



Land and Environment Court New South Wales

Case Title: Blue Mountains Conservation Society Inc v Delta Electricity

Medium Neutral Citation: [2011] NSWLEC 145

Hearing Date: 2 December 2010

Decision Date: 26 August 2011

Jurisdiction: Class 4

Before: Pepper J

Decision: Application dismissed

Catchwords: **PROCEDURE:** whether proceedings should be summarily dismissed or struck out in whole or part on the basis that no reasonable cause of action was disclosed – application dismissed

DECLARATIONS AND INJUNCTIONS: whether a declaration is a “remedy” for the purpose of s 252 of the Protections of the Environment Operations Act 1997 – whether the Court has jurisdiction to grant declaratory relief for breach of s 120 of the Protection of the Environment Operations Act 1997 under s 252 of that Act – whether a declaration ought to be made in respect of a past breach of a statute on the grounds of futility

Legislation Cited: Environment Protection Legislation Amendment Act 2002, cl 6, sch 2
Environment Protection Legislation Amendment Bill 2002
Interpretation Act 1987, s 34
Land and Environment Court Act 1979,

s 20(2)(c)

Protection of the Environment Operations Act 1997, ss 3, 11, 13, 15, 16, 17, 18, 19, 20, 24, 30, 120, 129, 252, 148, 167

Uniform Civil Procedure Rules 2005, rr 13.4, 14.28

Cases Cited:

Agar v Hyde [2000] HCA 41; (2000) 201 CLR 552

Banque Commercial SA En Liquidation v Akhil Holdings Ltd [1990] HCA 11; (1990) 169 CLR 279

Carr v McDonald's Australia Ltd (1994) 63 FCR 358

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd [2010] NSWCA 190

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384

Corkhill v Forestry Commission of New South Wales (No 2) (1991) 73 LGRA 126

Dasreef Pty Limited v Hawchar [2011] HCA 21; (2011) 277 ALR 611

Dey v Victorian Railways Commissioners (1949) 78 CLR 62

Director-General, Department of Environment, Climate Change and Water v Venn [2011] NSWLEC 118

Environment Protection Authority v Alkem Drums Pty Ltd [2000] NSWCCA 416; (2000) 113 LGERA 130

Forestry Commission of New South Wales v Corkhill 73 LGRA 247

General Steel Industries Inc v Cmr for Railways (NSW) (1964) 112 CLR 125

Gray v Macquarie Generation [2010] NSWLEC 34

Great Lakes Council v Lani; Great Lakes Council v Lani and Lampo Pty Limited [2007] NSWLEC 681; (2007) 158 LGERA 1

Leerdam v Noori [2009] NSWCA 90; (2009) 255 ALR 553

Meriton Apartments Pty Ltd v Sydney Water

Corporation [2004] NSWLEC 699; (2004)
138 LGERA 383

Multigroup Distribution Services Pty Ltd v
TNT Australia Pty Ltd [1996] FCA 1758;
(1996) ATPR 41-522

Mycogen Plant Science Inc v Monsanto
Australia Ltd [2002] FCA 613; (2002) AIPC
91-811

Project Blue Sky Inc v Australian
Broadcasting Authority [1998] HCA 28;
(2008) 194 CLR 355

Spencer v The Commonwealth [2010] HCA
28; (2010) 241 CLR 118

Those Best Placed Pty Ltd v Tweed Shire
Council [2010] NSWLEC 83

Those Best Placed Pty Ltd v Tweed Shire
Council [2010] NSWCA 309

Williams v Barrick Australia Limited [2003]
NSWLEC 218; (2003) 128 LGERA 80

Wilson v State Rail Authority of New South
Wales [2010] NSWCA 198

Texts Cited

R P Meagher, J D Heydon and M J Leeming
Meagher, Gummow & Lehane's Equity
Doctrines & Remedies, 4th ed (2002)
LexisNexis

Category:

Procedural and other rulings

Parties:

Blue Mountains Conservation Society Inc
(Applicant)
Delta Electricity (Respondent)

Representation

- Counsel:

Mr T G Howard (Applicant)
Mr R P Lancaster SC (Respondent)

- Solicitors:

Environmental Defenders Office (Applicant)
Clayton Utz (Respondent)

File number:

40358 of 2009

JUDGMENT

Delta Applies to Summarily Dismiss or Strike Out Blue Mountains' Claim

- 1 On 2 June 2009, Blue Mountains Conservation Society Inc ("Blue Mountains") commenced civil enforcement proceedings by summons seeking, relevantly for present purposes, a declaration that the respondent, Delta Electricity ("Delta"), had polluted waters of the Coxs River near Lithgow in contravention of s 120 of the *Protection of the Environment Operations Act 1997* ("the Act") (prayer 1 of the summons).
- 2 Points of claim were filed by Blue Mountains on 11 June 2009 alleging, amongst other things, at paragraph 13(a) of the points of claim that Delta introduced into the waters of the Coxs River the following pollutants: salt, copper, zinc, aluminium, boron, fluoride and arsenic.
- 3 The introduction of these pollutants is contended to have changed the physical, chemical and/or biological condition of the waters of the Coxs River and has introduced a "matter" that falls within paragraph (c) of the definition of "water pollution" in the Dictionary to the Act (paragraph 13(b) of the points of claim):

water pollution or pollution of waters means:

...

- (c) placing in or on, or otherwise introducing into or onto, the waters (whether through an act or omission) any matter, whether solid, liquid or gaseous, that is of a prescribed nature, description or class or that does not comply with any standard prescribed in respect of that matter,...

