Supreme Court of New South Wales - Court of Appeal

HOMEWORLD BALLINA PTY LTD v BALLINA SHIRE COUNCIL [2010] NSWCA 65 (1 April 2010)

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NEW SOUTH WALES COURT OF APPEALCITATION: HOMEWORLD BALLINA PTY LTD v BALLINA SHIRE COUNCIL [2010] NSWCA 65FILE NUMBER(S): 2009/298589HEARING DATE(S): 29 March 2010JUDGMENT DATE: 1 April 2010PARTIES: Homeworld Ballina Pty Ltd – AppellantBallina Shire Council – First RespondentMinister for Planning – Second RespondentJUDGMENT OF: Basten JA Macfarlan JA Young JA LOWER COURT JURISDICTION: Land & Environment CourtLOWER COURT FILE NUMBER(S): LEC 40098/2009LOWER COURT JUDICIAL OFFICER: Sheahan JLOWER COURT DATE OF DECISION: 9 October 2009LOWER COURT MEDIUM NEUTRAL CITATION: [<i>Homeworld Ballina Pty Ltd v Ballina Shire Council</i>] [2009] NSWLEC 172COUNSEL: C J Leggat SC – AppellantN Hemmings QC – First RespondentSubmitting Appearance – Second RespondentSOLICITORS: Shaw Reynolds Bowen & Gerathy – AppellantAllens Arthur Robinson – First RespondentDepartment of Planning – Second RespondentCATCHWORDS: ENVIRONMENT & PLANNING – local environmental plan – public exhibition of amending plan – whether misleading – nature of reasonable person examining exhibited documentsWORDS & PHRASES – "bulky goods retailing" – "industrial

purposes" – "public exhibition" – "reasonable reader"LEGISLATION CITED: Ballina Development Control PlanBallina Local Environmental Plan 1987 (Amendment No 95)[<i>Environmental Planning and Assessment Act 1979</i>] (NSW), ss 5, 24, 54, 57, 61, 64, 65, 66, 67, 68, 74; Pt 3CATEGORY: Principal judgmentCASES CITED: [<i>Cann's Pty Ltd v The Commonwealth</i>] [1946] HCA 5; 71 CLR 210[<i>Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning</i>] (1996) 90 LGERA 341[<i>El Cheikh v Hurstville City Council</i>] [2002] NSWCA 173; 121 LGERA 293[<i>Gales Holdings Pty Ltd v Minister for Infrastructure and Planning</i>] [2006] NSWCA 388; 69 NSWLR 156[<i>King Gee Clothing Co Pty Ltd v Commonwealth</i>] [1945] HCA 23; 71 CLR 184[<i>Litevale Pty Ltd v Lismore City Council</i>] (1997) 96 LGERA 91TEXTS CITED: DECISION: (1) Appeal dismissed.(2) Appellant to pay the respondents' costs.JUDGMENT: **IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL**

CA 2009/298589

LEC 40098/2009

BASTEN JA

MACFARLAN JA

YOUNG JA

1 April 2010

HOMEWORLD BALLINA PTY LTD v BALLINA SHIRE COUNCIL

Headnote

On 20 July 2007 the Minister for Planning made the Ballina Local Environmental Plan 1987 (Amendment No 95), pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) ("the EP&A Act"). The effect of the plan was to rezone certain lots owned by the Council in part as "Industrial Zone" and in part as "Environmental Protection (Wetlands) Zone". The purposes of the amendments were described in the plan as being "to enable the land to be used for industrial purposes, and for environmental protection".In 2004–2005 the Council had publicly exhibited the draft plan pursuant to s 66 of the EP&A Act. The appellant challenged the validity of the amendments in the Land and Environment Court, on the basis that the description of the purposes in the draft plan, referring to rezoning for "industrial purposes", was misleading because it made no reference to the fact that part of the purpose was to permit the land to be used for retailing bulky goods. Sheahan J dismissed the application, and the appellant appealed to this Court.The issue for determination on appeal was whether a reasonable reader would have been misled into thinking that the amendments permitting rezoning for "industrial purposes" did not include the possibility of "bulky goods retailing". **The Court held, dismissing the appeal:**

1. A local environmental plan is required to be placed on public exhibition pursuant to the EP&A Act, s 66. The process of public exhibition, and hence the plan, may be invalid if the material presented would be misleading to the reasonable reader. However, the test of what is "misleading" will be different with respect to the required notification of a public exhibition and the presentation of the documents exhibited: [19], [29]–[32].

