



Development Consents:

*Meaning,
Interpretation and
Effects*

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Interpretation of Development Consents

*A comparative analysis against the
construction of contracts and easements*

Conditions of Consent: An Introductory Overview

The *Newbury* Test

Newbury District Council v Secretary of State for the Environment [1981] AC 578, 607 (Lord Fraser)

1

The condition must relate to a planning matter

This will be resolved by a matter of statutory construction.

2

The condition must 'fairly and reasonably' relate to the development itself

*For an example of where the condition did not 'fairly and reasonably' relate to the development itself, see **Dogild (2009)** at 440 (Biscoe J).*

3

The condition must be reasonable

*A condition of consent will be deemed valid until declared invalid by the Court: see **Swadling (1994)***

General Principles of Construction

Development Consents

- Does not follow contractual interpretation principles but rather construed ‘in accordance with the rules of construction governing the interpretation of Acts of Parliament and subordinate instruments’:
***Sunland* [2021] at [58]**
- Construed not as a document drafted with legal expertise, but to achieve practical results: ***Kendall Street Developments* [2004] at [12]; *Lake Macquarie City Council* [2015].**

Contracts

- Focuses on the text and context of the contract, asking what an objective and reasonable businessperson, in the position of the parties, would have understood the terms to mean, having regard to the commercial purpose and object of the transaction: ***Toll (FGCT) v Alphapharm* [2004] at [40].**
- Applies business commonsense, although reasonable minds may differ on what constitutes ‘business commonsense’: ***Westgem Investments [No 6]* [2020] at [104].**
- Courts will adopt a construction which preserves the validity of contracts: ***Meehan v Jones* (1982) at 529; *Biotechnology Australia Pty Ltd v Pace* (1988) at 132.**

Easements (over *Torrens title*)

- ‘When construing the terms of an easement that is registered under the Torrens system of title, rules of evidence assisting the construction of contracts between parties ... do not apply’: ***Westfield Management* [2007] at 539 [37]** (emphasis added).
- The question is what would a ‘reasonable reader’ have understood the words to mean: ***Phoenix* [2010].**
- Unlike development consents, where uncertainty remains, the document may be construed *contra proferentem*: ***Ferella v Otvos* [2005] at [21].**
- For a comprehensive overview on the construction of easements and covenants, see ***Clare & Ors v Bedelis* [2016] at [31].**

Consideration of Extrinsic Materials

Development Consents

- Generally, development consents should be construed without any aid of extrinsic evidence. The only use of such extrinsic evidence is to assist identifying a thing or place referred to in the consent: *Lake Macquarie City Council* [2015] at [44]; *Ryde Municipal Council* (1970).
- A court may look at related development consents in order to construe another development consent. The terms of another document may be incorporated in the development if it serves a 'relevant purpose': *Vis Visitor Investment Services* [2010] at [56].

Contracts

- Antecedent agreements can be relied on in interpreting a later agreement, although where the later contract supersedes the prior one, the value of the prior one to the construction of the latter, is very low: see *Shepparton Projects (No 2)* [2011] at [18]
- Courts may refer to instruments which have been internally mentioned within the text of the instrument under construction: See *Hancock Prospecting* [2012] at [81].

Easements (over *Torrens title*)

- 'Resort to extrinsic evidence to aid construction is not permitted. It is the language of the registered easement that is paramount when construing it': *Howlin* [2016] at [63].
- '[E]xtrinsic material apart from the physical characteristics of the tenements, is not relevant to the construction of instruments registered under the Real Property Act 1900': *Nirimba Developments* [2007] at [15]-[16] citing *Westfield Management* [2007] at [5], [37], [41].
- For possible exceptions to the principle in *Westfield Management*: see *Currumbin Investments* [2012] QCA at [53].
- As to documents referred to in a dealing relating to land, see *Real Property Act (NSW)*, s80A and *Fermora* [2011].

