

Our Ref: AJS:NRS:390010
Contact: Adam Seton
Contact Tel: 4626 5077
Contact Email: aseton@marsdens.net.au

ABN 59 874 202 316

Your Ref: Jeff Smith

The General Manager
Randwick City Council
DX 4121
MAROUBRA JUNCTION

4 May 2017

All correspondence to
PO Box 291
Campbelltown NSW 2560
DX 5107 Campbelltown

www.marsdens.net.au
email@marsdens.net.au

Dear General Manager,

Re: Advice - Legal implications of Court of Appeal decision in Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government [2017] NSWCA 54

We refer to the emails received from Council's Director, Governance and Financial Services dated 26 April 2017 and 1 May 2017 seeking advice on various questions relating to the decision of the NSW Court of Appeal in *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54 (the "Ku-ring-gai case").

Our advice on the questions raised in the emails is provided below.

ADVICE

1. Does the Court of Appeal decision in the Ku-ring-gai case provide a basis for Randwick City Council to challenge the merger proposal with Woollahra and Waverley council?

As discussed in our earlier advice dated 21 April 2017, whilst there were some common elements, the grounds of appeal successfully raised in the Ku-ring-gai case were different to the grounds raised in the Woollahra case.

However, it seems to us that there are at least two reasons why Randwick City Council (RCC) is likely to be prevented from pursuing separate proceedings relating to the merger proposal on grounds similar to those successfully argued in the argued in the Ku-ring-gai case.

The first reason is that it is reasonably arguable that the proceedings are barred by an issue estoppel or an Anshun estoppel. A judicial determination creates an issue estoppel if it decides an issue of fact or law or mixed fact and law in a cause of action

Partners
J H Marsden OAM
J B Adam
A J Seton
D R Baird
P J Crittenden
T C Reeve
G P Butterfield
J Bonura
E M White
N M Youssef
J R Thornton
E Macfarlane
A L Johnson
D Mosca
R Lachman
B Wong
Consultants
K J Searle
J T Henshaw
Senior Associates
P D Hudson
T M Danjoux
N M Arias-Alvarez
S L Ramsden
K A Wolthers
Associates
D A Vardy
J A McCulllan
J D Alim
K A Buttriss
D G Friend
K L Ennever
W D Thomas
A N Deo
A M Mokhtar
B P McGrath
K A McLellan
B M Balasubramanian
C R Walsh

Campbelltown
T: 02 4626 5077
F: 02 4626 4826

Camden
T: 02 4655 7121
F: 02 4626 4826

Sydney
T: 02 9233 1133
F: 02 4626 4826

Liverpool
T: 02 9601 5666
F: 02 4626 4826

Oran Park
T: 02 4601 1811
F: 02 4626 4826

24 Hour Contact
M: 0416 184 412

Accredited Specialist Advocacy
Accredited Specialist Family Law
Accredited Specialist Local Govt. & Planning
Accredited Specialist Personal Injury
Accredited Specialist Property Law
Accredited Specialist Wills & Estates Law
Accredited Specialist Business Law
Accredited Specialist Commercial Litigation
Accredited Specialist Criminal Law



Liability is limited by a scheme approved under Professional Standards Legislation



Legal Best Practice
LAW 9000
SAI GLOBAL

as an essential step in its reasoning, and consequently the contrary cannot be asserted in a proceeding between the same parties. Issue estoppel extends to all matters that were fundamental to the earlier judicial determination, whether or not those matters were contested in the earlier proceeding. Consequently, an issue estoppel may arise from an admission or concession made by a party in an earlier proceeding.

The principle of issue estoppel also extends to judicial review proceedings (see *Taylor v Ansett Transport Industries Ltd* (1987) 18 FCR 342). An issue estoppel operates between parties who were in controversy in the earlier proceeding (and their privies). However, it is relevant to note that if an issue estoppel exists between two parties, then it is not defeated by the fact that another person was also a party to the earlier proceeding (and is not a party to the later proceeding), nor by the fact that another person is also a party to the later proceeding (but was not a party to the earlier proceeding).

Accordingly, it would seem that the delegate, the New South Wales Department of Premier and Cabinet and the Minister for Local Government who were parties in the Woollahra case, could rely on issue estoppel in their favour as a basis for asserting that it is not open to RCC in separate judicial review proceedings to raise matters determined against Woollahra Council in separate proceedings relating to the same merger proposal.

In addition to the principles relating to issue estoppel it may be reasonably argued that a challenge by RCC to set aside the examination and report of the delegate and the review of the Boundaries Commission is barred by Anshun estoppel.

