Land and Environment Court of New South Wales

CITATION :	**Sharples v Minister for Local Government [2008] NSWLEC 308**
PARTIES :	APPLICANT: Terry Patrick Sharples FIRST RESPONDENT Minister for Local Government SECOND RESPONDENT: NSW Department of Local Government THIRD RESPONDENT: Tweed Shire Council
FILE NUMBER(S) :	40959 of 2007
CORAM:	Biscoe J
KEY ISSUES:	Practice and Procedure :- application for leave to amend points of claim - principles - application made on fifth day of hearing when evidence virtually closed and after relevant witnesses had been cross-examined - prejudice to respondents.
LEGISLATION CITED:	Civil Procedure Act 2005, ss 56, 57, 58, 59, 64 Local Government Act 1993, s 508A
CASES CITED:	Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd [2004] NSWSC 1219 State of New South Wales v Mulcahy [2006] NSWCA 303 State of Queensland v J L Holdings Pty Ltd [1997] HCA 1, (1997) 189 CLR 146
DATES OF HEARING:	7 November 2008
EX TEMPORE JUDGMENT DATE :	7 November 2008
LEGAL REPRESENTATIVES:	APPLICANT: Mr T Robertson SC SOLICITORS Woolf Associates FIRST AND SECOND RESPONDENTS:

Sergeant. The marketing survey expert witnesses, Mr Elliott for the applicant and Mr Sergeant for the council, gave concurrent evidence in relation to the surveys and were cross-examined earlier this week before the application to amend was made. If the amendments were to be allowed, the respondents would have to be afforded the opportunity to call further evidence and have Mr Sergeant and Mr Elliott recalled for further questioning. To allow the amendments would disrupt and extend the further hearing of the case and adversely affect its timely disposal. I also consider that there has been insufficient explanation for the delay in moving for leave to amend until the fifth day of the hearing.

18 For these reasons, I am not persuaded that I should accede to the motion for leave to amend which, accordingly, I dismiss.

Reported Decision : 166 LGERA 302
[2010] NSWCA 36

Land and Environment Court
of New South Wales

CITATION : **Sharples v Minister for Local Government [2008] NSWLEC 328**

PARTIES :

APPLICANT:
Terry Patrick Sharples

FIRST RESPONDENT:
Minister for Local Government

SECOND RESPONDENT:
Department of Local Government

THIRD RESPONDENT:
Tweed Shire Council

FILE NUMBER(S) : 40959 of 2007

CORAM: Biscoe J

KEY ISSUES:

Judicial Review :- capacity of misleading representation to vitiate an administrative decision - determinations by Minister to increase council's general income under s 508A Local Government Act 1993 - under s 508A(3) determination may be made only on application of council made in accordance with any applicable guidelines issued by Director-General - applicable guidelines specified minimum requirements for applications including evidence of community support for proposal and how community was consulted - whether council made a material misrepresentation to the community as to the effect of proposed rate increase - if so, whether application was not in accordance with this requirement - if so, whether the determinations were invalid - whether council made a misleading representation to Minister concerning extent of community support in responses to surveys - if so, whether Minister's determinations were thereby invalid.

Costs: - whether appropriate to make no order for costs against unsuccessful applicant if the Court is satisfied that the proceedings have been brought in the public interest.

LEGISLATION CITED:

Environmental Planning and Assessment Act 1979, ss 45, 66(1), 77(3)(d), 78A(8), 117
Land and Environment Court Rules 2007, rr 3.7, 4.2
Local Government Act 1993, ss 7(c), 23A, 405, 505(a), 506, 508(2), 508A, 509(1), 512, 548(3)(a), 674, 676(1)

CASES CITED:

Al-Mehdawi v Secretary of State for the Home Department [1990] 1 AC 876
Anderson v Director General of the Department of Environment and Climate Change [2008] NSWCA 337
Anderson v Minister for Infrastructure Planning and Natural Resources [2006] NSWLEC 725, (2006) 151 LGERA 229
Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2) [2008] NSWLEC 272
Australian Broadcasting Corporation v Redmore Pty Ltd [1989] HCA 15, (1989) 166 CLR 454
Azriel v NSW Land and Housing Corporation [2006] NSWCA 372
Barrett v Minister for Immigration, Local Government and Ethnic Affairs [1989] FCA 269, (1989) 18 ALD 129
Belmorgan Property Development Pty Ltd v GPT Re Ltd [2007] NSWCA 171, (2007) 153 LGERA 450
Botany Bay Council v Remath Investments No 6 Pty Ltd [2000] NSWCA 364, (2000) 50 NSWLR 312
Bruce v Cole (1998) 45 NSWLR 163
Bushell v Secretary of State for the Environment [1981] AC 75
Castle Constructions Pty Ltd v North Sydney Council [2008] NSWLEC 137
Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd [1994] HCA 61, (1994) 182 CLR 51
Cranky Rock Road Action Group Inc v Cowra Shire Council [2006] NSWCA 339, (2006) 150 LGERA 81
El Cheikh v Hurstville City Council [2002] NSWCA 173, (2002) 121 LGERA 293
Foster v The Minister for Customs and Justice (Senator Vanstone) [1999] FCA 1447
Gales Holdings Pty Ltd v Minister for Infrastructure and Planning [2006] NSWCA 388, (2006) 69 NSWLR 156
GPT Re Ltd v Wollongong City Council [2006] NSWLEC 303, (2006) 151 LGERA 116
Hatton v Beaumont [1977] 2 NSWLR 211
Helman v Byron Shire Council (1995) 87 LGERA 349
Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291
Ku-ring-gai Council v Minister for Planning (No 2) [2008] NSWLEC 276
Leichhardt Municipal Council v Minister for Planning (1992) 78 LGERA 306
Lezam Pty Ltd v Seabridge Australia Pty Ltd [1992] FCA 206, (1992) 35 FCR 535
Manly Council v Byrne [2004] NSWCA 123
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Citizenship v SZLIX [2008] FCAFC 171, (2008) 245 ALR 501
Minister for Immigration and Multicultural Affairs v Anthonypillai [2001] FCA 274, (2001) 106 FCR 426

Newcastle City Council v Caverstock Group Pty Ltd [2008] NSWCA 249
Notaras v Waverley Council [2007] NSWCA 333, (2007) 161 LGERA 230
Parramatta City Council v Hale (1982) 47 LGRA 319
Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, (1998) 194 CLR 355

Smith v Wyong Shire Council [2003] NSWCA 322, (2003) 132 LGERA 148
SZFDE v Minister for Immigration and Citizenship [2007] HCA 35, (2007) 232 CLR 189
Timbarra Protection Coalition Inc v Ross Mining NL [1999] NSWCA 8, (1999) 46 NSWLR 55
Videto v Minister for Immigration and Ethnic Affairs (1985) 8 FCR 167
Walker v Minister for Planning (No 2) [2008] NSWCA 334
Weal v Bathurst City Council [2000] NSWCA 88, (2001) 111 LGERA 181
Woods v Bate (1987) 7 NSWLR 560
Zhang v Canterbury City Council [2001] NSWCA 167, (2001) 51 NSWLR 589

DATES OF HEARING: 3-7 November, 2-3 December 2008

DATE OF JUDGMENT: 30 December 2008

LEGAL REPRESENTATIVES:

APPLICANT:
Mr T Robertson SC and Mr J Lazarus
SOLICITORS:
Woolf Associates

FIRST AND SECOND RESPONDENTS:
Mr M Izzo
SOLICITORS:
Crown Solicitor's Office (NSW)

THIRD RESPONDENT
Mr C Leggat SC and Mr M Seymour
SOLICITORS:
Marsdens Law Group

JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

BISCOE J

30 December 2008

40959 of 2007

TERRY PATRICK SHARPLES v MINISTER FOR LOCAL GOVERNMENT AND ORS

JUDGMENT

1 **HIS HONOUR**: This case is mainly concerned with the capacity of a misleading representation to vitiate an administrative decision and with one requirement of t of the *Local Government Act* 1993. On that basis, the applicant challenges the validity of two determinations made by the Minister for Local Government in 2006 an general income under s 508A.

