CUMERLONG HOLDINGS PTY LTD v DALCROSS PROPERTIES PTY LTD & ORS (S120/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 214

Date of judgment: 2 September 2010

Date of grant of special leave: 11 March 2011

Cumerlong Holdings Pty Limited ("Cumerlong") is the registered proprietor of Lot 1 in DP302605, known as 9 Werona Avenue, Killara. Dalcross Properties Pty Ltd ("Dalcross Properties") was the former registered proprietor of Lots 102 and 103 in DP834629, known as 26 Stanhope Road, Killara. Dalcross Holdings Pty Ltd ("Dalcross Holdings") operates a private hospital on Lot 101 in DP834629 (which adjoins Lot 103). On 28 June 2010 Australasian Conference Association Limited acquired Lots 102 and 103.

Upon the registration of DP834629 in November 1993, a covenant was created pursuant to s 88B(3) of the *Conveyancing Act* 1919. That covenant benefited Cumerlong's land, as its terms provided that Lots 102 and 103 could not be used as a hospital.

Prior to 28 May 2004, Lot 103 was zoned 2(b) under the Ku-ring-gai Planning Scheme Ordinance ("KPSO"). Clause 68(2) of the KPSO suspended any restriction on the use of land in any zone (but it exempted land zoned 2(b)). On 28 May 2004 Ku-ring-gai Local Environment Plan No 194 ("LEP 194") was gazetted whereby large areas of land (including Lot 103) were rezoned to 2(d3). As Clause 68(2) of the KPSO did not exempt land zoned 2(d3) from its operation, the covenant's operation was suspended.

On 27 August 2008 Ku-ring-gai Municipal Council granted Dalcross Holdings a development consent to extend its hospital already on Lot 101, onto Lot 103. On 18 August 2008 Cumerlong filed a Supreme Court summons, seeking an order that both Dalcross Holdings and Dalcross Properties be restrained from using Lots 102 and 103 as a hospital. On 30 October 2009 that summons was dismissed.

On 2 September 2010 the New South Wales Court of Appeal (Tobias & McColl JJA, Handley AJA dissenting) dismissed Cumerlong's appeal. At issue upon appeal was whether the Governor's approval was required under s 28(3) of the *Environmental Planning and Assessment Act* 1979 ("EP&A Act") to those provisions of LEP 194 that changed the zoning of Lot 103. Justices Tobias & McColl held, that in the absence of a provision in LEP 194 that a specified regulatory instrument was not to apply to any development permissible under that LEP, s 28(3) of the EP&A Act was not engaged. The Governor's approval of the relevant zoning provisions of LEP 194 was therefore not required.

On 5 April 2011 the New South Wales Minister for Planning and Infrastructure filed a summons in this matter, seeking leave to appear as *amicus curiae.*

The grounds of appeal include:

- Their Honours in the majority erred in finding that for s 28(2) of the EP&A Act to be engaged, the relevant environmental planning instrument (LEP 194) had to contain an express provision which identified a regulatory instrument here (being a restrictive covenant) which itself was not to apply to identified development.