2. The test of what is misleading depends upon the understanding which would be obtained by the reasonable reader. That person is assumed to be able to understand the inter-relationship of various documents placed on public exhibition and, where the local environmental plan being amended is one of those documents, will be expected to have looked at the parts of that document relevant to his or her concerns: [22]–[25], [47]–[50].

Litevale Pty Ltd v Lismore City Council (1997) 96 LGERA 91; *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388; 69 NSWLR 156; *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 341; *El Cheikh v Hurstville City Council* [2002] NSWCA 173; 121 LGERA 293, discussed and applied.

3. The public exhibition of a document cannot be invalid because the document itself is misleading, unless it could be said that that it required accompanying explanatory material which was not exhibited and that a decision of the council not to exhibit such material was manifestly unreasonable: [36]–[37].

IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL

CA 2009/298589

LEC 40098/2009

BASTEN JA

MACFARLAN JA

YOUNG JA

1 April 2010

HOMEWORLD BALLINA PTY LTD v BALLINA SHIRE COUNCIL

Judgment

1 JUDGMENT of the COURT delivered by BASTEN JA: On 20 July 2007 the Minister for Planning made the Ballina Local Environmental Plan 1987 (Amendment No 95), pursuant to the terms of the *Environmental Planning and Assessment Act 1979* (NSW), ("the EP&A Act"). The effect of the plan was to rezone certain lots owned by the Council and situated near Ballina airport, in part as "**Zone No 4** Industrial Zone" and in part as "**Zone No 7(a)** Environmental Protection (Wetlands) Zone". The purposes of the amendments were described as being "to enable the land to be used for industrial purposes, and for environmental protection".

2 On 16 February 2009 the appellant commenced proceedings in the Land and Environment Court seeking declarations to the effect that the amendments were invalid. The basis of the challenge was that the Council had failed, prior to the making of the amending plan, to comply with the public exhibition requirements found in s 66(1) of the EP&A Act.

3 On 9 October 2009 the Court (Sheahan J) dismissed the application: *Homeworld Ballina Pty Ltd v Ballina Shire Council* [2009] NSWLEC 172. The appellant seeks to challenge that judgment.

4 The appellant submitted that the public exhibition was invalid because the description of one of the purposes of the draft Ballina Local Environmental Plan ("the draft LEP"), referring to rezoning for "industrial purposes", was misleading because it made no reference to the fact that part of the purpose was to permit the land to be used for retailing bulky goods. To understand the basis of the submission, it is necessary to identify the statutory scheme for public exhibition of such instruments.

5 Notice of the public exhibition of the draft LEP was given in late December 2004. Public exhibition was to continue until 28 January 2005. Accordingly, it is necessary to consider the provisions of the EP&A Act as they stood at that time.

Statutory scheme

6 Environmental planning instruments, of which a local environmental plan is one kind, provide the mechanisms by which the objects of the EP&A Act are to be achieved: EP&A Act, Pt 3, s 24. A local environmental plan ("LEP") is prepared by a council with respect to land within its geographical area: s 54. When the prescribed steps in the process have resulted in the preparation of a draft LEP, the council is required to submit a copy of the draft plan to the Director-General of the Department, then known as the Department of Infrastructure, Planning and Natural Resources: s 64.

7 Section 65, so far as relevant, provided:

65 Certificate of Director-General
(1) Where the Director-General receives a copy of a draft local environmental plan from a council under section 64, the Director-General may cause to be issued to the council a certificate certifying that the draft plan may be publicly exhibited in accordance with section 66.

...