- 4 As a consequence, Blue Mountains asserts, this introduction has changed the condition of the water insofar as it makes, or is likely to make, the waters "unclean, noxious, poisonous, impure and harmful to aquatic life, animals, birds or fish" (paragraph 13(c)). Further particulars were given in respect of the toxicity of the pollutants said to have been introduced into the River (paragraph 13(d) of the points of claim).
- 5 At paragraph 14 of the points of claim, Blue Mountains allege that Delta is continuing to pollute the waters of the Coxs River in contravention of s 120 of the Act "by continuing to discharge waste waters containing the said pollutants".
- 6 A defence was filed by Delta on 11 June 2009 denying the allegations contained in paragraphs 13 and 14 of the points of claim.
- 7 By notice of motion filed 22 November 2010, Delta seeks orders either dismissing in whole the points of claim or, in the alternative, summarily dismissing or striking out prayer 1 of the summons and paragraph 13 of the points of claim.
- 8 Delta relied on an affidavit of Ms Laura Gottlieb sworn 22 November 2010. Ms Gottlieb is a solicitor employed by Clayton Utz, who are Delta's solicitors. The affidavit annexed the summons, the statement of claim and various correspondence, including a request for particulars from Blue Mountains. The affidavit also set out the reasons for the delay in bringing this application, which was not in issue at the hearing.
- 9 The interlocutory relief is sought by Delta on the basis that the points of claim do not disclose a reasonable cause of action and that even if such a claim was disclosed, it would not be within the jurisdiction of this Court to determine it. I do not agree for the reasons that follow, with the consequence that the notice of motion must be dismissed.

Factual Background

- 10 It is not in dispute that Delta carries on the business of the wholesale generation of electricity and is the owner, occupier and operator of the coal-fired power station, namely, the Wallerawang Power Station (“the power station”).
- 11 It was an agreed fact that at all material times Delta has held an environment protection licence (which was in evidence before the Court) in respect of its operation of the power station. The licence has been subject to a number of variations, none of which were presently material.
- 12 Condition L1.1 states that except as may be expressly provided in any other condition of the licence, Delta must comply with s 120 of the Act.
- 13 Section 120 of the Act creates an offence of pollution of waters:

120 Prohibition of pollution of waters

- (1) A person who pollutes any waters is guilty of an offence.
- (2) In this section:
pollute waters includes cause or permit any waters to be polluted.

- 14 It was also not a matter of controversy that between May 2007 and April 2009 in the course of its operation of the power station, Delta discharged water and “other substances” into the Coxs River at a discharge point described in the points of claim.
- 15 It is alleged by Blue Mountains that waste water from the cooling towers and/or associated plant was, and continues to be (see paragraph 14 of the points of claim), discharged by Delta into the Coxs River at the specified discharge point. This waste water is said to contain the pollutants identified by Blue Mountains in paragraph 13(a) of the points of claim.
- 16 Delta does not dispute that some water in the form of “blowdown” was partially discharged from a cooling tower into the Coxs River, but denies

that the discharge contained the substances identified by Blue Mountains in paragraph 13 of the points of claim and denies that the discharge constituted, and continues to constitute, the pollution of waters contrary to s 120 of the Act. Further, Delta maintains that at all times any discharge was pursuant to, and in conformity with, its environment protection licence.

- 17 Finally, it was an agreed fact that upon discharge of the water containing the substances into the Coxs River, the water, and thus any substances it contained, were subject to dilution.

The Court Has Jurisdiction to Determine the Proceedings and They Ought Not Be Dismissed

- 18 Part 8.4 of the Act relevantly provides for civil proceedings to remedy or restrain breaches of the Act or harm to the environment. In particular, s 252 of the Act provides as follows:

252 Remedy or restraint of breaches of this Act or regulations

- (1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.
- (2) Any such proceedings may be brought whether or not proceedings have been instituted for an offence against this Act or the regulations.
- (3) Any such proceedings may be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.
- (4) Any such proceedings may be brought by a person on the person's own behalf or on behalf of another person (with their consent), or of a body corporate or unincorporate (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
- (5) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.
- (6) If the Court is satisfied that a breach has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.

- (7) Without limiting the powers of the Court under this section, an order under this section may suspend any environment protection licence.
- (8) In this section:
 - breach** includes a threatened or apprehended breach.

19 Delta's principal submission is that the proceedings should be summarily dismissed because s 252 of the Act does not authorise or permit civil proceedings to remedy or restrain an alleged contravention of s 120 of the Act. This is because s 120 is not a provision that imposes an obligation or duty upon any person that is therefore capable of giving rise to a "breach of" the Act within the meaning of s 252. The reasons for this, Delta advanced, are three-fold:

- (a) first, as a matter of statutory construction the language of s 120 is not apt to describe a statutory obligation or duty that is independent of the creation of the statutory offence. This, Delta argued, is reinforced by s 121 of the Act that provides for the making of civil obligations to prescribe the carrying out of activities that might pollute waters to be dealt with by way of regulation. This provision supports the conclusion that s 120 is not intended to be anything more than a bare provision constituting a criminal offence;
- (b) second, a consideration of the wider statutory context of the Act is consistent with this conclusion. That is to say, the language of s 120 is substantially different to that contained in other provisions that clearly impose obligations that can readily be "breached" for the purposes of s 252 of the Act. These include, for example, s 148(4) (occupiers of premises "must" notify the appropriate regulatory authority of a pollution incident) and s 167(1) and (2) (an occupier of premises "must" maintain and operate control equipment installed at the premises in a proper and efficient condition). While one consequence of contravening these provisions might be the

commission of a criminal offence (s 167(4)), another is to enliven the power contained in s 252 of the Act. The markedly different form and structure of ss 148 and 167 therefore militate against the implication of a duty within s 120. Similarly, ss 11, 13, 15–20, 24 and 30 are all examples of provisions that impose duties or obligations upon various persons, albeit without the creation of a criminal offence. These provisions would also engage the relief contained in s 252 of the Act; and

- (c) third, the language of s 252 of the Act renders its application inappropriate for the purposes of the criminal liability created by s 120. This is because a person cannot breach, infringe or contravene a provision that does not create any duty or obligation. This is supported by the text of s 252(2) which refers to proceedings that have been “instituted for an offence against this Act or the regulations”, as opposed to proceedings commenced to remedy or restrain a breach of the Act.