***CAMPBELL* [2019] NSWCA**

The intersection between contractual and easement construction

- **Factual Background**

- The Hamiltons wished to develop their land via subdivision and sought an easement for services and carriageway from their neighbours, the Campbells.
- The easement was not forthcoming; the Hamiltons instituted proceedings in the NSWSC pursuant to section 88K *Conveyancing Act*
- Mediation was held and resolution arrived at; Mr Campbell agreed (upon the terms being recorded more fully in Deed of Settlement) to provide the two easements called for.
- The Deed was duly drafted and executed and attached a Transfer Granting Easement. The Land and Property Information (formerly Land Titles Office) issued requisitions without Mr Campbell's knowledge, and changes were made to the then duly registered instrument.
- Mr Campbell challenged the Deed on the ground the impugned easements were not intended to bind his successors in title and did not 'clearly' indicate the land to be burdened as required by the relevant legislation.

- **Issue**

- Whether *Westfield Management* [2007] was authority for the proposition that the Court could not look to background circumstances to the Deed to construe its meaning.

- **Decision**

- The Court held that *Westfield Management* was confined to the construction of easements that had been registered and therefore it was permitted to resort to background circumstances to interpret a contract which provided for the grant.
- On this basis, the Court rejected Mr Campbell's argument.

DEFERRED COMMENCEMENT

Deferred Commencements

Environmental Planning and Assessment Act 1979 (NSW), section 4.16(3)

Can the beneficiary of a development consent / notice of determination, seek from Council a modification of the condition stipulating in respect of which land the easement must be obtained?



EXAMPLE

Based on conditions of consent for the applicant to obtain an easement to drain-water

1. Deferred Commencement

- a. *Pursuant to section 4.16(3) of the Environmental Planning and Assessment Act 1979 (NSW), this consent does not operate until evidence of creation of easement to drain water from the site over downstream properties **[insert property addresses]** is submitted from NSW Land Registry Services (NSW LRS) to Council.*
- b. *Such information must be submitted within 36 months of the date of this notice.*

**APPLICATIONS TO
MODIFY DEVELOPMENT
CONSENTS**

Applications to Modify Development Consents

- ***Environmental Planning and Assessment Act 1979 (NSW)***:
 - Section 4.55 (cf: previous s96)
 - Section 4.56 (cf: previous s96AA)
- The threshold issue is whether the proposed modification of the development results in ‘substantially the same’ development for which the consent was originally granted. Therefore, it is critical to establish what was originally approved.
- **Some key cases include:**
 - *Aveo North Shore Retirement Villages Pty Ltd v Northern Beaches Council* [2020] NSWLEC 1035, [15].
 - *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75, [59].
 - *Trinvass Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 77, [26].
- Pursuant to **section 17(d)**, applications, appeals and objections made pursuant to section 4.55 (inter alia) form part of the LEC’s Class I jurisdiction: ***Land and Environment Court Act 1979 (NSW) (‘LEC Act’)***. Therefore, such appeals are heard on a ‘de novo’ basis: ***LEC Act, section 39(3)***.

RECENT CASE REPORTS

AQC Dartbrook Management P/L v Minister for Planning [2021] NSWCA 112.

Factual Background

- Dartbrook made an application to modify a development consent for an underground coal mine under section 75W *EPA Act* (**now repealed**).
- The Independent Planning Commission (IPC) approved part of, and rejected part of, the modification application.
- Dartbrook appealed against the IPC's decision, but an agreement was then reached via a conciliation conference under **section 34 LEC Act**.
- HTBA then applied, and was subsequently granted, to be joined as a party to the appeal proceedings under **section 8.15(2) EPA Act** on the basis that the decision made under section 34 was not a decision the Court could have had jurisdiction to make.

Issue (inter alia)

- Whether the primary judge had erred in joining HTBA in the proceedings.

Decision (*per Preston CJ; note that Meagher and Leeming JJA did not address the issue*).

- Held that the primary judge did not err.
- Once a modification application for a development consent is lodged, the Court has no implied or express power to amend the application under the *EPA Act* or the *EPA Regulation*.
- Though previous LEC cases, such as *Jaimee Pty Ltd v Council of the City of Sydney* [2010] and *Ku-ring-gai Council* (2007), suggested there was such an implied power, the Court held that those decisions were 'wrongly decided' (at [251]).



Preston CJ's obiter dictum in *Dartbrook* was subsequently upheld by Robson J (sitting alone) in *Duke Developments Australia 4 Pty Ltd v Sutherland Shire Council* [2021] NSWLEC 69

Sunland Group Limited v Gold Coast City Council [2021] HCA 35

Factual Background

- The appellant sought to enforce certain ‘conditions’ against the respondent for the payment of infrastructure relating to a multi-staged residential development. The meaning of the ‘conditions’ was ambiguous.
- The appellant argued ambiguity does not of itself result in invalidity but rather, where possible, should be resolved against the drafter of the development approval, being the Council in this case. This reflected the ‘contra proferentem rule’ – that ambiguity in a contract is resolved ‘against the offeror’.