(3) Where a certificate is not issued under this section, the Director-General shall return the draft plan to the council, giving the reasons why the certificate was not issued, and directing the council to amend the draft plan in such a manner as to enable a certificate to be issued, or to take such other action as is appropriate.

(4) The council shall comply with a direction given under subsection (3).

8 On 16 December 2004 a delegate of the Director-General gave the necessary certificate.

9 Having received the certificate, the Council took steps under s 66(1) which then provided:

66 Public exhibition of draft local environmental plan
(1) Where a council receives a certificate under section 65 with respect to a draft local environmental plan, it shall, after complying with any condition subject to which the certificate was granted and subject to the regulations:

(a) give public notice, in a form and manner determined by the council, of the place at which, the dates on which, and the times during which, the environmental study prepared by the council under section 57 of the land to which the draft local environmental plan applies and the draft local environmental plan may be inspected by the public,

(b) publicly exhibit at the place, on the dates and during the times set out in the notice:

(i) a copy of that environmental study and draft local environmental plan,

(ii) a copy of any State environmental planning policy, regional environmental plan, or relevant direction under section 117, applying to the land to which the draft local environmental plan is intended to apply, and

(iii) if such a policy, plan or direction does so apply—a statement to the effect that the policy, plan or direction referred to in subparagraph (ii) substantially governs the content and operation of the draft local environmental plan and that any submission made pursuant to section 67

should be made having regard thereto,

(c) specify, in the notice, the period (being a period which is or includes the period referred to in subsection (2)) during which submissions may be made to the council in accordance with section 67, and

(d) publicly exhibit such other matter as it considers appropriate or necessary to better enable the draft plan and its implications to be understood.

10 One purpose of this provision is to allow for the public exhibition of the documents specified in paragraphs (b) and (d). The second purpose is to ensure that the public receive notice of the time and place of the exhibition.

11 The purpose of the exhibition itself is no doubt twofold: first, it allows for the public to be informed about a new LEP or changes to an existing plan. Secondly, it will provide an opportunity for those members of the public who wish to do so to make written submissions to the Council with respect to the provisions of the draft plan as publicly exhibited: s 67. Those submissions may result in a public hearing if the issues raised are of sufficient significance: s 68. These sections form an important mechanism for giving effect to one of the principal objects of the Act, namely to provide "increased opportunity for public involvement and participation in environmental planning and assessment": s 5(c).

12 The reference in s 66 to an "environmental study" picks up a requirement (in s 57) that the council shall prepare an environmental study of the land to which the draft LEP is intended to apply, and shall have regard to the study in preparing the draft LEP; s 61. This element is of no direct relevance for present purposes, but it draws attention to the fact that s 66 applies both to an initial LEP and to an amendment to an existing plan: in the latter case, the obligation to undertake an environmental study

does not apply: see s 74(2).

Issues raised on appeal

13 There is no complaint about the first step taken by the Council pursuant to s 66(1), namely giving notice in local newspapers of the public exhibition of the draft LEP and related documents. Nor was there any objection as to the inclusion of various additional materials with the documentation put on public exhibition. Significantly for present purposes, the additional documentation included the Ballina LEP as in force in December 2004 together with proposed amendments to the Ballina Development Control Plan ("the DCP"), which were to accompany the amendments made by the draft LEP.

14 The appellant's complaint was that a "reasonable reader" would be "misled" into thinking that the amendments were limited to providing land for "industrial purposes" and did not include the possibility of "bulky goods retailing". There are a number of aspects of this submission which need to be addressed.

15 First, the primary basis of the complaint lay in the language of cl 2 of the draft LEP itself:

"**Aims, objectives etc**
2. This plan aims to rezone land for industrial purposes and environmental protection."

16 A reasonable reader, it was submitted, would understand this language to mean that the land not set apart for environmental protection, would be available for use for "industrial purposes", which involved (picking up language used by senior counsel appearing in the Court below),

"engineering and smoke".