20 The Court has power pursuant to r 13.4(1) of the Uniform Civil Procedure Rules 2005 (“the UCPR”) to summarily dismiss the proceedings generally, or in relation to any claim for relief in the proceedings, if, amongst other things, no reasonable cause of action is disclosed. Rule 13.4(1) provides:

13.4 Frivolous and vexatious proceedings

- (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:
 - (a) the proceedings are frivolous or vexatious, or
 - (b) no reasonable cause of action is disclosed, or
 - (c) the proceedings are an abuse of the process of the court,the court may order that the proceedings be dismissed generally or in relation to that claim.

21 Summary dismissal of proceedings must only occur in clear cases. Descriptions of the applicable test have included “manifestly groundless” and “so obviously untenable that it cannot possibly succeed” (*Dey v*

Victorian Railways Commissioners (1949) 78 CLR 62 (at 91), *General Steel Industries Inc v Cmr for Railways (NSW)* (1964) 112 CLR 125 (at 130), both cited in *Spencer v The Commonwealth* [2010] HCA 28; (2010) 241 CLR 118 at [53]–[55] and see *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552 at [57], *Leerdam v Noori* [2009] NSWCA 90; (2009) 255 ALR 553 at [75]–[77] and in this Court *Gray v Macquarie Generation* [2010] NSWLEC 34 at [44]–[45]).

- 22 But as Macfarlan JA stated in *Leerdam* where, such as the present application, an application for summary dismissal turns on the resolution of questions of law, the very high threshold set in the cases may be more readily accommodated (at [75]):

Whilst caution is also required where, as here, the application turns on questions of law and there is no reasonable prospect that deficiencies in what is pleaded will be able to be cured by amendment, opportunities to summarily dismiss or strike out claims will arise more frequently.

- 23 In that case the Court of Appeal summarily dismissed claims alleging that a solicitor acting for a Commonwealth Minister, along with the Minister, had committed torts of misfeasance in public office and collateral abuse of process rendering them liable in damages. The Court held that because an essential element of the cause of action for misfeasance in public office was absent from the claim and because the tort of collateral abuse of process could only be committed by a party to the proceedings in which the abuse was alleged to have occurred, which it was not, neither claims could be maintained.
- 24 This Court has also not shied away from exercising its power to summarily dismiss proceedings where they have disclosed no reasonable cause of action (see *Gray v Macquarie Generation*).
- 25 In the present proceedings, s 252 of the Act is the only basis for the applicant's invocation of the jurisdiction of the Court. Accordingly, if s 252

does not empower the Court to grant the relief sought in the summons because it has no application to s 120, then it would be appropriate to dismiss the proceedings in their entirety.

- 26 In my opinion, however, Delta's submissions ought not be accepted. They are not consonant either with a proper textual analysis of ss 252 and 120, or a purposive construction of the Act (as to the proper approach to statutory interpretation see: *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198 at [12]–[13], *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 at [42], *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (2008) 194 CLR 355 at [69]).
- 27 First, and while seemingly trite, implicit in the words “a person who pollutes any waters is guilty of an offence” is the imposition of a duty or obligation not to pollute waters. I do not consider, as was insisted upon by Delta, that it was necessary for the legislature to expressly state that a person “must not” or “shall not” pollute waters to create a duty or obligation sufficient to enliven s 252 of the Act. To hold otherwise would be, in my opinion, to elevate absurdity above common sense.
- 28 As Smart AJ correctly, in my respectful opinion, observed in *Environment Protection Authority v Alkem Drums* [2000] NSWCCA 416; (2000) 113 LGERA 130 (at [83]):

83 Any statute which creates an offence, by necessary implication, imposes a duty on the person covered by its terms not to commit an offence (or a breach of the statute) by engaging in conduct which amounts to an offence. As the EPA submitted, the effect of the offence creating provisions of cl 21(3) of the Clean Waters Regulations is that cl 21 imposed upon a person upon whom a notice under cl 21(1) was served a duty to comply with the requirements of the notice.

29 Having said this, however, it must be acknowledged that the provision in question in that case, namely, cl 21 of the Clean Waters Regulations 1972, was in a very different form to that of the clear text of s 120 of the Act. That clause provided (as set out at [28] of Smart AJ's reasons):

28 The regulatory and statutory provisions are as follows. Clause 21(1) and (3) of the Clean Waters Regulations relevantly provide.

"(1) Where pollutants are being or are likely to be discharged into waters from any premises, the Commission may, by notice in writing, require the occupier of those premises to do any one or more of the following, namely:

...
(c) erect, alter or remove any walls in, on or from those premises or erect, alter or remove any dams, embankments, trenches or other works used in connection with those premises for the storage, treatment or disposal of those pollutants,
...

(g) undertake such measures as will, in the opinion of the Commission, control or prevent the discharge or likely discharge of those pollutants

within such time and in such manner as may be specified in the notice.

(3) An occupier of premises who does not comply with a requirement of a notice referred to in clause (1) ... is guilty of an offence and is liable

(a) if a corporation - to a penalty not exceeding \$4000 and, in the case of a continuing offence, to a further penalty not exceeding \$1000 for each day the offence continues..."

30 Notwithstanding the difference in language, I nevertheless find his Honour's observations apposite to s 252 of the Act.

