Court of AppealSupreme Court

New South Wales

Case Name:	Rafailidis v Camden Council
Medium Neutral Citation:	[2015] NSWCA 185
Hearing Date(s):	17 February 2015
Date of Orders:	17 February 2015
Decision Date:	17 February 2015
Before:	McColl JA at [1]; Gleeson JA at [62]; Bergin CJ in Equity at [63]
Decision:	(1) Allow the appeal. (2) Set aside the orders of Justice Sheahan made on 18 March 2014 finding Mrs Koula Rafailidis and Mr Efrem Rafailidis guilty of contempt and convicting each of them of that charge. (3) Set aside the order made by Justice Sheahan on 18 March 2014 fining Mrs Koula Rafailidis. (4) Set aside the order made by Justice Sheahan on 25 June 2014 fining Mr Efrem Rafailidis. (5) Set aside all costs orders made by Justice Sheahan on 18 March 2014 and 25 June 2014. (6) Order Camden Council to pay the appellants' costs of the appeal and their costs of the proceedings before Justice Sheahan. (7) Otherwise dismiss the further amended notice of appeal.
Catchwords:	PROCEDURE – Contempt of court – construction of court orders – first court order requiring land owners to "within ninety days to…obtain development consent" to allow a building to remain on certain land – where land owners obtained such development consent in 2012 but did not carry out the works that consent required within ninety days – where "ninety days" subsequently varied by second order to "4 July 2013" – where land owners

	did not carry out the works by that date – where land owners charged with contempt of court – whether on proper construction of first order 2012 development consent constituted compliance – whether contempt charge ambiguous
Legislation Cited:	Camden Local Environmental Plan 2010 Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 (NSW)
Cases Cited:	Ashrafi Persian Trading Co Limited t/as Roslyn Gardens Motor Inn v Ashrafinia [2001] NSWCA 243; (2002) Aust Torts Reports ¶81-636 Athens v Randwick City Council [2005] NSWCA 317; (2005) 64 NSWLR 58 Australian Consolidated Press Ltd v Morgan [1965] HCA 21; (1965) 112 CLR 483 Camden Council v Rafailidis [2012] NSWLEC 51 Camden Council v Rafailidis (No 2) [2012] NSWLEC 125 Camden Council v Rafailidis (No 3) [2012] NSWLEC 217 Camden Council v Rafailidis (No 4) [2014] NSWLEC 22 Camden Council v Rafailidis (No 5) [2014] NSWLEC 85 Harris v Harris [2000] EWHC 231 (Fam); [2001] 3 FCR 193 Hogan v Hinch [2011] HCA 4; (2011) 243 CLR 506 ICI Australia Operations Pty Ltd v Trade Practices Commission (1992) 38 FCR 248 Kao, Lee & Yip v Donald Koo Hoi Yan [2009] HKCFA 59; [2009] 5 HKC 36; (2009) 12 HKCFAR 830 Michael Wilson & Partners Ltd v Nicholls [2011] HCA 48; (2011) 244 CLR 427 Pang v Bydand Holdings Pty Ltd [2011] NSWCA 69 R v Liberti (1991) 55 A Crim R 120 Redwing Ltd v Redwing Forest Products Ltd (1947) 177 LT 387 Ross v Lane Cove Council [2014] NSWCA 50; (2014) 86 NSWLR 34 Suttor v Gundowda [1950] HCA 35; (1950) 81 CLR 418 Zaccardi v Caunt [2008] NSWCA 202; (2008) 15 BPR 28,403
Category:	Principal judgment

Parties:	Koula Rafailidis (First Appellant) Efrem Rafailidis (Second Appellant) Camden Council (Respondent)
Representation:	Koula Rafailidis (Appellants) Counsel: Mr J Lazarus (Respondent) Mr M W Sneddon (Amicus Curiae) Solicitors: Appellants self-represented Lindsay Taylor Lawyers (Respondent)
File Number(s):	CA 2014/102465
Publication Restriction:	No
Decision under appeal:	
Court or Tribunal:	Land and Environment Court
Jurisdiction:	Class 4
Citation:	[2014] NSWLEC 22; [2014] NSWLEC 85
Date of Decision:	18 March 2014; 25 June 2014
Before:	Sheahan J
File Number(s):	40855 of 2011

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **McCOLL JA**: The appellants, Koula Rafailidis and Efrem Rafailidis, each appealed from two judgments of Sheahan J in which his Honour found them guilty of contempt of court in proceedings brought by the respondent, Camden Council (the “Council”), fined each of them $10,000 and imposed a further fine

of $2,000 payable monthly until certain building works had been completed to the Council's satisfaction.[1]

2 The appeal was heard on 17 February 2015. The appellants appeared in person. The second appellant asked that the first appellant speak on his behalf. The Court acceded to that application. Mr J E Lazarus of counsel appeared for the Council. Mr M Sneddon of counsel appeared as amicus curiae.