17 There is no doubt that the case-law which has developed in this area has given rise to its own preferred terminology. Nevertheless, where the terminology is not that of the statute, care must be taken in seeking to apply it in place of the statutory language. Further, comments made in one particular context should not be applied unthinkingly in other contexts.

18 Counsel for the appellant insisted that the test of understanding must be applied by reference to what he described as the "reasonable reader". That is neither a statutory phrase, nor is it language which has any clear meaning. However, the risks of repetition in different circumstances are revealed by noting its development in the case-law. Thus, in *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 341, Pearlman CJ of the Land and Environment Court stated, obiter, at 357:

"Public participation in the planning process is an important objective of the *Environmental Planning and Assessment Act* (s 5(c)), and that objective cannot be achieved by public notice which takes away from the public the opportunity to participate or which renders their participation incomplete or misconceived (*Canterbury District Residents & Ratepayers Association Inc v Canterbury Municipal Council* (1991) 73 LGRA 317 at 320). Moreover, in such a case as the present case, where private rights of a wide class of persons may be displaced by the environmental planning instrument, it is all the more important that the effect of the amendment be made clear to a reasonable reader of the notice."

19 These comments, including the reference to "a reasonable reader", related to a notice under s 66(1)(a). They were made in respect of an amendment to an LEP, the effect of which would have been to overcome certain clauses in leases of premises in a shopping centre, which prevented

the redevelopment from being carried out without the lessees' consent: at 343. Her Honour's comments should be understood in that context.

20 Her Honour continued at 357:

"Here, no reasonable reader could have understood the import of amendment 14 as notified. The first sentence of the advertisement is not only ungrammatical, it does not make sense. ... Although a person with a knowledge of planning law and the relevant provisions of the [LEP] may have been able to guess at the effect of the amendment, no reasonable reader without that knowledge would have comprehended the nature of the changes to be made to the [LEP]."

21 The appellant relied upon the condensed statement of this "principle" as expressed by Tobias JA in *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388; 69 NSWLR 156 at [110]:

"(d) The reasonable person the subject of the relevant test is a person with no knowledge of planning law and the relevant provisions of the LEP: *Coles Supermarkets* ...."

22 The risk of identifying the guidance which may be obtained in particular factual circumstances involved in earlier cases, and encapsulating it as a "test" taken out of its context, is one to which lawyers should not succumb. It is clear from his Honour's discussion in *Gales* itself, at [115]–[123], that Tobias JA did not engage in a simplistic application of a "test". To say that the reader has "no knowledge of planning law" clearly did not mean, in his Honour's view, that the reader would not be able to follow the structure and content of the material which was on public exhibition.

23 The danger in taking such "tests" out of context is further illustrated by the present case. Counsel submitted that, in accordance with authority, the "reasonable reader" must be a person who has "no knowledge of ... the relevant provisions of the LEP", although that was one of the documents which was included in the public exhibition. To determine whether a reader would be misled in his or her understanding of one document, by positing complete ignorance of the contents of another document contemporaneously on public exhibition, finds no support in the statutory scheme. Nor is it readily conceivable that either Pearlman CJ (LEC) or Tobias JA were intending to support such a proposition. Indeed, one can be certain that Tobias JA was not, because the third of his propositions in *Gales Holdings* at [110] was in the following terms:

"(c) Where one document expressly or impliedly refers to another document, then regard should be had to the latter document when determining whether the former is misleading".

24 In support of that proposition, his Honour referred to the decision of this Court in *El Cheikh v Hurstville City Council* [2002] NSWCA 173; 121 LGERA 293 at [33], in which Ipp AJA (with the agreement of Sheller JA and Davies AJA) held that an earlier document, to which the critical document "neither expressly nor impliedly made any reference" could not be relied upon to form "part of any relevant context in which" the relevant notice was to be construed. By inference, the existence of an express or an implied reference would lead to a contrary conclusion. The placing of inter-related documents on public exhibition together precludes the approach proposed by the appellant in this case.