31 Delta relied on the decision of this Court in *Meriton Apartments Pty Ltd v Sydney Water Corporation* [2004] NSWLEC 699; (2004) 138 LGERA 383. In that case Lloyd J refused an application to stay or dismiss proceedings that had been brought under s 252 of the Act in respect of an alleged breach of s 129(1) of the Act. His Honour described the operation of s 252 of the Act in the following terms (at [15]):

15 Proceedings are brought under s 252 of the *POEO Act* to enforce a public duty imposed under that Act; a duty by which Parliament expresses the public interest in protecting the environment: *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339. Section 252(1) is an open standing provision that removes the common law limitations on the standing of citizens to commence proceedings to enforce a public right. Any person can commence proceedings regardless of whether or not any right of that person has been or may be infringed by, or as a consequence of, the breach of the public duty: *Rowley v NSW Leather Trading Co Pty Ltd* (1980) 46 LGRA 250 at 256-257; *Building Owners and Managers' Association of Australia Ltd v Sydney City Council* (1984) 53 LGRA 54 at 72-73 upheld on appeal (1985) 55 LGRA 444 at 447; *F Hannan Pty Ltd v Electricity Commission of NSW [No 3]* (1985) 66 LGRA 306 at 310, 313. A public interest also exists in upholding environmental legislation and ensuring that all persons comply with the duties imposed by the legislation. Proceedings brought under s 252 of the *POEO Act*, in Class 4 of this Court's jurisdiction, are not criminal proceedings. This is reinforced by s 252(2), which states that such proceedings may be brought whether or not proceedings have been instituted for an offence against the Act. In fact, if the applicant had brought proceedings to prosecute the respondent for a criminal offence, those proceedings would require the leave of this Court under s 219 of the *POEO Act*. Moreover, in *Sydney City Council v Building Owners and Managers' Association of Australia Ltd* (1985) 55 LGRA 444 at 447-448, Mahoney JA (Hope and Priestley JJA concurring) stated that the reference to "a breach" in s 123(1) of the *Environmental and Planning Assessment Act 1979* ("the *EP&A Act*"), is not limited to something essentially attracting a criminal sanction. The wording of s 252 of the *POEO Act* is similar to that provision of the *EP&A Act*. Accordingly, s 252 of the *POEO Act* should not be read down to only include breaches with criminal consequences. It is necessary to consider the respondent's submissions in this context.

32 Delta seized upon the characterisation of s 252 as a mechanism directed to enforcing "duties" imposed by the Act. Because s 120 is bereft of any "duties", Delta argued, it follows that it cannot attract the attention of s 252.

33 But *Meriton* does not, in my view, assist Delta. This is because, as I have discussed above, a provision that states that it is an offence to pollute waters must implicitly contain a duty on persons not to pollute waters, albeit with a consequential imposition of criminal liability if that duty is contravened. Put another way, s 120 creates a public right that waters are

not to be polluted. Section 252, as Lloyd J observed in *Meriton*, was enacted to remove restrictions on the ability of private citizens to enforce such public rights, especially where in breach of those rights a defendant commits a criminal offence (see R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies*, 4th ed (2002) LexisNexis at [21-170]–[21-185]). It is no more than an example of a statute that confers rights on private citizens to restrain the commission of a public wrong, which is a well recognised exception to the general principle that where a defendant commits a breach of a statutory prohibition the restraint is generally at the suit of the Attorney-General (*Meagher, Gummow & Lehane's Equity Doctrines & Remedies* at [21-185]). By way of illustration, the learned authors refer to ss 123 and 124 of the *Environmental Planning and Assessment Act* 1979. Section 252 of the Act is but another instance.

- 34 Further, while it is correct to note that in *Meriton* s 129(1) of the Act expressly cast a mandatory obligation on occupiers of premises to “not cause or permit the emission of any offensive odour from the premises” to which a licence applied (to do so resulted in an offence: s 129(3)), the decision does not stand for the proposition that s 252 of the Act is precluded from applying to provisions that create criminal offences absent an express statutory admonishment not to engage in the very act giving rise to the commission of the offence. To the contrary, as I understand Lloyd J’s reasoning, his Honour accepts that s 252 is sufficiently broad in that it captures both provisions explicitly and implicitly imposing “duties” of a criminal and civil character and provisions where no explicit duty is imposed but a contravention of the section will result in a breach of the Act with criminal consequences.
- 35 Second, although a drafting curiosity by comparison to other provisions creating criminal offences (which simultaneously contain a statutory obligation either to engage in a positive act, or alternatively, to refrain from doing so, coupled with a separate imposition of criminal liability if that

obligation is not honoured), the current form and structure of s 120 of the Act is, in my view, explicable by its legislative history.

36 The previous incarnation of s 120 was as follows:

120 Prohibition of pollution of waters

- (1) **Prohibition on polluting**
A person must not pollute any waters.
- (2) **Prohibition on causing pollution**
A person must not cause any waters to be polluted.
- (3) **Prohibition on permitting pollution**
A person must not permit any waters to be polluted.
- (4) **Offence**
A person who contravenes this section is guilty of an offence.

37 The Act was amended in 2002 by the *Environment Protection Legislation Amendment Act 2002*, which by the operation of cl 6 of Sch 2 amended s 120 to repeal the earlier iteration of the provision and substitute the current version. The Explanatory Notes for the Environment Protection Legislation Amendment Bill 2002 state the rationale for the repeal and replacement (see s 34 of the *Interpretation Act 1987*). Thus "Schedule 2 [6] reorganises the offence of pollution of waters by combining the existing separate offences into one offence." It is therefore apparent that the objective intention of Parliament in enacting the new version of s 120 was to rationalise the three offences into one omnibus water pollution offence. It was not to prohibit proceedings from being instituted to prevent water pollution from occurring, or continuing to occur, pursuant to s 252 of the Act (which is the logical corollary of Delta's submissions).

38 Third, when properly construed the restrictive interpretation that Delta affords to the interaction between ss 120 and 252 of the Act does not accord with a construction of either provision in its wider context. This is particularly so when s 120 is juxtaposed against the other offences contained in Ch 5 of the Act and when both sections are read against the objects of the Act contained in s 3.

