

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

PRACTICE AND PROCEDURE

A Paper by Justice Peter Biscoe
for a visiting delegation of the Thai Judiciary, 19 March 2009

1. As far as possible, the same procedural legislation and rules of court apply to the Land and Environment Court of New South Wales as apply to all other courts in New South Wales. However, it is necessary to have some special legislation, rules of court and practice notes to accommodate the Land and Environment Court's special jurisdiction.
2. The practice and procedure of the Land and Environment Court varies according to whether the Court is exercising its civil or criminal jurisdiction and according to the class of matter.
3. The jurisdiction of the Land and Environment Court is separated into eight classes prescribed by the *Land and Environment Court Act 1979*. Five of the classes comprise the Court's civil jurisdiction. The other three classes comprise its criminal jurisdiction.
4. The five classes in the Court's civil jurisdiction are as follows:
 - Class 1 environmental planning and protection appeals (merit appeals). It includes appeals on the merits against refusals, or deemed refusals, of development consents or conditions of development consents, third party appeals against designated development, and appeals against Council orders.
 - Class 2 local government and miscellaneous appeals and tree disputes (merit appeals and disputes). It includes appeals against

building and other such approvals under the *Local Government Act*, appeals under other miscellaneous environment and planning legislation and tree disputes between neighbours.

Class 3 land tenure, valuation, rating and compensation for compulsory acquisition (merit appeals). It includes appeals involving compensation for compulsory acquisition of land, valuation of land, the determination of property boundaries, encroachment matters, and Aboriginal land claims.

Class 4 environmental planning and protection (civil enforcement and judicial review). It includes proceedings for breaches of planning law (eg carrying out a development without consent) or breaches of conditions of development consent, and proceedings which question the legal validity of consents or refusals of consent by consent authorities.

Class 8 mining disputes.

5. Determination of matters in Classes 4 and 8 are conventional judicial functions. They are heard only by Judges (not Commissioners) of the Court, the rules of evidence apply, and usually the loser is ordered to pay the winner's costs. Class 8, which is a very wide mining jurisdiction, was transferred to the Land and Environment Court in early 2009.
6. Determination of matters in Classes 1, 2 and 3 are unconventional judicial functions because they are merit matters. In merit appeals the Court stands in the shoes of the administrative body from which the appeal is brought, the rules of evidence do not apply, and usually there is no order as to costs. Merit matters are mostly heard by Commissioners of the Court who generally are not lawyers but have expertise in matters such as planning and valuation. However, the practice is that merit matters concerning compensation for the compulsory acquisition of land are heard only by Judges. Where a Judge hears a merit appeal, the Judge is sometimes assisted by a Commissioner (who, in that assistant capacity, does not constitute part of the Court adjudicating the matter)

7. The three classes in the Court's criminal jurisdiction are as follows:

Class 5 environmental planning and protection (summary criminal enforcement). It includes prosecutions for environmental offences, for example pollution offences and offences of carrying out development without development consent

Class 6 appeals against convictions or sentences relating to environmental offences imposed by magistrates in Local Court prosecutions

Class 7 appeals from magistrates in the Local Court against convictions or sentences relating to environmental offences which previously would have been heard by the Supreme Court

8. Judges (not Commissioners) hear matters in Classes 5, 6 and 7. Procedure in criminal matters is largely governed by the *Crimes (Sentencing Procedure) Act 1999*, the *Crimes (Appeal and Review) Act 2001* and Part 5 of the LEC Rules, which will not be addressed in this paper.

9. Practice and procedure in the Land and Environment Court's civil jurisdiction is governed by:

- The *Civil Procedure Act 2005* (CPA). A copy is in Annexure 1.
- The *Uniform Civil Procedure Rules 2005* (UCPR). A copy of the table of contents of the UCPR is in Annexure 2. The UCPR with annotations and forms fills three loose leaf folders and is too voluminous to be reproduced here.
- The *Land and Environment Court Act 1979* (LEC Act). A copy is in Annexure 3.
- The *Land and Environment Court Rules 2007* (LEC Rules). A copy is in Annexure 4.
- Five Practice Notes of the Land and Environment Court. They supplement the UCPR and the LEC Rules. Copies are in Annexures 5 to 9. They are currently under revision.