25 This discussion suggests that the idea of the 'reasonable reader' may be better understood by reference to the 'interested reader', to clarify that an analysis of the materials is to be undertaken bearing in mind the statutory purpose of public exhibition of documents serving a specific statutory

function, in which most people will have little or no interest.

26 The concept of a "misleading" presentation was addressed in the first two propositions put forward by Tobias JA in *Gales Holdings*. However, they did not apply specifically to the construction of the documents required to be put on public exhibition, but rather to the public notice of such an exhibition required under s 66(1)(a). The propositions were as follows:

"(a) A public notice that is misleading is invalid and not a public notice as required by s 66(1)(a): *El Cheikh* ... at [12] applying *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91 at 101-102 per Rolfe AJA;

(b) 'Misleading' is a word of pejorative connotation but for present purposes probably means little more than failing fully to advise members of the public, through public notification of the exhibition of the draft plan, or by making a limited statement lulling them into a false sense of security: *Litevale* at 102".

27 Some elaboration is required of these succinct propositions. First, the passage from the judgment of Rolfe AJA in *Litevale*, referred to in *El Cheikh,* read in part as follows:

"Thus s 66 provides for a public notice advising members of the public where and when the proposal and documents, the implementation of some of which may affect their interests, may be inspected. Section 66 does not require any explanation of the proposal or documents and, thus, may be contrasted with the legislative provision considered by the High Court in *Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242 .... However, if the notice pursuant to s 66 does attempt an explanation of what is proposed it must be accurate and complete, either particularly or

generally. The problem of seeking to give an explanation in a relatively short document is that there is a real possibility that it will be neither accurate nor complete. The inaccuracy is likely to result from the omission of information."

28 It is not necessary for present purposes to consider how strictly the comments of Rolfe AJA in *Litevale* should apply in other contexts. There is at least a risk that too strict a test will discourage councils from providing helpful information as to what is being placed on exhibition, because by doing more than the statute requires, they will risk invalidating the process.

29 Secondly, two factors pertain to a notice under s 66(1)(a) which distinguish it from the documents placed on public exhibition. One is that the notice itself does not require any explanation of what is proposed and will be entirely valid even if no explanation is provided. The second is that the sense in which it may be misleading, as described by Rolfe AJA, involved lulling into a false sense of security persons whose interests may be affected, but are led to believe they are not. His Honour was not speaking of the public at large, in identifying the risk of invalidity through a misleading notice.

30 Both of these factors demonstrate, contrary to the submissions for the appellants, that quite a different test may need to be applied in considering whether the material actually placed on public exhibition is misleading, so as to invalidate the exercise of public exhibition.

31 Thirdly, Tobias JA's ascription of meaning to the term "misleading" was directed to the public notification and was not expressed to apply to an assessment of the documents on public exhibition. Again, the point may be illustrated by his Honour's reasoning as to the circumstances of that case, at [115]–[124].

32 Where the danger of a reader being misled arises from the exhibition of the very documents which are required by statute to be placed on exhibition, a different kind of analysis is necessary. A statutory instrument is not invalid because it is ambiguous or requires interpretation, about which legally trained minds may differ. If the validity of statutory instruments were to be determined by reference to whether they were misleading to non-legally trained readers, it is likely that a significant number would fail the test. Nor can such a test stand with the principles adopted in such cases as *King Gee Clothing Co Pty Ltd v Commonwealth* [1945] HCA 23; 71 CLR 184 and *Cann's Pty Ltd v The Commonwealth* [1946] HCA 5; 71 CLR 210. In any event, this area of discourse was simply not raised by the grounds of challenge in the Land and Environment Court: cf Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (Law Book Co 2009, 4th ed) at [6.165] and [6.170].

33 Arguably a different analysis may arise in relation to documents not required to be placed on public exhibition by the statute, but which are chosen by the council as appropriate or necessary "to better enable the draft plan and its implications to be understood", pursuant to paragraph (d). The appellant submitted that the draft LEP itself was a document exhibited pursuant to paragraph (d), but that submission cannot be accepted. Paragraph (d) refers to "other matter", by way of contrast with matters specified in paragraph (b). The draft LEP itself was a matter specified in paragraph (b)(i).