- 39 To find that the objective intention of the legislature was to preclude the application of s 252 to s 120 would result in the bizarre scenario that under the Act no preventative measures could be taken to avoid anticipated, or halt continuing, water pollution which could result in immediate consequential harm to the environment, including to harm to human safety, whereas relief could be obtained to ensure that an occupier of premises operated control equipment installed at the premises in an efficient manner (s 167 of the Act).
- 40 Such an outcome would also plainly not achieve the objects of the Act contained in s 3, particularly those set out in subparagraphs (a), (b), (d), (e) and (f):

3 Objects of Act

The objects of this Act are as follows:

- (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,
- (b) to provide increased opportunities for public involvement and participation in environment protection,
- (c) to ensure that the community has access to relevant and meaningful information about pollution,
- (d) to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following:
 - (i) pollution prevention and cleaner production,
 - (ii) the reduction to harmless levels of the discharge of substances likely to cause harm to the environment,
 - (iia) the elimination of harmful wastes,
 - (iii) the reduction in the use of materials and the re-use, recovery or recycling of materials,
 - (iv) the making of progressive environmental improvements, including the reduction of pollution at source,
 - (v) the monitoring and reporting of environmental quality on a regular basis,
- (e) to rationalise, simplify and strengthen the regulatory framework for environment protection,
- (f) to improve the efficiency of administration of the environment protection legislation,
- (g) to assist in the achievement of the objectives of the *Waste Avoidance and Resource Recovery Act 2001*.

- 41 As Lloyd J noted in *Meriton* (at [15]), s 252 embodies, especially as a provision of open standing, the important public interest of upholding environmental legislation.
- 42 The objects of the Act would similarly not be served by persons being able to, in effect, bring proceedings to restrain or remedy the commission of less serious tier three offences that can be dealt with by way of penalty notice under Pt 8.2 of the Act, but not a tier one (ss 115–117) or tier two (such as s 120) environmental offence (for a classification of the offences see s 114 of the Act).
- 43 Fourth, if Delta's contentions are correct, a tier one or tier two offence would have to be committed, and therefore proven, before s 252 was engaged. This would be necessary in order to demonstrate that "a breach" of the Act had occurred. However, this conclusion does not sit comfortably with the text of s 252(2) of the Act which expressly permits proceedings to be brought to remedy or restrain "a breach" of the Act or regulations irrespective of whether proceedings have been instituted for an offence.
- 44 For the reasons given above, I therefore do not accept that Blue Mountains are precluded from bringing proceedings under s 252 of the Act to restrain or remedy the alleged contravention by Delta of s 120 as pleaded, or that this Court has no jurisdiction to entertain the claim. It follows that I refuse to summarily dismiss the proceedings.

The Pleadings Ought Not be Struck Out

- 45 In the alternative, Delta submitted that prayer one of the summons seeking declaratory relief and paragraph 13 of the points of claim ought to be dismissed or struck out pursuant to either rr 13.4 or 14.28 of the UCPR.
- 46 Rule 14.28 of the UCPR is the twin to r 13.4. It empowers the Court to strike out pleadings where:

14.28 Circumstances in which court may strike out pleadings

- (1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:
 - (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
 - (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
 - (c) is otherwise an abuse of the process of the court.
- (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

47 The case must be no less unequivocal before a litigant will have his or her case struck out either in whole or in part because no reasonable cause of action is disclosed, than a litigant whose case is sought to be summarily dismissed (see the authorities referred to above at [21] and *Those Best Placed Pty Ltd v Tweed Shire Council* [2010] NSWLEC 83 at [3], affirmed in [2010] NSWCA 309).

48 As advanced by Delta, the basis of this relief is that s 252 of the Act does not authorise or permit civil proceedings to remedy or restrain the alleged contravention of s 120 by Delta in the period between May 2007 and April 2009. This is, first, because the breach referred to in paragraph 13 had passed, and consequently, there was nothing to “restrain”. And second, because the declaratory relief sought in prayer one of the summons did not amount to a “remedy” within the meaning of s 252 of the Act.

49 In reply to the first limb of Delta’s contention, Blue Mountains submitted that paragraphs 13 and 14 must be read together so that properly understood the injunctive relief was sought not in respect of the initial act of polluting the Coxs River in the period between May 2007 and April 2009, but was sought to restrain the continuing act of polluting the waters of that River by Delta discharging pollutants from its cooling towers that had commenced no earlier than May 2007. To separate the two acts in the manner proposed by Delta was “artificial” because a fair reading of both

paragraphs 13 and 14 of the points of claim made it clear that the injunctive relief was directed to the continuing pollution of the Coxs River, whereas the declaratory relief was directed to both past and present unlawful acts.

50 I accept this submission. And just as a declaration can be made in respect of a past breach, there is no doubt that a declaration may be made in respect of a continuing, or even anticipated breach of an environmental statute (*Corkill v Forestry Commission of New South Wales (No 2)* (1991) 73 LGRA 126 at 160–161 per Stein J, affirmed in the Court of Appeal in *Forestry Commission of New South Wales v Corkill* (1991) 73 LGRA 247 at 256).

51 The function of pleadings was described authoritatively by the High Court in *Banque Commercial SA En Liquidation v Akhil Holdings Pty Ltd* [1990] HCA 11; (1990) 169 CLR 279 where Mason and Gaudron JJ stated (at 286):

The function of pleadings is to state with sufficient clarity the case that must be met... In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness.

52 Of course care must be taken not to read pleadings with an overly keen eye for imprecision. As Burchett J observed in *Carr v McDonald's Australia Ltd* (1994) 63 FCR 358 (at 367):

the so-called "new" system of pleading requires of a party that he state the material facts on which his claim is based, not that he formulate his claim as an elegant model of legal purity: *Konskien v B Goodman Ltd* [1927] 1 KB 421 at 427; *Wickstead v Browne* (1992) 30 NSWLR 1 at 15–16; *Ravinder Rohini Pty Ltd v Kriziac* (1991) 30 FCR 300 at 314–315, per Wilcox J (with whom Davies J (at 303) relevantly agreed).

