



Land and Environment Court

New South Wales

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Case Name: Whitehouse Developments Pty Limited v The Council of the City of Sydney

Medium Neutral Citation: [2017] NSWLEC 1512

Hearing Date(s): 12 July 2017

Date of Orders: 12 July 2017

Decision Date: 12 July 2017

Jurisdiction: Class 1

Before: Dixon C

Decision: Joinder application dismissed

Catchwords: JOINDER APPLICATION – Notice of Motion - Application by Strata Plan 70267 of the ‘Yellow House’ to be joined to the proceedings

Legislation Cited: Land and Environment Court Act 1979, ss 38, 39A

Cases Cited: Morrison Design Partnership Pty Ltd v North Sydney (2007) 159 LGERA 361; [2007] NSWLEC 802

Texts Cited: Nil

Category: Principal judgment

Parties: Strata Plan 70267 of the Yellow House (Applicant on the notice of motion for joinder)  
Whitehouse Developments Pty Limited (Applicant)  
The Council of the City of Sydney (Respondent)

Representation: Counsel:  
Mr P Tomasetti SC (Applicant on the notice of motion for joinder)  
Ms S Duggan SC (Applicant)  
Mr Singh, solicitor (Respondent)

Solicitors:

Dibbs Barker (Applicant on the notice of motion for joinder)

Mills Oakley (Applicant)

Council of the City of Sydney (Respondent)

File Number(s): 2016/00383441

Publication Restriction: No

## **EX TEMPORE JUDGMENT**

- 1 COMMISSIONER: This appeal concerns the redevelopment of a heritage terrace known as the White House situated at 55 Macleay Street, Potts Point. The site adjoins another heritage terrace known as the Yellow House. The Strata Plan 70267 for the Yellow House ('Yellow House') has filed a notice of motion seeking an order that it be joined as a party to the proceedings pursuant to s 39A of the *Land and Environment Court Act 1979* ('the Court Act'), or, in the alternative, under s 38 of the Court Act.
- 2 Mr Tomasetti SC appears for the Yellow House the applicant of the notice of motion. Ms Duggan SC appears for the appellant in the class 1 appeal and opposes the joinder application made by the Yellow House. Mr Singh, the in-house lawyer for the Sydney City Council, appears for the respondent in the appeal. He informs me that the Council does not consent or oppose the Yellow House's application for joinder.
- 3 The first time that the Court (or the parties) became aware of this application was at the site view yesterday morning when Mr Tomasetti told me that he represented the Yellow House and foreshadowed instructions later that morning to make an application for his client to be joined as a party to the proceedings. Pending such instructions he requested that I allow him to speak on behalf of the Yellow House at the view and explain, by reference to the site, the particular concerns of his client. The parties agreed to this course and it was further agreed that any application for joinder by the Yellow House would be dealt with in the Court house immediately following the view.

- 4 The site view proceeded and Mr Tomasetti invited the Court to the laneway at the rear of the site to inspect from several locations the Yellow House and the decorative screen artwork attached to the rear balconies. The impact of the proposal on the visibility of the decorative screens from the public domain was a particular concern not only for Mr Tomasetti's client but a number of other objectors to the application. The development of the design of the decorative screens was explained to the Court in some detail by Mr Bartlett the owner of the commercial art space within the Yellow House. The Court also inspected at that time the interior of the Yellow House and received oral evidence from several other objectors to the proposal. At the conclusion of the view at about 11.30am, I directed that any notice of motion for joinder relied upon by the Yellow House should be served on the parties before the hearing resumed in the Courthouse at 12:30pm.
- 5 As it happened, the notice of motion was filed and served as directed together with a supporting affidavit prepared by a solicitor from the Yellow House's legal firm, Ms Katherine Aileen Blunden. Before the motion was heard, and in order to obtain proper instructions, Ms Duggan requested certain particulars of the matters referred to in paragraph 9 of Ms Blunden's affidavit. However, that information was not forthcoming so at the resumed hearing the appellant opposed the application.
- 6 At the hearing of the motion Mr Tomasetti explained to me that he had only recently been briefed in the matter - the previous Friday and therefore had only conferenced with his client for the first time on the Monday evening before the hearing. He indicated that his client wanted to call oral evidence from two expert witnesses: Mr Graham Brooks, a heritage consultant, and Mr Cirillo, a town planner. These witnesses apparently, had earlier prepared written objections on behalf of the Yellow House which had been lodged with the Council in respect of the original DA and the amended proposal. Their submissions included two letters from the Yellow House's lawyers, Dibbs Barker dated 5 September 2016 and 1 June 2017 which raised concerns about access for the Yellow House over the right of way located at the rear of the White House and some other heritage/amenity impacts said to be generated by the original DA. It was suggested that without further oral evidence from these

