the need to take hearing dates in a timely manner; and

    (e) changes to the s 56A appeals regime.

3. A keen observer will have noticed that some of these topics have nothing to do with planning law, but who among you will actually argue the point with a judge that you may be appearing before in the very near future?

Changes to Rules and Forms Concerning Classes 4 to 8

4. The *Land and Environment Court Rules 2007* ("the Rules") have been amended by means of the *Land and Environment Court (Amendment No 1) Rule 2016* (No 76). The amendments took effect from 19 February 2016. The amendments are as follows:

    (a) r 3.4 has been amended to reflect the changes to the relevant sections of the *Environmental Planning and Assessment Act 1979*, so that references to ss 97(4), 97(5) and 98(3) have been removed and have been replaced with a reference to section 97A(4); and

[1] Remarks delivered to *UNSW Planning Law Update 2016*, Sydney, 23 March 2016. The remarks were compiled with the assistance of materials provided by the Chief Judge, Justice Brian Preston, and the Registrar, Ms Joanne Gray, for which I am grateful. I am also appreciative of the assistance of my tipstaff, Mr John Zorzetto, in preparing these remarks. Any errors are, however, my own.

(b) Pt 5 of the Rules has been amended so that specified rules in Pt 51B of the *Supreme Court Rules 1970* now apply to proceedings in Classes 6 and 7 of the Court's jurisdiction. In particular, rr 3, 5 (1),(2) and (6)-(9), 7-12, 14-16, 17(1) and (3) and 18 of Pt 51B of the *Supreme Court Rules 1970* apply, so far as applicable, to proceedings in those Classes.

5. The Court has approved new forms to give effect to these legislative changes. Accordingly, there are now forms to be used for commencing appeals, for applications for leave to appeal, and for the filing of cross-appeals in proceedings in Classes 6 and 7.

6. What is Class 7 you enquire? Class 7 (see s 21B of the *Land and Environment Act 1979*) concerns appeals relating to environmental offences that do not fall within Class 6 of the Court's jurisdiction. Suffice it to say, that the Class is so obscure that I cannot even tell you the colour of the file cover sheet.

7. Finally, the Court has also approved the use of a Summons (Judicial Review) (UCPR Form 85) for commencing proceedings for, or in the nature of, judicial review in Classes 4 or 8, consistent with Pt 59 of the *Uniform Civil Procedure Rules 2005* ("UCPR") and consistent with the procedure in the Supreme Court.

Winter is Coming (and so is JusticeLink)

8. In or about late April, the current case management systems used by the Court, CiTiS and eCourt, will be replaced with:

(a) JusticeLink, an internal case management system;

(b) Online Registry Website - an external facing website that court users registered to the case can log-in to and view the record of documents filed, all listings, and listing outcomes (adjudications). This website also allows parties to file documents online; and

(c) Online Court - an interface that allows a party to request orders to be made online, and that allows an internal decision-maker to make those orders online.

9. Each of these three systems will interact with one another, so that, for example:

    (a) orders entered by staff and documents received in JusticeLink are visible to court users registered to that case on the Online Registry Website;

    (b) documents filed online using the Online Registry Website will automatically be recorded as being filed in JusticeLink and can be downloaded from JusticeLink for viewing; and

    (c) similarly, orders made using the Online Court interface are automatically recorded in JusticeLink and will be visible on the online registry website.

10. In addition to these systems, the Court will also be on the NSW searchable court list website. This website allows members of the public to search for both past and future listings in the Court, and displays the details of each future listing up to three weeks in advance. In particular, after the weekly allocations are published, the presiding officer's name will appear on the searchable court list and parties will be aware of the name of the presiding judge or commissioner much earlier than they presently are. This is not, however, to be used as a vehicle for 'judge shopping'.

11. As a result of the introduction of these new systems, a number of changes will be taking place in the practice of the Court and the Registry. It is inevitable that glitches and teething problems will arise. Please be patient.

The Use and Abuse of Lists of Authorities

12. A number of judges, myself included, have become increasingly frustrated at the manner in which practitioners are compiling and filing their lists of authorities.

13. A list of authorities is not a document to show off your cutting and pasting skills. That is to say, it is not a list of every case and legislative provision contained in your written submissions.

14. A list of authorities ought to comprise of those cases and legislation, and only those cases and legislation, that you will be expressly taking the Court to in oral argument. No less and certainly no more.

15. Further, the list should not be served at 9.45am before the commencement of the hearing at 10am. This is apt to cause the tipstaff to meltdown and the judge to get annoyed. Not a good start to the hearing.

16. My practice, in the face of a lengthy and/or very late list of authorities is to simply ignore the document and then state, on the record at the appropriate juncture, my reasons for doing so.

17. Late last year it was agreed by the judges that the relevant practice notes in the various Classes would be amended to ensure that only those cases and legislation that the Court will be taken to are to be included in a party's list of authorities; to make it clear that all unreported cases are to be handed up to the Court; and to ensure that only references to reported versions of authorities are to be used. The changes have yet to be drafted by the Chief Judge, but the intent to do so is there.