3 At the conclusion of the hearing the Court made the following orders and reserved its reasons for making them:

(1) Allow the appeal.

(2) Set aside the orders of Justice Sheahan made on 18 March 2014 finding Mrs Koula Rafailidis and Mr Efrem Rafailidis guilty of contempt and convicting each of them of that charge.

(3) Set aside the order made by Justice Sheahan on 18 March 2014 fining Mrs Koula Rafailidis.

(4) Set aside the order made by Justice Sheahan on 25 June 2014 fining Mr Efrem Rafailidis.

(5) Set aside all costs orders made by Justice Sheahan on 18 March 2014 and 25 June 2014.

(6) Order Camden Council to pay the appellants' costs of the appeal and their costs of the proceedings before Justice Sheahan.

(7) Otherwise dismiss the further amended notice of appeal.

4 These are my reasons for joining in those orders.

Statement of the case

5 On 22 October 2008 the Council granted the appellants development consent (the "2008 development consent") to erect a new dwelling at XXXX Catherine Field (the "property").[2] At the time the development application was lodged, there was a single storey fibro clad dwelling on the property (the "existing dwelling"). The development consent was conditional on the appellants lodging a separate development application for the demolition of the existing dwelling and, too, that it should "be demolished and/or removed from the site within 28

[1] Camden Council v Rafailidis (No 4) [2014] NSWLEC 22 ("Rafailidis (No 4)"); Camden Council v Rafailidis (No 5) [2014] NSWLEC 85 ("Rafailidis (No 5)").

[2] The street address of the property has not been reproduced in accordance with the Court's policy on identity theft prevention.

days of the completion of the proposed dwelling." The new dwelling was erected and occupied by the appellants, but the existing dwelling was not demolished within 28 days or at all.

6 The Council commenced Class 4 proceedings in the Land and Environment Court to enforce compliance with the 2008 development consent (the "enforcement proceedings"). Lloyd AJ acceded to the application on 5 March 2012.[3] In the course of his reasons, his Honour said:

> "[9] The respondents have known all along that the original dwelling had to be demolished following completion of the new dwelling. They have previously been served with two orders under s 121B of the *Local Government Act 1993*, on 25 March 2010, and on 27 June 2010, requiring them to comply with the development consent. The planning controls which are in place would be set at nought if persons could avoid complying with those controls and, in particular, avoid complying with the conditions of any development consent which has been granted."

7 His Honour made the following declaration and orders:

> "1. A declaration that in breach of s 76A(1)(b) of the *Environmental Planning and Assessment Act* 1979 the respondents have carried out development otherwise than in accordance with the notice of determination of development application number 701/2008 dated 22 October 2010 for the proposed development at lot 10 deposited plan 27602 955 Camden Valley Way Catherine Field.
>
> 2. An order pursuant to s 124 of the Act that the respondents are within ninety days to demolish and remove the existing single storey dwelling on the property, or otherwise obtain an appropriate development consent to allow it to remain on the land in some form or another.
>
> 3. As an alternative to order number 2 an order pursuant to s 124 of the Act that the respondents are:
>
> (a) within fourteen days to lodge a development application with the applicant for the demolition and removal of the existing single storey dwelling on the property, and
>
> (b) to demolish and remove the existing single storey dwelling within ninety days of the granting of consent to the development application in accordance with such consent."

It is Order 2, in particular, which has had continuing significance, as is apparent from what follows.