Anshun estoppel involves an extension of the doctrine of *res judicata*. It operates not only in respect of points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment in the earlier proceeding, but in respect of every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time (see *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45). In other words, there will be an estoppel if the matter relied upon in the later proceeding was so relevant to the subject matter of the earlier proceeding that it would have been unreasonable not to rely on it. An Anshun estoppel also arises where an omission to plead a claim or defence would contribute to the existence of conflicting judgments.

The second reason why the decision why RCC is likely to be prevented from pursuing separate proceedings relating to the merger proposal on grounds similar to those successfully argued in the Ku-ring-gai case is the delay in commencing the proceedings. In that regard it is relevant to note that Part 59 of the Uniform Civil Procedure Rules 2005 ("UCPR") applies to the following proceedings for judicial review:

“(a) proceedings under section 65 and 69 of the Supreme Court Act 1970 and other proceedings in the supervisory jurisdiction of the Supreme Court, and

(b) proceedings for or in the nature of judicial review in the Class 4 or Class 8 jurisdiction of the Land and Environment Court.”

Rule 59.10 of the UCPR provides:

“59.10 Time for commencing proceedings

*(1) Proceedings for judicial review of a decision must be commenced within **3 months** of the date of the decision.*

(2) The court may, at any time, extend the time for commencing proceedings fixed by subrule (1).

(3) In considering whether to extend time under subrule (2), the court should take account of such factors as are relevant in the circumstances of the particular case, including the following:

(a) any particular interest of the plaintiff in challenging the decision,

(b) possible prejudice to other persons caused by the passage of time, if the relief were to be granted, including but not limited to prejudice to parties to the proceedings,

(c) the time at which the plaintiff became or, by exercising reasonable diligence, should have become aware of the decision,

(d) any relevant public interest.

(4) This rule does not apply to proceedings in which there is a statutory limitation period for commencing the proceedings.

*(5) This rule does not apply to any proceedings in which the setting aside of a decision is not required.” (emphasis in **bold** is added)*

There are questions about whether the examination and report of the delegate or the review by the Boundaries Commission constitute “decisions” as referred to in Rule 59.10. In our view, the recommendation of the delegate of the Departmental Chief Executive contained in the report prepared by the delegate is likely to be considered to constitute a “decision”. The report of the delegate was provided to the Boundaries Commission in March 2016.

It seems to us that it would be unlikely that the Court would extend the time for commencing proceedings under Part 59 of the UCPR. In that regard, irrespective of the estoppel arguments that would arguably bar the proceedings, it is likely that the Court would see it as unreasonable for RCC to now commence separate proceedings in respect of the same subject matter as the Woollahra case in circumstances where RCC could have joined in the Woollahra case more than 12 months ago and brought forward any grounds which properly belonged to the subject of litigation.

The fact that a different decision has been handed down in the Ku-ring-gai case to the decision in the Woollahra case would not in our view be a sufficient reason, in the circumstances, for the Court to extend the time for commencing proceedings.

2. At [100] Justice Basten, of the majority, held:

“In the present case, a critical element in the reasoning in favour of the proposal was the financial advantage which was expected to accrue from the amalgamation of Ku-ring-gai with part of Hornsby Shire. The document containing the proposal indicated that the calculations were undertaken for the government by KPMG. The footnote to the summary of the financial advantages identified the source which, it is accepted by the Minister, was a document not provided to the delegate or publicly released. The Council was right to assert that the delegate could not properly carry out his function of examination without having access to that material. Release of the material was also necessary for public participation in the public inquiry to be meaningful.”

The calculations undertaken for the government by KPMG with respect to the proposal to amalgamate Randwick, Waverley and Woollahra Council's were also not provided to Dr Robert Lang, the delegate that considered this proposal, and nor were they publicly released.

In light of the decision of the Court of Appeal in the Ku-ring-gai case are there avenues of redress with respect to the proposal to amalgamate it with Waverley and Woollahra Council's?

For the reasons set out in answer to question 1 we do not consider that RCC would be able to commence and maintain separate proceedings relating to the merger proposal on grounds similar to those successfully argued in the Ku-ring-gai case (including the grounds dealt with in the comments made by Justice Basten) because it is likely that such proceedings would be barred by issue or Anshun estoppel and/or that an extension of time to commence such proceedings under Part 59 of the UCPR would not be allowed.

It is also relevant to note that the circumstances surrounding the delegate's examination of the financial advantages and disadvantages in the proposal for the amalgamation of the Randwick, Waverley and Woollahra local government areas were different from those in the Ku-ring-gai case.