18. And please note that our library is limited. We have the main reported cases only. We do not, for example, have FLRs or A Crim Rs.

The Timely Taking of Hearing Dates

19. Feedback from the Court's User Group reveals that some practitioners are not, when given leave to do so either in person before the Registrar, or through eCourt, approaching the Court in a timely fashion to take hearing dates. This has meant that the hearing date (or dates) they previously understood were available have been allocated to other matters. This is particularly so when leave has been given to obtain a hearing date within a specified time period, for example, "within seven days" or "within 48 hours".

20. It must be understood that dates are generally allocated on a first come, first serve basis and that sometimes only one or two judges or commissioners may be available on that day.

21. In other words, do not delay in obtaining your hearing date once leave is given, lest disappointment ensues.

Section 56A Appeals

22. There has been, of recent times, no doubt facilitated by an earlier division in the Court concerning the question of who pays the costs of a successful party in the absence of any disentitling conduct on a s 56A appeal, an burgeoning s 56A 'industry'.

23. While legitimate appeals from the decisions of Commissioners are welcome, attempts to have a second bite of the judicial cherry by dressing up questions of fact as questions of law (a matter to which I shall return) and re-running your case in the knowledge that no costs sanction will be incurred if unsuccessful, are not. Indeed, those days are over.

24. It was, in part, for this reason that the Court's costs rules, insofar as they concern s 56A appeals, were amended late last year.

25. In short, amendments have been made to r 3.7 of the Rules and to Sch 1 of the UCPR so that the usual costs provisions now apply to appeals pursuant to s 56A.

26. The effect of the amendments is that r 3.7 no longer applies to s 56A appeals, and that the costs rules under the UCPR that are excluded from application to proceedings in Classes 1 to 3 of the Court's jurisdiction now apply to a s 56A appeal. In other words, costs now follow the event.

27. The amendments took effect on 10 July 2015.

28. This means that if you wish to appeal a commissioner's decision by raising pages and pages of grounds of appeal, none of which are particularly meritorious, and almost none of which raise, as is required by s 56A, a

question of law, there are very likely to be cost implications if you lose, and perhaps, depending on the conduct of the appeal, even if you win.

29. To reiterate, s 56A appeals are limited to questions of law, and not questions (or errors) of fact, or disagreement with the outcome.

30. Thus merely because reasonable minds may differ on the evaluation of the evidence this is unlikely to give rise to a question of law.

31. The weight a commissioner gives to an expert report or the expert's testimony is also unlikely to give rise to a question of law.

32. Commissioners need to give reasons, but it is very rare that an appeal predicated upon a failure to do so is successful. It must also be recalled that a 'fine toothed comb' analysis of a commissioner's reasons will not be countenanced by the Courts.

33. Any allegation that a commissioner has either failed to have regard to a mandatory relevant consideration, or taken into account an irrelevant consideration, must commence with a careful analysis of the statute as a matter of construction. All too often such an analysis does not occur.

34. As for the catch-all ground of appeal of 'unreasonableness' (in truth, a ground of last resort by the desperate), I have yet to see it succeed in a s 56A appeal (and only once in my time as a judge). It ought not be pleaded without good foundation. It is not to be used as an excuse to invite the Court to trawl through the evidence a second time. To do so may sound in a costs order, again, even if successful.

35. The Court's statistics on s 56A appeals are illuminating. In 2013 and 2014 there were only five successful s 56A appeals in each year. Given that the commissioners determined 529 matters in 2013, and 541 matters in 2014, this indicates that only 0.9% of commissioner decisions were successfully appealed in those years.[2]

[2] *Land and Environment Court of NSW: Annual Review 2013*, p 49; *Land and Environment Court of NSW: Annual Review 2014*, p 49; available from: <http://www.lec.justice.nsw.gov.au/Pages/publications/annual_reviews.aspx>.

36. On 21 December 2015 a s 56A Practice Note was published. Please read it.

37. The Practice Note contains the ‘usual directions’. It also contains provisions for the filing of an appeal book. Care should be taken in compiling the appeal book. It is usually not necessary, in an appeal founded only on a question of law, to include all of the evidence and material that was before the commissioner. Most errors giving rise to questions of law will be apparent from the reasons of the commissioner, the relevant statutory and planning instruments, and the transcript. Be prepared to justify other inclusions to the appeal book in your conference with the Registrar to settle the index to the appeal book (see the Practice Note).

38. Again, and speaking only for myself, I no longer receive appeal books (or court books, for that matter) into evidence, even if by consent, without rigorous scrutiny. Parties must justify to me the need for the admission of each document included in the appeal book. Similarly, if at the end of the hearing there are documents that have not been referred to by the parties, they are usually excluded from the tender of the appeal (or court) book.

39. Remember, at all times, the appeal should be conducted in a manner that is ‘quick, just and cheap’. To do so is to the benefit of everyone: parties and the Court.

The Hon Justice Rachel Pepper
Land and Environment Court of New South Wales