8 On 23 April 2012, Mrs Rafailidis "instructed … lawyers to apply for a stay of the orders of Lloyd AJ so that she could properly prepare and lodge an appropriate

[3] Camden Council v Rafailidis [2012] NSWLEC 51 ("Rafailidis (No 1)").

development application and pursue all appeal rights as may be necessary to maintain the existing dwelling."[4]

9 On 25 May 2012, the appellants lodged a further development application (the "2012 DA") seeking approval to retain the existing dwelling as a secondary dwelling. The Council refused that application on 28 May 2012 "on the grounds that it was not established in conjunction with the new dwelling and was therefore not a secondary dwelling as defined by the relevant local environmental plan."[5]

10 As the appellants wished to lodge a merits appeal against the refusal of the 2012 DA, they applied by motion filed in the enforcement proceedings for a stay of Order 2 to extend the 90 day period for a sufficient time to allow that appeal to be lodged and determined.[6] Biscoe J granted the stay "on condition that the respondents file and serve a Class 1 appeal against the Council's refusal of their development application of May 2012 on or before 31 May 2012".[7]

11 The appellants duly filed and served a Class 1 appeal on 31 May 2012.[8] On 4 July 2012, at a conciliation conference conducted by Commissioner Hussey, an agreement was reached pursuant to which the appeal was allowed. The appellants were granted development consent to allow the existing dwelling to remain on their land, subject to conditions set out in a document described as annexure "A" (the "2012 development consent"). The 2012 development consent required the removal of the laundry and a bedroom from the existing dwelling. This involved the removal of walls, the insertion of corner posts and removal or modification of services in order to extend an existing patio and establish a covered verandah. It also required the removal of asbestos. The 2008 development consent for the new dwelling was required to be modified by deleting the conditions that the existing dwelling be demolished.

---

[4] Camden Council v Rafailidis (No 2) [2012] NSWLEC 125 ("Rafailidis (No 2)") (at [5](d)) per Biscoe J.
[5] Camden Council v Rafailidis (No 3) [2012] NSWLEC 217 ("Rafailidis (No 3)") (at [8]) per Biscoe J.
[6] Rafailidis (No 2) (at [6]).
[7] Rafailidis (No 2) (at [12](1)).
[8] Rafailidis (No 3) (at [9]).

12 On 19 July 2012 the Council filed a notice of motion in the enforcement proceedings seeking orders that Biscoe J's 30 May 2012 stay be lifted and that Order 2 be stayed until November 2012 unless the appellants "procure the lawful issuing of a certificate in accordance with and as required by condition 3.0(6) of the 2012 development consent … and provide a copy of same to the Council prior to 1 November 2012, in which case it be ordered that the said Order No 2 be permanently stayed."[9] The Council contended that "the granting of the 2012 development consent [did] not regularise the status of the old dwelling [and] [o]nly the carrying out of the work required by that consent will achieve that objective".[10] The application was heard by Biscoe J and determined on 18 September 2012.

13 The appellants, who had legal representation on this occasion, submitted that Order 2 did not require the development consent to which it referred be obtained within 90 days. Rather, the 90 day requirement only governed the time for demolition. The 2012 development consent achieved the second part of Order 2, consequently that order was "final and spent and [could not] be varied". They also contended that the 2012 development consent lapsed in five years and that the Council's motion, to the extent it sought to vary that position, was an abuse of process.[11]

14 Biscoe J discharged the stay order. He rejected the appellants' submission concerning the proper construction of Order 2 and the effect of obtaining the 2012 development consent. In the course of his reasons his Honour said:

> "Order 2 made by Lloyd AJ required that, within 90 days, either the old dwelling be demolished or its presence on the land be legalised by an appropriate development consent. This means that if a conditional development consent were obtained within the 90-day period, the consent had to become unconditional (in the sense of any conditions being satisfied) within the 90-day period. Only then would the presence of the old dwelling on the land be legalised. If that were not so, then if a conditional development consent were obtained within the 90-day period, Order 2 would permit the old dwelling to remain unlawfully on the land forever, or at least for five years until the consent expired, if the conditions were never satisfied. That is not a

[9] Rafailidis (No 3) (at [11](1)(b)). Condition 3.06 of the 2012 development consent required the appellants to submit an engineer's certificate certifying the structural adequacy of the completed building.
[10] Rafailidis (No 3) (at [13](b)).
[11] Rafailidis (No 3) (at [14](a) and [14](e)).