34 The LEP in operation in December 2004 was included as matter publicly exhibited in par (d). That was a sensible course, which permitted the amendment in the draft LEP to be placed in its context. However, it was not the exhibition of the existing LEP which gave rise to any misleading statement. Rather, according to the appellant's submissions, simply adding further voluminous material failed to correct the misleading impression created by the draft LEP itself.

35 The appellant sought to rely on the following discussion of compliance with s 66(1) in *Gales Holdings*:

"116 The present case is not one involving the non-public exhibition of documents which s 66(1)(b) mandates must be exhibited. All documents required by s 66(1)(b) to be exhibited were in fact so exhibited. The issue in the present case is somewhat different. It involves an exhibition of documents which, so it was submitted, were misleading so that the process of public exhibition miscarried in a fundamental respect.

117 I would accept the proposition that if a relevant document required to be publicly exhibited was misleading in the sense that the reasonable member of the public referred to by the appellant would be misled into believing that the subject land was to be rezoned Commerce and Trade and not Industrial, then the appellant should succeed on this ground of challenge."

36 The appellant's submissions in this regard could only demonstrate that the draft LEP was misleading if it were to be read without reference to the accompanying documents. As already noted, that approach is impermissible. Nor, for reasons identified below, do the accompanying documents in fact create confusion or misconception of a relevant kind. Nevertheless, assuming that the draft LEP (which was required to be on exhibition) and the existing LEP (which it was clearly permissible and appropriate to place on exhibition) were in some way misleading, it would be necessary to construe paragraph (d) as not merely conferring on the Council a power to exhibit other material, but imposing a duty of clarification. Because paragraph (d) only permits public exhibition of such material as the Council "considers appropriate or necessary", presumably any view to the contrary would need to be manifestly unreasonable to give rise to invalidity. The case was not, however, presented in that way in the Court below, nor in substance in this Court. Even had it been, for the reasons which follow, it would not have been manifestly unreasonable for

the Council to form an opinion that no explanatory material was required.

37 In *Gales Holdings,* Beazley JA agreed with the reasons of Tobias JA as did I, on this point noting that I was “content to adopt the reasons given by Tobias JA”, including the passage set out at [35] above. The appellant failed in demonstrating that the exhibited material was, in a relevant respect, misleading. That meant that it was unnecessary to consider in detail precisely how his case might otherwise have been justified. There could not have been a failure to comply with s 66(1) by exhibiting that which the section required to be exhibited, unless it could be demonstrated that the Council could not reasonably have failed to provide further explanatory material in all the circumstances. That articulates, more precisely than was necessary in *Gales Holdings,* the principled basis upon which the Court was prepared to accept the legal analysis underlying the appellant’s challenge.

Material not misleading

(a) dictionary definitions

38 The first proposition espoused by the appellant was that to rezone land for “industrial” purposes must, by ordinary implication, mean permitting uses by way of manufacturing, engineering or some similar category of activities. In that sense, industry must be differentiated from trade or commerce. However, as an ordinary English word “industry” has a wide range of meanings. Many of them may be disregarded in considering purposes of land use. Even excluding meanings which give rise to the adjectival form “industrious”, there are many senses of the word which encompass activities involving productive labour generally and hence give rise to industrial agreements, industrial courts and other usage which clearly is not confined to engineering or manufacture. Thus, the *Macquarie Dictionary Online* provides the following meanings of the term “industry”:

“**1.** a particular branch of trade or manufacture: *the steel industry*.

2. any large-scale business activity: *the tourist industry*.
3. manufacture or trade as a whole: *the growth of industry in underdeveloped countries*.

4. the ownership and management of companies, factories, etc: *friction between labour and industry*.

5. systematic work or labour.
6. assiduous activity at any work or task ....”

39 In effect, the appellant seeks to constrict the term “industrial” in the context of land zoning to the first meaning only. The implausibility of that exercise, in relation to the ordinary meaning of the term, is illustrated by the *Macquarie Dictionary’s* definition of “industrial”:

“**1.** of or relating to, of the nature of, or resulting from industry or productive labour: *the industrial arts*.