2 The applicant, Mr Terry Sharples, is a ratepayer in Tweed Shire. He pleads that he brings the proceedings pursuant to s 674 of the *Local Government Act*, which er Land and Environment Court for an order to remedy or restrain a breach of that Act. The first respondent is the Minister for Local Government. The second respond third respondent is Tweed Shire Council

3 As for the first determination challenged by the applicant, on 14 June 2006 the council applied to the Minister under s 508A for increases to its general income for **Application**). On 10 July 2006, the Minister determined the 2006 Application, pursuant to s 508A, by increasing the council's general income for 2006/2007 to 7.6 p 2007/2008 to 8 percent above that for the preceding year (**2006 Determination**). In the same instrument, the Minister also determined the minimum amount of ordin

4 As for the second determination challenged by applicant, on 20 July 2007 the council applied to the Minister under s 508A for increases to its general income for f **Application**). On 15 August 2007, the Minister determined the 2007 Application, pursuant to s 508A, by increasing the council's general income for those five years for the preceding year; 2009/2010 – 9.5 percent above that for the preceding year; 2010/2011 – 8.5 percent above that for the preceding year; 2011/2012 – 7.5 percer 7.5 percent above that for the preceding year (**2007 Determination**). In the same instrument, the Minister also determined the minimum amount of ordinary rates for

5 The council has levied and collected rates and charges for the 2006/2007 and 2007/2008 years in accordance with the 2006 Determination. The council has levied r for the 2008/2009 year in accordance with the 2007 Determination.

STATUTORY SCHEME

6 Councils in New South Wales are subject to what is popularly known as rate-pegging. The general income from rates and charges for a specified year cannot be va Minister for Local Government under s 506 of the *Local Government Act* (with the exceptions noted in s 505(a)). The Minister's practice has been to peg this variati could persuade the Minister to support a special variation for between two and seven years. The machinery for doing so appears in s 508A, which relevantly provide:

> "**508A Special variation over a period of years**
>
> (1) The Minister may, by instrument in writing given to a council, determine that the council's general income, or the amount of an annual c provided by the council, or both, for a specified period consisting of two or more years, may be varied by a specified percentage over the wl
> (2) The specified period must not exceed 7 years, but this subsection does not prevent a further determination being made that takes effect a
> (3) *The determination may be made only on the application of the council made in accordance with any applicable guidelines issued by the*
> ...
>
> (9) The determination may be varied or revoked only:
> (a) on the application of the council made in accordance with any applicable guidelines issued by the Director-General under th
> (b) on the Minister's own initiative if the Minister is satisfied that the council has contravened any conditions of the determinat Director-General under this Act."
>
> (emphasis added)

not personal, but were among the departmental papers. The material in the possession of the Department must clearly be treated as being in

119 Mason J, with whom Dawson J relevantly agreed at 71, held at 45:

> "It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one se application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring implication that the decision is to be made on the basis of the most current material available to the decision-maker."

120 In *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* [1989] FCA 269, (1989) 18 ALD 129 at 133 the Full Federal Court quoted from the have quoted above, and applied them to hold that a departmental submission which gave a wrong impression as to a person's immigration history might vitiate the M

121 The reasoning in *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 was similar, although it was decided before *Peko-Wallsend*. There, dep believe, incorrectly, that the fact that he had a son in Australia was not relevant to his application to remain in the country. Toohey J held at 179:

> "If an officer of the Department withholds information from the Minister or his delegate, it is no answer to a complaint that the decision-ma consideration to say that the matter was not before him. That information was constructively before him. And, in my view, if an officer of th discourages a person from giving information that is relevant to the decision to be made, it is no answer to a complaint in terms of s 5(2)(e) matter before him. It was nevertheless a relevant consideration. Clearly much will depend upon the circumstances of each particular case.
>
> Applying those principles to the present application, relevant information that officers of the Department failed to forward to the delegate ar before them had they not led Mr Videto to believe that the information was not relevant may be urged in support of the contention that the M considerations."

122 *Foster v Minister for Customs and Justice (Senator Vanstone)* [1999] FCA 1447 is no different. The case concerned allegedly misleading information supplied b with a decision to surrender a person for extradition. Kiefel J at [62] referred to *Peko-Wallsend, Barrett* and *Videto*. The case is not authority for the proposition that whose interests are affected by the decision may vitiate the decision.

123 *Gales* (above at [77]) concerned an allegedly misleading statement made to the public which had the effect that s 66(1)(b) of the *Environmental Planning and A* It was not concerned with whether a decision-maker had made a decision on the basis of misleading information supplied to the decision-maker.

124 The applicant submits that for the purposes of deciding the effect of a misleading representation to the Minister, a local council should be equated with the Minis proposition. It is erroneous in principle, in my opinion, for it is the doctrine of Ministerial responsibility that makes the Minister responsible for the conduct of the M

125 Secondly, on the same assumption that the council materially misrepresented the survey results to the Minister, the applicant submits that the 2006 and 2007 Det Guidelines, the council failed to provide valid evidence of community support to the Minister. I have earlier expressed the opinion, when analysing the applicant's ca purpose of the legislation that a determination made on a Guidelines discordant application should be invalid: see [80] – [93] above.