> reasonable construction of Order 2. It is also repugnant to his Honour's reasoning in the last sentence of [9] of his judgment."[12]

15 His Honour concluded it was appropriate to discharge the May 2012 order and mould an order which would permit time within which the works required by the 2012 consent should be carried out. His Honour considered one year from the date of the 2012 development consent reasonable.[13] Accordingly, his Honour varied Order 2 "by extending the ninety day period referred to therein to 4 July 2013" (the "September 2012 order").[14]

16 The appellants did not remove the two rooms referred to in Annexure "A" by 4 July 2013. On 12 November 2013 the Council filed a notice of motion in the enforcement proceedings seeking orders that they be found guilty of contempt of the Land and Environment Court on the grounds set out in the statements of charge and that they be punished for contempt of court by committal to a correctional centre, or fined, or both, as well as an order for costs. The motion was heard by Sheahan J. The statement of charge asserted:

> "The First and Second Respondent (Respondents) are guilty of contempt of court in that in breach of order of the Court in these proceedings on 18 September 2012 the Respondents did not, as required by paragraph 2 of the Order made by the Court on 5 March 2012, as varied on 18 September 2012, before 4 July 2013, demolish and remove the existing single storey dwelling on the Property, or otherwise obtain an appropriate development consent to allow it to remain in some form or another."[15]

17 Mrs Rafailidis appeared at the hearing. Mr Rafailidis did not.

18 Mrs Rafailidis prepared written submissions on both her own and Mr Rafailidis' behalf in response to the charge. They consisted principally of challenges to the Land and Environment Court's jurisdiction and allegations of bias by Lloyd AJ and the Court in general.[16] Sheahan J found that her documents "shed no light on the position with regard to the continuing state of the subject building, and they advance no arguments as to why this Court should be lenient in dealing with Koula Rafailidis and her husband, in respect of their non-performance of the Court's orders."[17]

---

[12] Rafailidis (No 3) (at [15]).
[13] Rafailidis (No 3) (at [18]).
[14] Rafailidis (No 3) (at [21](2)).
[15] Rafailidis (No 4) (at [1]).
[16] See Rafailidis (No 4) (at [18]).
[17] Rafailidis (No 4) (at [27]).

19 In the course of reciting the history of the matter, Sheahan J said:

> "[11] On 4 July 2012, a s 34(3) conference conducted by Hussey C resulted in the grant of a DC which included conditions requiring modifications to the older dwelling and the removal of asbestos, partial demolition of the older dwelling, and completion of some structural alterations to the remaining parts of it. Orders were made by the Court accordingly, by consent, that day. Annexed to those orders were clear plans of the current floor layout of the older house, and of what the consent orders required to be done to it by way of modification (pages 36 - 37 of Saab affidavit 7 November 2013).
>
> …
>
> [14] It is clear from his Honour's judgment of 18 September 2012, delivered in the presence of the respondents, that his Honour required that the works proposed to be done to the older dwelling were to be completed by 4 July 2013. His Honour said (at [18]):
>
> > In the circumstances, it is appropriate to discharge the May 2012 stay order and mould an order which would permit time within which the works required by the 2012 consent must be carried out. One year from the date of the development consent seems reasonable. The evidence of Mrs Rafailidis that the respondents intend to carry out the works does not detract from this conclusion; indeed, it indicates that such an order should not prejudice the respondents."

20 After setting out the background, the principles of the law of contempt and the parties' competing contentions, his Honour found each appellant guilty of contempt and convicted each of that charge. He deferred sentencing Mr Rafailidis because he was not present in Court.

21 Sheahan J fined Mrs Rafailidis $10,000, plus a monthly fine of $2,000 payable on the first calendar day of each month, on and from 1 June 2014, until the works the subject of the charge had been completed to the Council's satisfaction. He also ordered her to pay the Council's costs of the contempt proceedings on and from 1 November 2013, on an indemnity basis, as agreed or assessed according to law.[18]

22 Mr Rafailidis was sentenced on 25 June 2014.[19] He did not file any documents, or appear at the sentencing hearing. Although Mrs Rafailidis was in contact with his Honour's associate via email, including to deny her and her husband's guilt of contempt and to deny service of any documents on either of them, she did not submit any documents on his behalf that related to sentencing.[20]

---

[18] Rafailidis (No 4) (at [34]).
[19] Rafailidis (No 5).
[20] Rafailidis (No 5) (at [13] – [20]).

23 Sheahan J was satisfied that a penalty no less severe than that imposed on Mrs Rafailidis should be imposed on Mr Rafailidis. Accordingly, he made the following "supplementary orders":

> "(A) Efrem Rafailidis is fined $10,000, payable to the Registrar pursuant to the Fines Act 1996, plus a monthly fine of $2,000 payable on the first calendar day of each month, on and from 1 August 2014, until the works the subject of the charge have been completed to Council's satisfaction.
>
> (B) The costs order already made against Koula Rafailidis is amended to read: Koula Rafailidis is ordered to pay Council's costs of the contempt proceedings from 1 October 2013 until and including 23 May 2014, on an indemnity basis, as agreed or assessed according to law.
>
> (C) Efrem Rafailidis is ordered to pay Council's costs of the contempt proceedings since 23 May 2014, on an indemnity basis, as agreed or assessed according to law." [21]

Notice of appeal

24 The Notice of Appeal from Sheahan J's orders went through various iterations, the final version being set out in the Further Amended Notice of Appeal. Relevantly it challenged Sheahan J's jurisdiction to make the contempt orders. Taking into account the fact the appellants did not have legal assistance, I would treat that "ground" of appeal as asserting there was no factual basis for his Honour's orders.