10. The CPA and UCPR apply to all courts in New South Wales. The LEC Act and LEC Rules, as their titles indicate, apply specifically to the Land and Environment Court. The LEC Rules are paramount over and prevail to the extent of any inconsistency with the UCPR. The LEC Rules are inconsistent with the UCPR only to the extent considered to be appropriate to accommodate the special jurisdiction of the Land and Environment Court.
11. The UCPR applies without exceptions to Class 4 (judicial review and civil enforcement) and Class 8 (mining) matters because they are within the conventional civil jurisdiction of courts. The UCPR applies with certain exceptions to Classes 1, 2 and 3 matters because they require merit determinations to which it is inappropriate to apply some UCPR rules.
12. The most important civil procedure provisions are in ss 56 and 57 of the CPA, as follows:

56 Overriding purpose

- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
- (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

57 Objects of case management

- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:
 - (a) the just determination of the proceedings,
 - (b) the efficient disposal of the business of the court,
 - (c) the efficient use of available judicial and administrative resources,
 - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
 - (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).
13. The Land and Environment Court places great emphasis on as much efficiency and speed in civil practice and procedure as is consistent with justice. That is the object of its Practice Notes, which supplement the UCPR and the LEC Rules. Some civil matters, by their nature or the particular circumstances of the case, take longer than others to dispose of. Statistics are kept as to the speed with which the Court is able to dispose of the various matters within its jurisdiction, and the results are published in the Court's annual reports.
14. Matters heard by Judges are listed for pre-hearing directions before the List Judge, usually on Fridays. As many as about eighty matters may be in the list. The only way that such a large list can be disposed of efficiently within the day is by annexing "usual directions" to the Practice Notes, and by requiring the parties or their lawyers to confer with each other before the directions hearing in an endeavour to agree on the directions that they seek and to hand to the List Judge at the directions hearing their agreed or competing "short minutes" of the directions sought.
15. When a matter is ready to be given a hearing date, the List Judge directs the parties, at a directions hearing, to proceed forthwith to the Registrar to obtain a hearing date.

16. Notices of motion are usually also made returnable on Fridays before the List Judge. If the notice of motion is short and the motion is ready to proceed, it will be heard, if possible, on the return date either by the List Judge or the Duty Judge. Matters heard by Commissioners are listed for pre-hearing directions before the Registrar.
17. Urgent matters, such as applications for urgent interlocutory injunctions, can be listed before the Duty Judge at any time on short notice or, if necessary, immediately. If the hearing of an urgent interlocutory injunction is likely to be lengthy, the parties are encouraged to consider whether, if the Court can allocate dates for an early final hearing, any necessary restraint can be put in place until then by consent and without prejudice and without having to take up Court time hearing the application for the urgent interlocutory injunction.
18. The Land and Environment Court is unusual in that anyone can bring proceedings in relation to some matters within the Court's civil jurisdiction. Such open standing provisions are considered to be important to the effective enforcement of environmental laws. For example, s 123(1) of the *Environmental Planning and Assessment Act 1979*, an important statute, provides:

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.
19. In judicial review matters (Class 4), r 4.3 of the LEC Rules is significant because it empowers the Court to make an order which will inform the applicant of the reasons for an administrative decision and provide the applicant with access to relevant documents. That rule provides:

4.3 Proceedings for the review of public authority's decision

In any proceedings in which a public authority's decision is challenged or called into question, the Court may make one or more of the following orders:

- (a) an order directing the public authority to make available to any other party any document that records matters relevant to the decision,
- (b) an order directing the public authority to furnish to any other party a written statement setting out the public authority's reasons for the decision, being a statement that includes:
 - (i) the public authority's findings on any material questions of fact, and
 - (ii) the evidence on which any such findings were based, and
 - (iii) the public authority's understanding of the applicable law, and
 - (iv) the reasoning process that led to the decision,
- (c) an order for particulars, discovery or interrogatories

20. The *Land and Environment Court Rules* r 4.2 is a unique rule applicable to Class 4 matters (judicial review and civil enforcement) whereby an unsuccessful applicant in proceedings brought in the public interest may not be ordered to pay the successful party's costs. It provides:

4.2 Proceedings brought in the public interest

- (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.
- (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
- (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:
 - (a) the injunction or order sought by the applicant, or
 - (b) an undertaking offered by the respondent in response to the application,
 if it is satisfied that the proceedings have been brought in the public interest.

21. Section 34 of the LEC Act provides for conciliation conferences in proceedings in Classes 1, 2 or 3 (see Annexure 4). In planning and

valuation appeals in Classes 1, 2 and 3 of the Court's jurisdiction, it is usual to direct that the parties participate in a conciliation conference. Conciliation conferences are often successful in resolving the dispute.

As regards expert evidence, parties are encouraged to share a single expert where possible. Where each party calls an expert witness in the same discipline, it is the usual practice to require the expert to confer and produce a joint report before the hearing which sets out the matters on which they agree and the matters on which they disagree and the reasons for any disagreement. At the hearing their evidence is heard concurrently. The judge, as well as counsel, can question the experts and the experts can question each other.