witnesses the Yellow House's concerns would not be properly agitated before the Court.

- 7 In response, Mr Singh produced two emails to the Council from the Yellow House's lawyers, sent after notice of the Council decision to support an approval of the amended application. The emails stated that the Yellow House wanted to proffer some alternate conditions of consent and requested access to the amended plans and the Environmental Impact Statement ('EIS'). I am told that both the amended plans and the EIS were provided to the Yellow House lawyers.
- 8 It seems that it was only after conference with Mr Tomasetti at 6.30pm on Monday evening, 10 July 2017, that the Yellow House (no doubt on legal advice) changed its position. A further email to the Council from Ms Murray, the partner representing the Yellow House, communicated the possibility of an application for joinder at the hearing the next morning although at that time she stated that she had no firm instructions in that regard.
- 9 That said, at about 12:30pm on 11 July 2017 Mr Tomasetti asked, through me, that he be given access to further documents from the Court file including the statement of facts and contentions and the Council file. As the luncheon adjournment was approaching I facilitated such access to the requested material over the luncheon break.
- 10 At 2:00pm, or thereabouts, the notice of motion hearing resumed and Mr Tomasetti informed me that he had not had sufficient time to digest the documentation, including the council's bundle of some hundreds of pages and the parties' experts' joint reports over the lunchtime, and also eat his lunch. I asked him how long he needed to consider that material and obtain proper instructions and it was agreed that I would adjourn the notice of motion until 9:30am this morning to provide further time to Mr Tomasetti and his client to prepare its application with the further information to hand.
- 11 Ms Duggan, understandably, objected to the delay in bringing the application on the evidence at that time. She submitted that the Yellow House lawyers had not acted quickly enough and in her view her client was prejudiced because it had lost a day of hearing. Moreover Mr Tomasetti's client, despite

her request, declined to provide any undertaking as to costs and she was concerned that her client's case would not be completed in the allocated time remaining. Ms Duggan's clients' response in my opinion was quite reasonable. I therefore indicated to the parties that I would be available to continue the hearing on Thursday, if necessary, and if that was convenient to the appellant and the Council.

- 12 I did that because I, too, understood that half a day had been lost, in terms of hearing time, because of the late joinder application and the need for the adjournment at 3:00pm yesterday to allow Mr Tomasetti to consider further material and obtain instructions in respect of his client's application. It was plain to me that the Court could not finish the matter in the allocated hearing time. However, I also made it clear to Mr Tomassiti and the Yellow House that when the matter resumed today at 9:30am that I would hear and determine the application forthwith.
- 13 This morning I have been provided with some additional evidence that the Yellow House relies upon in support of its application for joinder. The additional evidence includes the papers marked as exhibits CC, DD, EE, FF. Generally speaking, Mr Tomasetti's client is concerned about minor discrepancies in the plans, which I am assured by the applicant will be corrected, which have not been picked up by the Council's experts. For example, the extent of the demolition of the heritage chimney and the location of the garbage area; the exhaust fans from the kitchen and the air conditioning units in the right of way. It also raises comment on the draft conditions proposed by the Council. Mr Tomasetti confirmed that the Yellow House would like its experts to address the Court about these matters.
- 14 Not surprisingly, Ms Duggan objected to the need for this and indicated that the Yellow House should not be given opportunity to call additional experts evidence about these matters. Her client would allow these witnesses to be called as lay witnesses through the Council and on that basis there was no need for the Yellow house to be joined as a party.
- 15 Ms Duggan invited me to carefully read the Statements of Facts and Contentions and consider the submissions from the Yellow House within the