25 Mr Sneddon pointed out that Mr Rafailidis had not been named as an appellant until the Further Amended Notice of Appeal was filed and, accordingly, a question arose whether he should be given an extension of time to appeal. The Council did not object to the competence of Mr Rafailidis' appeal. Hence it is unnecessary to consider that question.

Appellants' submissions

26 The appellants' essential submission was that which Biscoe J rejected, namely that Order 2 had been complied with by way of the 2012 development consent, and, accordingly, there could have been no contempt of Court.[22]

27 It is unnecessary to refer to most of the rest of the appellants' written documents, which largely amounted to baseless assertions as to the constitution of the Land and Environment Court and whether the Council

---

[21] Rafailidis (No 5) (at [31]).
[22] See Rafailidis (No 3) (at [14](a)).

"existed", as well as invocations of numerous passages from the Bible and the like.

28 Brief mention should be made of the appellants' assertion that Sheahan J was biased on the basis that the "Attorney General's department was a party to the case and [his Honour] did work for the Attorney-General's department" and that he "is employed/contract by the Department of Justice … a clear conflict of interest". The former was an apparent reference to the fact his Honour was the Attorney-General in and for the State of New South Wales during the 1980s, the latter presumably a reference to the source of judicial salaries.

29 It is not apparent whether the appellants were relying on actual or apprehended bias. Either assertion would be without foundation. Neither the Attorney General's Department or the Department of Justice was a party to the case (nor had either any identified interest in it), no basis for any complaint of actual bias was identified and no fair minded lay observer might reasonably apprehend that his Honour might not have brought an impartial and unprejudiced mind to the resolution of the question his Honour was required to decide.[23]

Submissions of the Amicus Curiae

30 Mr Sneddon submitted the appeal concerned three related issues. First, whether the contempt charge was ambiguous or defective, such that the conduct charged was not in conformity with the order breached; secondly, whether the contempt charge was ambiguous, such as being incapable of enforcement by contempt proceedings; and thirdly, whether the agreement under s 34(3) of the *Land and Environment Court Act 1979* (NSW) between the parties and the 2012 development consent had the effect that Order 2 had been complied with.

31 It is fair to say that Mr Sneddon placed greatest emphasis on the third proposition, to contend, in substance, that by 18 September 2012 the appellants had complied with Order 2 by obtaining the 2012 development

[23] Michael Wilson & Partners Ltd v Nicholls [2011] HCA 48; (2011) 244 CLR 427 (at [31]) per Gummow ACJ, Hayne, Crennan and Bell JJ.

consent which allowed the existing dwelling "to remain on the land in some form or another."

32 As to ambiguity, Mr Sneddon submitted that, construed in the context of *Rafailidis (No 3)*, the reference in the contempt charge to the demolition of the building meant the contempt charge was ambiguous or defective. This was because Biscoe J's amendment of Order 2 had clearly been intended to operate only on the completion of the works contemplated by the second limb of Order 2 and the 2012 Development Consent. He pointed out that that was how Sheahan J had interpreted Biscoe J's reasons, when his Honour accepted that the gravamen of the Council's complaint was that the works required by the 2012 consent had not been completed by 4 July 2013.[24]

33 Mr Sneddon accepted that his submissions had not been advanced before Sheahan J. However he contended that it was nevertheless open to a person who had been a defendant in the Court below to submit on appeal that the evidence did not make out an essential element of the cause of action sued upon.[25]

The Council's submissions

34 Mr Lazarus first submitted that Mr Sneddon's submission concerning the proper construction of Order 2 should not be permitted to be made on appeal as it was one in relation to which the Council would have sought below to adduce further evidence including the statement of facts and contentions or other documents in the Class 1 proceedings.