- 53 The pleadings the subject of this application suffer neither from the vice that Delta is under any misapprehension as to the case it must meet nor from an absence of the material facts on which the claim is based.
- 54 A fair and reasonable reading of the pleadings does not give rise to a claim for relief by Blue Mountains that Delta must be restrained from committing a past — assuming the allegations in paragraph 13 are proven — breach of the Act. And nor could it (*Williams v Barrick Australia Limited* [2003] NSWLEC 218; (2003) 128 LGERA 80 at [45]–[47]).
- 55 Rather, what is plainly sought to be restrained is the continuing and uninterrupted pollution of the river as alleged by Blue Mountains in paragraph 14 of the points of claim, such pollution commencing in the manner and at the time alleged in paragraph 13 and comprising the pollutants set out in that paragraph. It follows that I will not strike out the points of claim on this basis.
- 56 In support of the second limb of Delta's argument for striking out the pleadings, Delta relied upon dictionary definitions of "remedy" (*Oxford English Dictionary* and *Macquarie Dictionary*, on-line editions) that defined the term to mean "to put right", "to rectify", "to make no good" and "to restore". These definitions, according to Delta, demonstrated that the proper construction of the term "remedy" contained in s 252(1) of the Act did not extend to all legal remedies but meant, in the context of the provision when read as a whole and when read in its wider context in Pt 8.4 of the Act, an order for relief that remediates the breach of the Act. Because a declaration cannot "put right", "restore" or "make good" the polluted waters of the Coxs River, it is not relief to which s 252 is directed, and therefore, should be struck out.
- 57 In my opinion there is no warrant for such a restrictive interpretation of the term "remedy" in s 252 of the Act. Not only would it subvert the objects of the Act as expressed in s 3, it is inconsistent with the operation of

s 20(2)(c) of the *Land and Environment Court Act 1979* that includes a jurisdiction “to make declarations of right in relation to any such right, obligation or duty or the exercise of any function” set out in subparagraphs (a) and (b) of that subsection (*Corkill (No 2)* at 145). Section 20(3)(a) includes the Act as a planning or environmental law for the purpose of subsection (2).

- 58 Allied to the above argument, was the submission by Delta that common sense and “an appreciation of the ordinary processes of nature” compelled the conclusion that there was no practical remedy that could be imposed in respect of the past breaches pleaded in paragraph 13 of the points of claim.
- 59 In this regard Delta sought to rely upon an expert report of Dr Graeme Batley entitled “Fate of Contaminants in the Coxs River System” dated November 2010. Dr Batley is a chief research scientist at CSIRO Land and Water. His expertise is in the area of the chemistry and ecotoxicology of contaminants in natural water systems.
- 60 At the time, and with the acquiescence of the parties, the Court reserved its position on the tender, which was opposed by Blue Mountains on the grounds of relevance. It did so before the recent admonishment by the High Court against judges engaging in this practice (*Dasreef Pty Limited v Hawchar* [2011] HCA 21; (2011) 277 ALR 611 at [19]–[20]).
- 61 While uncommon, there is no rule preventing a party to an application for strike out or summary dismissal relying on expert evidence (see, for example, *Mycogen Plant Science Inc v Monsanto Australia Ltd* [2002] FCA 613; (2002) AIPC 91–811). Indeed r 14.28(2) of the UCPR expressly permits it. Having said this, recourse to evidence will be exceptional in such applications, the success of which typically turns on the outcome of legal, and not factual, contests.

62 The material contained in Dr Batley's report is relevant to the present application insofar as Dr Batley opines as to the likelihood of some of the deposited contaminant particulates settling to the bottom of the Coxs River and, assuming this to be the case, the available remediation options.

63 In his report Dr Batley stated that it was possible, albeit remote, for some of the particulates discharged as alleged into the Coxs River to settle and form part of the bottom sediments of the River. In Dr Batley's opinion, however, "it would be difficult to detect increases in concentrations of these contaminants in bottom sediments above background concentrations in the areas in which the contaminated particles settle." He also noted that the area across which any investigation would be required to be undertaken would be potentially very large and that:

It is worth noting that it would be difficult if not impossible to unambiguously conclude that any elevated metal concentrations found in downstream sediments were those discharged in the period between May 2007 and April 2009 compared with those from a different source.

64 But importantly for present purposes Dr Batley stated that, assuming causal identification could be achieved, that is to say, assuming a breach of the Act could be demonstrated:

In the event that it could be determined that an area of the bottom of the Coxs River had a raised level of particulate contaminants and that the contamination was the result of the discharge by Delta in the period between May 2007 and April 2009 – a possibility I regard as unlikely dredging would be a possibility to recover or remove highly contaminated sediments in specific depositional areas. For widely dispersed, mild levels of contamination, as is the most likely case based on my experience with other systems, the best option would be to allow natural remediation to occur through dilution with naturally depositing uncontaminated particulates in the system following the cessation of discharge, i.e natural burial, a process that leads to rapid recolonisation and ecosystem restoration. Other potential options would include capping contaminated sediments with inert materials. There are many options here, but our research has shown that by far the best is to use clean sediments from another location as the material.

65 Accordingly, and as I understand Dr Batley's opinion, the task of remediation is not impossible and can occur one of two ways: either by

dredging the River to recover or remove the highly contaminated sediments in specific areas of deposition (which he regarded as “unlikely”); or by allowing natural remediation to occur through dilution by naturally depositing uncontaminated particulates to bury the contaminated particulates. While Dr Batley did not expressly state this in his report, it can be inferred that to the extent that Delta is allegedly continuing to deposit pollutants in the River, this would have to cease in order to permit the natural dilution and remediation to occur. It follows that, contrary to Delta's submission, there is a practical remedy that can be imposed in respect of the past breaches, viz, the cessation of the continuing discharge of the pollutants identified in paragraph 13 of the points of claim.

66 Delta further relied on an argument of futility, namely, that a declaration of a past breach would have “absolutely no utility” in the circumstances of this case, and moreover, could not achieve the restorative justice that Blue Mountains ultimately seeks by an order pursuant to s 252 of the Act.