Issue

- How should the ambiguity in the development approval be construed and thus resolved?

Decision

- The Court agreed that ‘[t]here is no general principle that uncertainty in an instrument made pursuant to power given by an Act spells legal invalidity’ (citing *Television Corporation* (1963) at 71): **per Kiefel CJ, Keane and Gleeson JJ at [19]**.
- However, the Court rejected the applicant’s contention that the ‘contra proferentem rule’ is to be used to resolve the meaning of ambiguous language contained in development approvals. Instead, the Court held that conditions of an approval ‘are not to be construed like any other contract, but rather in accordance with the rules of construction governing the interpretation of Acts of Parliament and subordinate instruments’: **per Steward J at [58], with whom Kiefel CJ, Keane, Gleeson, and Gordon JJ concurred**.
- **Kiefel CJ, Keane and Gleeson JJ** held that ‘[w]here there is an exercise of power for the imposition of a charge, the very nature of the power usually necessitates certainty in the imposition of the charge’ (at [21]).
- Ultimately, the Court found that ‘the due date of payment, and hence the quantum of the contribution, is objectively unascertainable’: **per Kiefel CJ, Keane and Gleeson JJ at [26]**.
- The appeal was dismissed (with costs).



Sunland has been subsequently applied in *Noosa Council v Cordwell Resources Pty Ltd & Ors* [2021] QPEC 67

BIBLIOGRAPHY

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- The following article was of significant assistance: [10 GOLDEN RULES ON CONDITIONS \(pvlaw.com.au\)](http://pvlaw.com.au)
- The following articles were of general assistance:
 - [High Court states important principles for construing statutory approvals | Higgins Chambers](#)
 - [Interpreting Development Approvals | McCullough Robertson Lawyers](#)
 - [Dentons - No power to amend a modification application – AQC Dartbrook case](#)

INDEX OF AUTHORITIES

Authority	Slide(s) referenced at
Legislation	
<i>Environmental Planning and Assessment Act 1979</i> (NSW)	8, 10
<i>Land and Environment Court Act 1979</i> (NSW)	10
<i>Real Property Act 1900</i> (NSW)	5
Cases	
<i>AQC Dartbrook Management P/L v Minister for Planning</i> [2021] NSWCA 112	12
<i>Biotechnology Australia Pty Ltd v Pace</i> (1988) 15 NSWLR 130	4
<i>Campbell V Hamilton</i> [2019] NSWCA 22	6
<i>Clare & Ors v Bedelis</i> [2016] VSC 381	4
<i>Clarence City Council v Howlin</i> [2016] TASSC 61	5
<i>Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood</i> CTS [2012] QCA 9	5
<i>Dogild Pty Ltd v Warringah Council</i> (2009) 158 LGERA 429	3
<i>Duke Developments Australia 4 Pty Ltd v Sutherland Shire Council</i> [2021] NSWLEC 69	12
<i>Ferella v Otwosi</i> [2005] NSWSC 962	4

INDEX OF AUTHORITIES (cont.)

Authority	Slide(s) referenced at
Cases (cont.)	
<i>Fermora Pty Ltd v Kelverton Pty Ltd</i> [2011] WASC 281	5
<i>Jaimee Pty Ltd v Council of the City of Sydney</i> [2010] NSWLEC 245	12
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<i>Sertari Pty Ltd v Nirimba Developments Pty Ltd</i> [2007] NSWCA 324	5
<i>Shepparton Projects Pty Ltd v Cave Investments Pty Ltd (No 2)</i> [2011] VSC 384	5
<i>Sunland Group Limited v Gold Coast City Council</i> [2021] HCA 35	4, 13
<i>Swadling v Sutherland Shire Council</i> (1994) 82 LGERA 431.	3
<i>Television Corporation Ltd v The Commonwealth</i> (1963) 109 CLR 59	13
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<i>Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd</i> [No 6] [2020] WASC 302	4
<i>Vis Visitor Investment Services Pty Ltd v Hawkesbury City Council</i> [2010] NSWLEC 10	5

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