35 Secondly, Mr Lazarus accepted that Order 2 had to be construed in context, but contended that the "more relevant" context was that afforded by *Rafailidis (No 3)* rather than *Rafailidis (No 1)*, although he submitted aspects of the latter judgment also aided the construction exercise.

36 Mr Lazarus submitted that the effect of the 18 September 2012 order, read into Order 2, was that by 4 July 2013 the appellants were either to demolish the existing dwelling or obtain an appropriate development consent to allow it to

[24] Rafailidis (No 4) (at [14]).
[25] Zaccardi v Caunt [2008] NSWCA 202; (2008) 15 BPR 28,403 (at [75]) per Campbell JA (Allsop P and Barr J agreeing).

remain on the land in some form or another and, further, make the development consent "unconditional" by satisfying any conditions to which it was subject. Otherwise, the presence of the existing dwelling on the land would not be "legalised".

37 Mr Lazarus submitted that the appellants could not reasonably have believed they had satisfied the second limb of Order 2 merely by obtaining the 2012 development consent, as that would have rendered Biscoe J's orders on 18 September 2012 nugatory. He also contended it was significant that the appellants were present when Biscoe J delivered his judgment, had legal representation and that Mrs Rafailidis gave evidence that they would carry out the works the subject of the 2012 development consent.

38 Mr Lazarus submitted that the appellants' construction was repugnant to Biscoe J's reasoning as, on their construction, Order 2 would permit the existing dwelling to remain unlawfully on the land throughout the period of the 5 years within which a development consent normally remains valid.[26]

39 Finally, Mr Lazarus contended that the appellants were bound by Biscoe J's reasons rejecting their submissions to like effect concerning the construction of Order 2[27] and that this Court should not entertain any argument challenging his Honour's conclusion.

Consideration

40 The appellants should be permitted to advance both the submission they made (which was also made by the amicus curiae) concerning the proper construction of Order 2. The Court should also entertain the additional submissions helpfully made by the amicus curiae. Insofar as the Council contends that had it been on notice of the construction argument it would have tendered additional material before Sheahan J, I note it does not appear it took, or sought to take, that opportunity before Biscoe J when the appellants' legal representative first advanced this argument. The fact it has had that opportunity but chosen not to avail itself of it suggests any such material would not produce a different outcome.

---

[26] Environmental Planning and Assessment Act 1979 (NSW) ("EPA Act"), s 95(1).
[27] Rafailidis (No 3) (at [15]).

41 Further, as Heydon JA (as his Honour then was) explained in *Ashrafi Persian Trading Co Limited t/as Roslyn Gardens Motor Inn v Ashrafinia*[28] in such circumstances the appellants are not raising a new "point" in the *Suttor v Gundowda*[29] sense. Rather, they are contending that the case pleaded and proved by the Council at trial (to which they had effectively pleaded "not guilty") did not establish that they were guilty of contempt of court.

42 I turn to the substance of the appeal.

43 As at 4 July 2012, the date the 2012 development consent was granted, Order 2 required the appellants "within ninety days to demolish and remove the existing single storey dwelling on the property, or otherwise obtain an appropriate development consent to allow it to remain on the land in some form or another". Order 2, which was made in exercise of the Land and Environment Court's power pursuant to s 124 of the EPA Act to "make such order as it thinks fit to remedy or restrain" an actual or anticipated breach of the EPA Act, was in the nature of a mandatory injunction. It commanded the appellants to take one or other of the steps contemplated by the two limbs of the order.

44 The effect of Biscoe J's variation was that on and from 18 September 2012, Order 2 read:

> "2. An order pursuant to s 124 of the Act that the respondents are **by 4 July 2013** to demolish and remove the existing single storey dwelling on the property, or otherwise obtain an appropriate development consent to allow it to remain on the land in some form or another."

45 In contempt proceedings, two questions of interpretation arise: first, what the order or undertaking said to be breached requires on its true construction; and secondly, whether that requirement is sufficiently clear to the person affected by the order to support its enforcement against that person.[30]

46 "Plainly injunctions should be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or

---

[28] [2001] NSWCA 243; (2002) Aust Torts Reports ¶81-636 (at [51]) (Mason P and Handley JA agreeing).
[29] Suttor v Gundowda Pty Ltd [1950] HCA 35; (1950) 81 CLR 418.
[30] Athens v Randwick City Council [2005] NSWCA 317; 64 NSWLR 58 ("Athens") (at [27]) per Hodgson JA (Tobias JA agreeing); see also Australian Consolidated Press Ltd v Morgan [1965] HCA 21; (1965) 112 CLR 483 ("ACP") (at 515-516) per Owen J (Windeyer J agreeing).