67 Again I disagree. This Court is replete with illustrations of decisions where declaratory relief has been granted in respect of a past breach of an environmental statute. *Meriton Apartments* is one such example. In that case, Lloyd J correctly, in my respectful opinion, stated (at [17]–[18]. Section 256(6) is the precursor to s 252 of the Act):

17 Mr Rushton relies on the decision of Bignold J in *Williams v Barrick Australia Limited* (2003) 128 LGERA 80 where his Honour exercised the Court's discretion in refusing to grant declaratory relief in relation to breaches of the *National Parks and Wildlife Act 1974* (NSW). Although no breaches had in fact occurred, Bignold J stated that since mere declaratory relief would not remedy or restrain the breach in any way, it would not be granted in any event. In that case, however, there was no ongoing breach and there was no utility in granting any relief. Conversely, in these proceedings, there are steps that could be taken by the respondent to rectify any ongoing breach of the *POEO Act*. The applicant seeks to show that past breaches of the Act have occurred and to demonstrate that, unless restrained, the respondent will continue to breach the *POEO Act*. In such circumstances, the Court could order various forms of relief to remedy or restrain the continuance of the breach.

18 Section 256(6) of the *POEO Act* states that the Court may make such orders as it thinks fit to remedy or restrain a breach. Under s 20(2) of the *Court Act* this Court can make a declaration of right in relation to a right, obligation or duty or the exercise of any such function arising from the *POEO Act*. Therefore, this Court has power to make an order declaring that a breach of the *POEO Act* has occurred or that a certain act that is proposed to be done will, if done, amount to a breach of that Act in the future. This Court has previously made declarations that the past conduct of a respondent in civil proceedings has involved a breach of an Act: see for example *Donnelly v Solomon Islands Mining NL* (2002) 121 LGERA 264 at 291; *Woolworths Limited v The Warehouse Group (Australia) Pty Limited (No 2)* [2003] NSWLEC 72 upheld in *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2003) 137 LGERA 115; *Bankstown City Council v Le* (2003) 133 LGERA 155 at 167. In *Forestry Commission of NSW v Corkill* (1991) 73 LGRA 247, the Court of Appeal recognised that this Court could also make a declaration that certain future conduct would be in breach of the relevant legislation. Therefore, a mere declaration is a remedy that the Court could impose.

68 Delta relied on the observations made by Preston CJ in *Great Lakes Council v Lani; Great Lakes Council v Lani and Lampo Pty Limited* [2007] NSWLEC 681; (2007) 158 LGERA 1 where his Honour declined to make the declarations sought by the council for reasons that Delta submitted were equally germane to this application (at [19]–[25]):

19 Whilst the Court would have jurisdiction to make declarations that the respondents have breached the planning or environmental statutes in question in this case, I have determined, as a matter of discretion, that declarations would not be appropriate in the circumstances of this case.

20 First, the making of a declaration by itself would not have any practical effect in the circumstances of this case. A declaration that a breach of a statute has occurred does not have any constitutive effect - it does not bring about any change in the rights or duties of the parties.

21 Secondly, declarations of breach of the statutes are not necessary in order for the Court to have jurisdiction to make other orders including the injunctive orders to remedy or restrain breaches of the statute. The Court can make the injunctive orders agreed to by the parties and found by the Court to be appropriate without first making declarations that the respondents have breached the statutes. The situation in

this case is to be contrasted to the regime under the *Corporations Act* 2001, considered in *ASIC v Rich* (2005) 50 ACSR 500, where the Court can only make consequential orders of a pecuniary penalty order or a disqualification order once a declaration of breach of the statute has been made under s 1317E of the *Corporations Act*.

- 22 Thirdly, a declaration of breach of a statute by itself neither remedies past breaches of the statute nor restrains any future breaches of the statute. Only the injunctive orders, agreed to by the parties and found by the Court to be appropriate to be made, will achieve the consequences of remedying the past breaches and restraining future breaches of the statutes.
- 23 Fourthly, care must be taken not to use a declaration of breach of a statute in civil enforcement proceedings as a substitute for a criminal prosecution. It is not appropriate for the Court in the exercising of its civil enforcement jurisdiction to punish wrong-doers under the guise of remedying a breach: *Liverpool City Council v Roads Traffic Authority and Interlink Roads Pty Ltd* (1991) 74 LGRA 265 at 280. A declaration of breach of a statute in civil enforcement proceedings is not to be equated with the entry of a conviction upon a finding of guilt in a criminal prosecution. The latter does have an effect on the person, including by creating a criminal record for the person, which may have external consequences for that person. A declaration of breach of a statute in civil enforcement proceedings does not have such consequences.
- 24 The Council could have brought criminal prosecutions in respect of each breach of the statutes but elected not to do so. The reasons why the Council undertook this course are perfectly understandable and related to the greater range of remedial relief available in civil enforcement proceedings compared to that available in criminal prosecutions and to the lower standard of proof in civil enforcement proceedings compared to criminal prosecutions. Nevertheless, that election to bring civil enforcement proceedings having been made, the civil enforcement proceedings should not be now used as a substitute for criminal prosecutions.
- 25 I accept that a legitimate purpose of civil enforcement proceedings is for there to be a finding by the Court and through its judgment a public pronouncement that a breach of the law has occurred by the respondents. However, this effect can be achieved by the Court making findings in the judgment of the Court, which, of course, is a public document. The Court's judgment will suffice to publicly expose and denounce on behalf of the community the unlawful behaviour in which the respondents have engaged. I have set out above in full each of the findings of the Court, including those that have been admitted in the points of

claim, together with the consequences that flow from those findings as to the breaches of each of the statutes. This public pronouncement in the judgment suffices to achieve the purpose of public exposure and denouncement of the unlawful conduct of the respondents.

