



HIGH COURT OF AUSTRALIA

3 August 2011

CUMERLONG HOLDINGS PTY LTD V DALCROSS PROPERTIES PTY LTD
[2011] HCA 27

The High Court today allowed an appeal by Cumerlong Holdings Pty Limited ("the appellant") from a decision of the Court of Appeal of the Supreme Court of New South Wales, which had upheld the decision of Smart AJ of the Supreme Court dismissing the appellant's suit.

The appellant had sought declaratory and injunctive relief to enforce a restrictive covenant which burdened land owned by Australasian Conference Association Ltd ("the third respondent") for the benefit of land owned by the appellant. In resisting the suit, the third respondent and the previous owner of the burdened land (the first respondent) relied upon cl 68(2) of the Ku-ring-gai Planning Scheme Ordinance ("the Ordinance"), as amended by the Ku-ring-gai Local Environment Plan No 194 ("LEP 194"), which purported to suspend the operation of the restrictive covenant.

However, the High Court (Gummow ACJ, Hayne, Heydon, Crennan and Bell JJ) held that the amendments to cl 68(2) of the Ordinance made by LEP 194 were ineffective to suspend the operation of the restrictive covenant. This was by reason of failure to comply with s 28 of the *Environmental Planning and Assessment Act 1979* (NSW). Section 28 required that a planning instrument that had the effect of suspending the operation of a restrictive covenant, such as LEP 194 purported to do, must be approved by the Governor acting on the advice of the Executive Council. This requirement had not been complied with in making LEP 194. As a result, LEP 194 was ineffective to amend cl 68(2) of the Ordinance to effect the suspension of the restrictive covenant burdening the third respondent's land. As a result, the High Court granted the declaratory and injunctive relief sought by the appellant.

The third respondent was ordered to pay the costs of the appellant's appeal to the High Court.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.