not their future conduct falls within the scope or boundaries of the injunction."[31] Thus it is "an elementary principle of justice and fairness that no order will be enforced by committal unless it is expressed in clear, certain and unambiguous language".[32] Accordingly, an "injunction should indicate the conduct which is enjoined or commanded to be performed, so that the defendant knows what is expected on its part".[33]

47 A court order may be enforced "if it bears a meaning which the Court is satisfied is one which ought fairly to have been in the contemplation of the person to whom the order was directed … as a possible meaning."[34] However, "a defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character … the undertaking must be clear and the breach must be clear beyond all question."[35]

48 Prima facie, injunctions and court orders should so far as reasonably practicable, be self-standing.[36] However, in seeking to determine the meaning of the injunction or order a defendant charged with contempt of court is said to have breached, it is open to the court to have regard to the judgment given when the order was made and to other surrounding circumstances, including the pleadings.[37] Because the purpose of a court order is, ordinarily, to give effect to a judgment, the order must conform to the judgment, with only such latitude as the judgment allows. Accordingly, the originating judgment is the primary reference point in construing orders.[38]

---

[31] ICI Australia Operations Pty Ltd v Trade Practices Commission (1992) 38 FCR 248 (at 259) per Lockhart J (Gummow and French JJ agreeing); Ross v Lane Cove Council [2014] NSWCA 50; (2014) 86 NSWLR 34 (at [29]) per Leeming JA (Meagher and Tobias AJA agreeing).

[32] Harris v Harris [2000] EWHC 231 (Fam); [2001] 3 FCR 193 (at [288]) per Munby J; see also Pang v Bydand Holdings Pty Ltd [2011] NSWCA 69 (at [55]) per Beazley JA (McColl JA and Lindgren AJA agreeing); Kao, Lee & Yip v Donald Koo Hoi Yan [2009] HKCFA 59; [2009] 5 HKC 36; (2009) 12 HKCFAR 830 (at [23]) per Sir Gerard Brennan NPJ (Bokhary, Chan, Ribeiro PJJ and Nazareth NPJ agreeing).

[33] Hogan v Hinch [2011] HCA 4; (2011) 243 CLR 506 (at [58]) per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

[34] ACP (at 492) per Barwick CJ.

[35] Redwing Ltd v Redwing Forest Products Ltd (1947) 177 LT 387 ("Redwing") (at 390) per Jenkins J; applied by Owen J (with whom Windeyer J agreed on this point) in ACP (at 515 – 516).

[36] Athens (at [137]) per Santow JA (Tobias JA agreeing).

[37] Athens (at [28]) per Hodgson JA (Tobias JA agreeing).

[38] Athens (at [129] – [130]; [140](a)) per Santow JA (Tobias JA agreeing).

49 At the time Order 2 was made, the Camden Local Environmental Plan 2010 (the "2010 LEP") permitted secondary dwellings with consent in Zone RU4, the zone in which the appellants' land was situated.[39] It was uncontroversial that the existing dwelling fell within the definition of a "secondary dwelling" in the 2010 LEP.[40] Where development for the purposes of a secondary dwelling was permitted under the 2010 LEP, clause 5.4(9) required that the total floor area of that dwelling (excluding any area used for parking) could not exceed either 60 square metres or 25% of the total floor area of the principal dwelling, whichever was the greater.[41]

50 Mr Lazarus accepted that the existing dwelling would comply with clause 5.4 if modified in accordance with the conditions of the 2012 development consent. He also accepted it was an available construction that, on a literal reading, the 2012 development consent satisfied the second limb of Order 2.

51 Mr Lazarus submitted, however, that Order 2 had to be read purposively. He argued that, having regard to paragraph [9] of *Rafailidis (No 1)*, the second limb of Order 2 had to be read, as he contended Biscoe J had done,[42] as requiring the actual carrying out of the works the subject of "an appropriate development consent" within the time stipulated by Order 2 so as to bring the existing dwelling into compliance with the 2010 LEP. The 2012 development consent of itself, accordingly, was not sufficient to comply with the second limb of Order 2 because it was subject to conditions requiring modifications to the existing dwelling in the form of the plans attached as Annexure A. Thus, those modifications also had to be effected by 4 July 2013, the time stipulated by Order 2, as amended by Biscoe J on 18 September 2012.