Council's bundle, including the evidence of Mr Brooks and Mr Cirillo to appreciate that the Yellow House does not need to be a party as its concerns are well ventilated in the evidence before the Court.

16 To that end, I have also considered the parties' oral submissions and the material provided to me in support of the motion this morning, and I am not satisfied that the orders sought in the notice of motion, either under ss 39A or 38 of the Court Act, should be made having regard to the evidence and the provisions of the Act and the particular legal principles that should be applied.

17 The legal principles are clear. They were stated by Preston CJ in *Morrison Design Partnership Pty Ltd v North Sydney* (2007) 159 LGERA 361; [2007] NSWLEC 802 ('*Morrison Design*'). His Honour stated at [42]:

"42. I note at the outset that s 39A is facultative in the sense of enabling the Court to join a person to proceedings under the *Environmental Planning and Assessment Act* of the types listed in s 39A of the *Land and Environment Court Act* who would not otherwise have a right to be a party to such proceedings. Under the *Environmental Planning and Assessment Act*, persons who object to development proposal in a development application or to a modification of development consent, have no right to be joined as a party to proceedings unless the development is classified as designated development. Objectors to development applications for designated development do have a right of appeal under s 98(1) of the *Environmental Planning and Assessment Act* and have a right to be joined to an appeal in respect of such development by the applicant for development consent under s 97(4)."

18 While I accept that the provisions in s 39A are facultative the Court Act makes it plain that there can be no expectation for joinder as a matter of right as a contradictor. Chief Justice Preston put it this way in *Morrison Design* at [43]:

"...the legislature has drawn a distinction between the two types of development, designated and other development, and the rights of public participation, including the right to be a party to an appeal to the Court for the different types of development. This needs to be kept in mind when considering exercising the power under s 39A. The power under s 39A is not intended to be a plenary power to allow, in each and every circumstance, objectors to non-designated development to become a party to appeals under ss 96, 96AA, 96A and 97..."

19 Those principles must be applied in my consideration of the two limbs of s 39A of the Court Act. The section states:

**"Section 39A Joinder of parties in certain appeals**

On an appeal under s 96(6), 96(AA)(3), 96A(5), 97 and 98 of the *Environmental Planning and Assessment Act 1979*, the Court may, at any

time, on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion:

(a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or

(b) that:

(i) it is in the interests of justice, or

(ii) it is in the public interest,

that the person be joined as a party to the appeal."

- 20 The issues in the appeal have been identified in the Statement of Facts and Contentions. Importantly, they include the matters raised by the objectors including those matters raised by Yellow House in the oral and written evidence, and I am not satisfied that any relevant issue is not sufficiently before the Court, nor am I satisfied that it is in the public interest or in the interest of justice to join the Yellow House in the present circumstances under s 39A or a limited basis under s 38 as a '*Double Bay Marina*' type application, as it will unnecessarily extend the hearing and the costs of the litigation.
- 21 There is simply no satisfactory basis for any separate representation of the strata plan on the facts before me, as I understand them, and based on the evidence presented to this Court. As I have said, the Court fully understands the objections and the concerns of the objectors of the Yellow House and the strata plan from the documentation before the Court and will have opportunity to hear from Mr Brooks and Mr Cirillo in respect of their submissions filed, and any other matter that the Court wishes to raise, having heard the objectors at the view for some period, some one and a half hours to my recollection, in respect of their particular concerns.
- 22 Accordingly, I decline to make the orders sought in respect of the joinder application, prayers 1 and 2, and I dismiss the motion.

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