69 In that case the council sought to remedy and restrain breaches of three environmental statutes arising from two instances of clearing native vegetation on a public reserve by the respondent and one instance of placing fill on a parcel of land the respondent owned without obtaining the necessary development consent to do so. At the trial the breaches were admitted and the only issue was the form of the orders the Court should make to give effect to the relief sought by the council. This relief included the making of declarations denouncing the unlawful conduct.

70 But *Lani* may be distinguished from the present application in at least one critical aspect. In *Lani* Preston CJ declined to exercise his discretion to grant the declaratory relief sought after making findings of fact based on the evidence, even if consisting of admissions, before the Court at a final hearing. Given the nature of this application, no such process has taken place. In this regard it is, in my view, premature to make any pronouncements on the utility of making the declaration sought by Blue Mountains absent any evidence having been adduced by either party.

71 As is evident from the defence filed by Delta and the correspondence attached to Ms Gotlieb's affidavit, Delta's defence is likely to be that it was permitted to discharge the particularised pollutants into the Cocks River pursuant to its licence. Thus there is likely to be a dispute concerning the proper construction of the licence. If, as Blue Mountains stated in its submissions (although there was no evidence of this before the Court), there are many environment protection licences in New South Wales which impose conditions in the form in which they appear in Delta's licence, it may be entirely appropriate upon full ventilation of the legal and factual arguments raised in the proceedings to make the declarations sought. It is simply too early to predict.

72 The result and reasoning in *Lani* must be contrasted with the result and reasoning in *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118. In *Venn* one of the two declarations sought were made by Preston CJ. Mr Venn had been accused by the council in civil enforcement proceedings of unlawfully clearing and filling his land. His Honour's reasons for granting, in part, the declaratory relief were as follows (at [279]–[283]):

- 279 First, unlike in *Great Lakes Council v Lani*, the person in breach, Mr Venn, did not admit the breach and put in issue the critical elements of the breach. He denied that his conduct involved "picking", that the subject of the picking were "plants", and that any plants were part of any endangered ecological community. As I have found, these denials were in the face of overwhelming evidence establishing each of these elements of the breach. Mr Venn's belated letter to the Court offering an undertaking not to do further work on or cause harm to or pick plants from Lot 1 was made conditional upon the Court finding that Lot 1 is part of an endangered ecological community. In the circumstances of this case, it is not sufficient for there to be merely findings in the reasons for the judgment of the Court; the ultimate findings need to be reflected in a declaration that Mr Venn's conduct constituted a breach of s 118A(2) of the Parks Act by picking plants of the endangered ecological communities of Swamp Oak Floodplain Forest and River-Flat Eucalypt Forest.
- 280 Secondly, Mr Venn's conduct was part of, but he did not complete, his planned works of clearing and filling Lot 1. Both before and at the hearing, Mr Venn has expressed his desire to continue the planned works and to continue to use and occupy Lot 1 which would continue to cause picking of plants of the endangered ecological communities. There is a threatened or apprehended breach of s 118A(2). This continual nature of the breach makes it appropriate to make a declaration: *Marrickville Council v Tanwar Enterprises Pty Ltd* at [37].
- 281 Thirdly, having regard to the denial and defiance of Mr Venn in relation to picking plants of the endangered ecological communities on Lot 1 and the broader public interest in his conduct on Lot 1, it is appropriate for the Court to mark disapproval of the conduct by means of a formal declaration. In the circumstances, it is in the public interest that a declaration of breach be made by the Court to, "publicly expose and denounce on behalf of the community the

unlawful behaviour" in which Mr Venn has engaged:
Australian Securities and Investment Commission (ASIC) v Atlantic 3 Financial (Aust) Pty Ltd [2006] QSC 132 at [52]. As Pepper J said in *Hill Top Resident Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008 (No 4)* at [20];

"the making of the declarations marks the disapproval of the Court of conduct that Parliament has proscribed. It also serves to discourage others from acting in a similar way and may, therefore, be seen to have a deterrent and educative element. The granting of the declaration may accordingly be seen as advancing the regulatory objects of the EPAA (s 5 of the EPAA and *Humane Society v Kyodo Senpaku* [2006] FCAFC 116; (2006) 154 FCR 425 at [22]-[27])."

282 Similarly, in *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17; (2001) 130 LGERA 508 at [308] Stein JA, in determining that declarations should be made that mining activities causing environmental harm were in breach of relevant statutes, said that:

"There is a demonstrable purpose in making the declarations. They serve to declare the law and underline the breaches. They have utility and draw attention to the continuing environmental harm to the aquifer".

283 The last comment is equally applicable to the regulatory objects of the Parks Act in this case.

73 Much of his Honour's reasoning will, it can reasonably be anticipated given the denials pleaded to date by Delta in its defence, have resonance in these proceedings. But again it is far too early to say this with any degree of confidence. Again it must be noted that his Honour's careful reasons were expressed only after the conclusion of a final hearing.

74 It follows, therefore, that in light of the very clear case required to strike out a pleading either in whole or in part, I decline to strike out the parts of the pleadings impugned by Delta in this application.

Orders

75 In conformity with the reasons above the application must be dismissed. And because these are proceedings brought in Class 4 of the Court's

jurisdiction, costs ought, in the absence of some other order proposed by either party, to follow the event.

76 The application having been dismissed, it is also appropriate that consequential orders be made to progress the matter to a final hearing.

77 The orders of the Court are therefore:

- (1) the notice of motion is dismissed;
- (2) Delta is to pay Blue Mountains' costs of the motion, unless within seven days some alternate costs order is sought;
- (3) Delta is to file and serve any amended points of defence by 2 September 2011;
- (4) the matter is stood over to 2 September 2011 for further directions before the List Judge;
- (5) the parties are granted liberty to restore on 48 hours notice; and
- (6) the exhibits are to be returned.

I CERTIFY THAT THIS AND
THE 25 PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE RACHEL PEPPER

Date 26/8/11
Associate