2. having highly developed industries: *an industrial nation*.
3. engaged in an industry or industries: *industrial workers*.

4. relating to the workers in industries: *industrial training*.

5. designed for use in industry: *industrial diamonds*.
...
[as a noun]
7. a worker in some industry, especially a manufacturing industry.

8. someone who owns or runs an industrial enterprise.
9. (*plural*) stocks and shares in industrial enterprises.

10. the genre of industrial music.”

(b) documents on public exhibition

40 Although the appellant would not succeed by reference to dictionary definitions, the approach itself is unsound. A person with sufficient interest to inspect the materials available on public exhibition might be expected at least to look quickly through the first few pages. The first page on public exhibition was a coversheet identifying the draft LEP and the draft DCP. The second page contained a table of contents. Section 1 was identified as "Background" and sub-section 1.3 as "Bulky goods retailing", giving reference to page 5. If the reader were interested in bulky goods retailing, he or she would then go to page 5 where the following appeared:

"1.3 Bulky Goods Retailing
The recently adopted Ballina Shire Retail Strategy identifies Southern Cross Industrial Estate as an option for the establishment of a bulky goods retail precinct. A more recent study suggests the long term land needed for such a use could be between 10 and 16 hectares. Further investigations and consideration will, however, need to be given to the suitability of such a precinct in Southern Cross Industrial Estate."

41 The previous discussion had identified the area subject to rezoning as a proposed extension of the "Southern Cross Industrial Estate". On page 6 of the document, part of the area was identified as "suitable for rezoning to industrial": at section 1.5. There were other references to the area being "zoned for industrial purposes": at, for example, section 1.6 on page 9. At section 1.9 the following paragraph occurred, as the last paragraph under the heading "Background".

"1.9 Accompanying DCP Amendment
The exhibition of draft Ballina Development Control Plan No. 1 – Urban Land (Amendment No. 76) is also part of this exhibition. This amendment involves designating the area proposed to be rezoned *4 – Industrial* under the Ballina Local Environmental Plan as *I2 – General Industry*."

42 Section 2 of the document was "Exhibition Authorisation". Section 2.1 was the s 65 certificate and section 2.2 identified the extent of the Director's delegation. Section 2.3 then identified a "Statement of

Council's interest", which noted that the Council owned the land proposed to be rezoned and that the purpose of the rezoning was to ensure that "long-term demand for serviced industrial land can be met in an efficient manner". It further noted that the rezoning of the land would substantially increase its value and explained:

"● It is anticipated that once the land is rezoned it will be developed and subdivided for the establishment of industrial buildings, warehouses and the like, with some possibility of buildings for bulky goods retail."

43 Section 4 of the exhibition material (at page 17) was the draft LEP, which contained the further reference to rezoning for industrial purposes of which the appellant complains and which is noted above at [15].

44 The first point which needs to be made in relation to the appellant's complaint is that there may have been a large array of potential uses for land zoned "industrial", none of which were excluded by any express statement. Obviously it would not have been useful to refer, or attempt to refer, to all of them. The references to "bulky goods retail" identify that as one of the possible uses for the land once it had been rezoned. Any actual subdivision or use of the land would have required a development application to be considered by Council in due course. The ordinary reader of documents of this kind would realise that rezoning itself did not constitute approval for any particular use. Nor should the documents be read with only one possible use in mind, to determine whether, and to what extent, that particular use was identified as potentially available. Nevertheless, it is already clear that there were several references to 'bulky goods retail' as a potential use.