52 Mr Lazarus accepted that Biscoe J's amendment to Order 2 could not be read in isolation but, rather, had to be read into the original order. He argued that it was also necessary to read into the second limb of Order 2 words to the effect "and satisfy all conditions of that development consent" to achieve his

---

[39] 2010 LEP, Zone RU4, cl 3.
[40] See Dictionary, 2010 LEP.
[41] 2010 LEP, cl 5.4(9).
[42] Rafailidis (No 3) (at [15]).

purposive construction. In my view this would constitute impermissibly re-writing Order 2, rather than construing it.

53 Mr Lazarus submitted that *Rafailidis (No 3)* was the appropriate context for the construction of Order 2 as amended because it explained the circumstances of the amendment to the original Order 2. He accepted that Biscoe J's amendment to Order 2 could have been expressed so as to make clearer what his Honour had in mind but contended that, taken in the context of paragraph [18] of *Rafailidis (No 3)* his Honour's intention and, accordingly, the meaning of amended Order 2, was plain.

54 In my view, Lloyd AJ's reasons are the primary reference point for construing Order 2. When one has regard to Order 2 in that context, it is apparent that it required the appellants to take one or other of the two steps contemplated (demolition or obtaining an appropriate development consent) within 90 days. In the ordinary course, a development consent lapses 5 years after the date from which it operates.[43] Accordingly, unless there was an indication to the contrary in contextual material to which recourse was permitted for the purposes of construction, once the appellants obtained the appropriate development consent, they had 5 years within which to comply with it.[44]

55 There is no express, nor in my view implied, limitation in Lloyd AJ's reasons on the usual time for compliance with the "appropriate development consent" once obtained. Indeed the silence on that issue might be contrasted with the emphasis on completion of the demolition of the existing dwelling within 90 days should that be the course the appellants chose to take rather than pursue the "appropriate development consent" route. That can be seen from both the first limb of Order 2, and the express requirement in Order 3(b) that the appellants demolish the existing dwelling within 90 days of being granted development consent to do so. I do not see paragraph [9] of *Rafailidis (No 1)* as compelling any contrary conclusion.

---

[43] EPA Act, s 95(1).

[44] It might be noted that the Council had the opportunity, whether before Lloyd AJ or, for example, in the Class 1 proceedings, to argue the five year period in relation to the 2012 development consent should be reduced to at least two years: EPA Act, s 95(2); s 95(3)(a).

56 However, the appellants decided to try to retain the existing dwelling rather than demolish it. On 30 May 2012, 85 days after Lloyd AJ's orders, they obtained a stay of Order 2 so they could pursue an appeal from the refusal of their 2012 DA. On 4 July 2012, while the stay was in force, the 2012 development consent was granted.

57 The appellants clearly understood that conduct constituted compliance with the second limb of Order 2. In other words they understood that part of Lloyd AJ's order as first made to require them to obtain the "appropriate development consent" referred to therein within 90 days, but not to require them to carry out any conditions of that consent within that period. In my view, that meaning was, objectively, "one which ought fairly to have been in [their] contemplation" when the order was made.[45]

58 As the timetable I have already set out confirms, the appellants obtained the 2012 development consent within the period of ninety days. Accordingly, assuming their construction of Order 2 was correct, as, in my view it was, obtaining the 2012 development consent within that period satisfied the second limb of Order 2. One limb of the two alternatives in Order 2 having been satisfied, there was no order Biscoe J could amend. His amending order was a nullity. Once this is understood, it is not to the point, with respect, to inquire into what the appellants understood Biscoe J's amendment to Order 2 was intended to achieve if, for the reasons given, his Honour's order could have no effect.

59 It is unnecessary, accordingly, to deal with the question whether the charge itself was ambiguous.

60 The Council complained that these proceedings did not involve a challenge to any finding other than that of Sheahan J. To the extent that this conclusion might be seen to conflict with Biscoe J's understanding of Order 2, that outcome is a necessary corollary of the obligation not to convict the appellants of a charge "which is not, in law, sustained by the facts".[46]

---

[45] ACP (at 492) per Barwick CJ.

[46] R v Liberti (1991) 55 A Crim R 120 (at 125) per Kirby P (Grove and Newman JJ agreeing); see also Redwing (at 390).

61 Once it is accepted that the appellants' construction of Order 2 is an available one, it is clear the appellants should not have been convicted of contempt of Court.

62 **Gleeson JA**: I agree with McColl JA

63 **Bergin CJ in Equity**: I agree with McColl JA.

****