In the Woollahra, Waverley and Randwick local government amalgamation it is known that the delegate relied on an independent report by chartered accountants SGS Economics and Planning, a report that had been undertaken on behalf of Randwick and Waverley Councils that was based upon assumptions and calculations that had been independently assured by the external auditors of all three councils. In the Ku-ring-gai decision, the delegate did not consider any external material aside from the KPMG material.

It is therefore arguable that an action brought on this ground would fail as it may be accepted that the delegate did properly examine the proposal under s 263(3)(a) of the Local Government Act 1993 ("LG Act") given he was informed by the SGS report, a document apparently assured by the external auditors of Randwick, Woollahra and Waverley Councils.

3. Is there utility in commencing proceedings (i.e. can the Government take action to overcome any identified errors in the process)?

For the reasons set out in answer to question 1 we do not consider that RCC would be able to commence and maintain separate proceedings relating to the merger proposal on grounds similar to those successfully argued in the Ku-ring-gai case because it is likely that such proceedings would be barred by issue or Anshun estoppel and/or that an extension of time to commence such proceedings under Part 59 of the UCPR would not be allowed.

However, if contrary to our view, RCC was able to commence and maintain proceedings and was successful in having the Minister agree not to implement the merger proposal before the final determination of those proceedings, it is possible that there could be utility in the proceedings. In that regard, the comments of Justen Basten at paragraph 62 of the Ku-ring-gai decision are relevant:

"First, it should be said that this is not a true case of futility. It is not like the case where a person challenges the refusal of his or her application for an appointment to office, in circumstances where another person has been appointed and cannot be removed to make way for the thwarted applicant. [50] The merger proposal has not yet been acted upon, nor, subject to one qualification, has any factual circumstance changed which would prevent the proposal being re-examined and acted upon, if the Minister thought appropriate."

However, the utility in commencing proceedings would largely be dependent on unknown variables. If proceedings were able to be maintained by RCC and were successful it would be open to the Minister

to refer the unchanged proposal for further examination or to refer a new proposal to the Departmental Chief Executive. It is not known whether the Minister would elect to refer the unchanged proposal for further examination or, if he did, that the process would necessarily produce the same recommendation.

4. Are there any time limitations in which Randwick City Council can launch an action against the NSW Government, The Minister, The Delegate or any other relevant body or representative?

See answer to question 1.

5. As the NSW State Government has not challenged the Court of Appeal decision in the Ku-ring-gai matter and in particular the Court's factual finding that a failure to provide the delegate with the full KPMG amounts to a denial of procedural fairness, can the NSW state Government legitimately challenge an action based on a denial of procedural fairness where the delegate did not receive the full KPMG report?

The decision in the Ku-ring-gai case does not prohibit the NSW State Government from defending the action by Woollahra (or an action brought by RCC) based on a denial of procedural fairness. In that regard, as noted previously, the circumstances surrounding the proposal to amalgamate Randwick, Waverley and Woollahra local government areas differed from the Ku-ring-gai case.

In the Woollahra case the Council argued before the Court of Appeal that there was a denial of procedural fairness by the delegate but confined its challenge under this ground to the SGS report in contending that the primary judge erred in failing to find, as a matter of procedural fairness, that it was entitled "*to be notified of key material ... upon which the Delegate proposed to rely for the purposes of recommending the proposed merger*".

In our letter of advice dated 21 April 2017 we highlighted a number of distinctions between the Ku-ring-gai case and the Woollahra case. One of the significant distinctions is that in the proposal to amalgamate Randwick, Waverley and Woollahra local government areas the delegate was in possession of a financial report on the financial advantages and disadvantages prepared by chartered accountants SGS Economics and Planning. This report had been undertaken on behalf of Randwick and Waverley Councils and was based upon assumptions and calculations that had been independently assured by the external auditors of all three councils.

There was no such report relied on by the delegate in the Ku-ring-gai case.

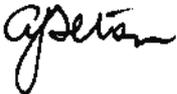
Accordingly, given that Woollahra Council did not raise in the Court of Appeal that there was a denial of procedural fairness due to the KPMG report not being made available it is reasonably arguable that estoppel issues (as discussed above) would bar proceedings where that point is sought to be agitated or relitigated in respect of the same subject matter.

6. Is the matter (in 5 above) Res Judicata or subject to issue estoppel?

See answers to question 1 and 5.

We trust the above advice is of assistance. If you have any questions about the advice or require further advice please do not hesitate to contact Adam Seton at our Campbelltown Office.

Yours faithfully
MARSDENS LAW GROUP



A.J. SETON
Partner
Accredited Specialist Local Govt. & Planning