45 It should further be accepted that the ordinary reader of such material would immediately appreciate that what was proposed was amendment of two documents, one being the LEP and the other the DCP. The LEP was to be amended, not to change the system of zoning, but to apply an existing zoning to the specified land. The reader could only identify what uses were

permitted, permitted only with consent or prohibited on such land by turning to the relevant part of the LEP dealing with "Zone No.4 – Industrial zone". On doing so the reader would immediately see:

"**1. Objectives of zone**
A. The primary objectives are –
(a) to regulate the subdivision and use of land to permit its use for industrial purposes and other uses specified in clause 27 and Schedule 3;
(b) to allow detailed provision to be made, by means of a development control plan, to set aside specific areas within the zone for different industry types and intensities of development; ..
...
2. Without development consent
Nil.
3. Only with development consent

Any purpose other than a purpose specified in item 4.

4. Advertised development – only with development consent
Advertising structures; caravan parks; commercial premises (other than those used in conjunction with an industry and situated on the same land as the industry or referred to in clause 27 or Schedule 3); mineral sand mining; mines; offensive or hazardous industries; recreation vehicle areas; residential buildings ...; shops (other than those referred to in clause 27 or Schedule 3); stock and sale yards.
5. Prohibited development

Nil."

46 From that description of the zone, the breadth of the development permitted with consent would have been readily apparent. It would also be clear that reference may need to made to cl 27 and Sch 3. Clause 27 with its heading, reads as follows:

“**Retailing of bulky goods within Zone No 4 and on land referred to in Schedule 4**
27. (1) This clause applies to land within Zone No 4 and land referred to in Schedule 4.

(2) In this clause, “bulky goods” means large goods ....

(3) Subject to subclauses (4) and (5), nothing in this plan shall prevent a person, with the consent of the council, from carrying out development for the purposes of the retail sale of bulky goods on land to which this clause applies.”

47 The ordinary reader, who for present purposes is assumed to have some interest in the retail sale of bulky goods, could readily ascertain from reference to the draft LEP that certain land was to be zoned “industrial” and, by referring to that zoning, would ascertain that it might well permit consent to use as a retail sale centre for bulky goods. It is also clear from the exhibited material referred to above that controls will be imposed through the DCP. Knowing from the coversheet of the exhibition material that the DCP was also to be amended, one would expect the interested reader to see the proposed amendment in that document (which contained only one page) and note that the lot to be zoned “Zone No 4 Industrial” was to be identified in the DCP as “*I2 – General Industry*”. That of course would be meaningless without a copy of the DCP, but that was a document contained within the exhibition material. The DCP identified “preferred land uses” for *I2* as:

“Light industry, general industry, showrooms and other businesses which require relatively large indoor or outdoor display and sales areas.”

48 This reasonably straightforward exercise would have revealed that the land proposed to be zoned industrial would be available for the retail selling of bulky goods, with Council consent. There was no ambiguity in this scheme, nor was the intention, expressed by reference to a rezoning, in

any way misleading.

(c) nature of the interested reader

49 The appellant sought to resist this conclusion by starting with the assumption that reference to “industrial purposes” would be understood as extending no further than manufacturing industry. Knowing that the purpose of the draft LEP was to rezone land in accordance with established zones set out in the LEP, one can only infer that the appellant’s test requires an obtuse reader, or one so confident of his or her first impressions that no checking would be undertaken. Not only does that not conform to the “reasonable reader” test; it does not conform to the exercise undertaken in *Gales Holdings* at [119] ff.

50 The appellant then submitted that the reader for whom the material was exhibited, would not consult the existing LEP or have sufficient knowledge to be able to construe the provisions set out above. The approach set out above is inconsistent with such a submission, which must accordingly be rejected.

Conclusions

51 The trial judge undertook a more extensive review of the materials than appears here. That approach was not erroneous, but more comprehensive. His Honour came to the same conclusion at [88]-[90], referring to a similar exercise in reading the primary documents, as that set out above. His Honour continued at [91]:

“The reasonable reader need not go beyond the primary document and the inquiries it would stimulate, but if he/she ventured past the primary document into the land audit and/or the Maunsell report, there are almost overwhelming indications that bulky goods retailing could occur on the rezoned industrial land.”

52 No error has been demonstrated in the approach undertaken by the primary judge nor in his Honour's conclusions. The appeal should be dismissed and the appellant ordered to pay the respondents' costs.

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