126 Thirdly, on the same assumption, the applicant submits that the Minister did not give proper consideration to whether there was community support for the prop a finding by the Minister that there was community support for the proposal. I do not accept the submission. The Minister was not bound to make such a finding, nor Minister did not consider whether there was community support for the proposal. The Guidelines required "evidence" of community support, not the Minister's acce Guidelines did not require any particular level of community support. It was within the Minister's discretion to accept or reject a Guidelines discordant application. I Minister's discretion to revoke or vary the resultant determination: s 508A(9)(b). In any event, in my opinion, the Minister did consider the issue of community cons that the Minister did not do so. The Minister's tendered statement of reasons evidences that the Minister took into consideration a range of material which went to th support for the proposal.

127 It follows from these conclusions that the applicant's fourth ground that the Determinations were manifestly unreasonable is unsustainable. It is therefore unnec relating to the ground of manifest unreasonableness, which were reviewed in *Notaras v Waverley Council* [2007] NSWCA 333, (2007) 161 LGERA 230 at [121] – [

CONCLUSION

128 For these reasons, the applicant's claim is unsuccessful.

129 I will hear the parties as to costs if they are not agreed. It may be appropriate to make no order as to costs having regard to the applicant's measure of success in representation to the public and the special rule concerning costs where proceedings are brought in the public interest. Rule 4.2 of the *Land and Environment Court* in Class 4 of the Court's jurisdiction and provides that: "The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in an proceedings have been brought in the public interest". An equivalent rule, r 3.7, applies to proceedings in Classes 1 and 2 and to some proceedings in Class 3 of the rules were introduced with effect from January 2008. Rule 4.2 was considered and compared with the pre-existing public interest litigation costs principles in *Anders Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272 and *Ku-ring-gai Council v Minister for Planning (No 2)* [2008] NSWLEC 276. Altho appear not to have been brought to the attention of the Court of Appeal in the later case of *Walker v Minister for Planning (No 2)* [2008] NSWCA 334, the Court of against an unsuccessful applicant where the proceedings had been brought in the public interest and additional factors were present.

130 The orders of the Court are as follows:

(1) The further amended summons is dismissed.
(2) The exhibits may be returned.
(3) Costs are reserved. Any application for costs is to be made within six weeks, otherwise there will be no order as to costs.

Land and Environment Court of New South Wales

CITATION :	**Sharples v Minister for Local Government (No 2) [2009] NSWLEC 62**
PARTIES :	APPLICANT: Terry Sharples FIRST RESPONDENT: Minister for Local Government SECOND RESPONDENT: New South Wales Department of Local Government THIRD RESPONDENT: Tweed Shire Council
FILE NUMBER(S) :	40959 of 2007
CORAM:	Biscoe J
KEY ISSUES:	COSTS :- public interest litigation - judicial review proceedings in class 4 of Court's jurisdiction - exercise of Court's power not to award costs against unsuccessful applicant
LEGISLATION CITED:	Land and Environment Court Rules 2007, r 4.2(1) Local Government Act 1993, s 508A
CASES CITED:	Anderson v NSW Minister for Planning (No 2) [2008] NSWLEC 272, (2008) 163 LGERA 132 Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2) [2004] NSWLEC 434, (2006) 136 LGERA 365 Ku-Ring-Gai Council v Minister for Planning (No 2) [2008] NSWLEC 276 Minister for Planning v Walker (No 2) [2008] NSWCA 334 Oshlack v Richmond River Council [1998] HCA 11, (1998) 193 CLR 72 Sharples v Minister for Local Government [2008] NSWLEC 67 Sharples v Minister for Local Government [2008] NSWLEC 328
DATES OF HEARING:	29 April 2009
DATE OF JUDGMENT:	29 April 2009

CONCLUSION

24 In my opinion, under r 4.2 there should be no order as to costs in relation to the first limb of the applicant's case. In relation to the second limb, I am not persuaded that I should depart from the usual order that costs should follow the event. It is therefore necessary to make an apportionment in a broad way. The council submits that half the costs should be attributed to the first limb and half to the second. Doing the best I can, my impression is that about two thirds of the hearing time was spent on the first limb. I think that this proportion probably also represented preparation time.

25 The order of the Court is that the applicant is to pay one third of the third respondent's costs.