THE NEW JUDICIAL REVIEW RULES 2013

Justice Peter Biscoe[*]

1. On 15 March 2013 new judicial review rules of court commenced. They are in Part 59 of the *Uniform Civil Procedure Rules* 2005 (UCPR). A copy is attached.

2. The Supreme Court and the Land and Environment Court are the only NSW courts with judicial review functions. Unsurprisingly, therefore, the new rules were drafted by a working group comprising judges of those courts: Basten JA and Hall and Rein JJ of the Supreme Court and Preston CJ and Biscoe J of the Land and Environment Court.

3. Prior to the new rules, the Land and Environment Court's practice in relation to judicial review matters was largely governed by general provisions of the *Civil Procedure Act* 2005 and, more specifically, by Part 4 of the Land and Environment Court Rules 2007, the Land and Environment Court's Practice Note Class 4 Proceedings, and forms approved by the Chief Judge pursuant to s 77A of the *Land and Environment Court Act* 1979.

4. The new rules refer to "plaintiff" and "defendant" but define those terms broadly so as to include "applicant" and "respondent", which are the preferred terms in the Land and Environment Court: r 59.2.

5. The new rules change the procedure in judicial review proceedings in a number of significant respects.

6. The new rules apply not only to judicial review proceedings in Class 4 but also in Class 8 of the Land and Environment Court's jurisdiction: r 59.1.

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7. The body or person responsible for a decision to be reviewed must be joined as a respondent, *but not as the first respondent* unless there is no other respondent: r 59.3(4). This changes a long-standing practice of practitioners in the Land and Environment Court, which has been to join the body or person responsible for a decision to be reviewed – usually a Council or a Minister – as the first respondent. Under the new rule, the beneficiary of a challenged development consent should be the first respondent and the council that granted the consent should be the second respondent.

8. This rule creates the impression of giving the body responsible for the decision a back seat by making the beneficiary of the challenged decision the first respondent. What lies behind this rule? It is the *Hardiman/Oshlack* principle that the usual course is for the body responsible for the decision to submit to the court's order to avoid the risk that, by becoming a protagonist, it endangers the impartiality which it is expected to subsequently maintain if and when relief is granted: *The Queen v Australian Broadcasting Tribunal ex parte Hardiman* (1980) 144 CLR 13 at 35-36; *Oshlack v Richmond River council* (1998) 193 CLR 72 at [12] per Gaudron and Gummow JJ. The application of that principle to most matters of the sort that the Land and Environment Court deals with is awkward, and the rationale for its application is perhaps not convincing. That is because often the truth of the grounds of judicial review advanced (for example whether mandatory relevant matters were considered or whether the decision-maker was satisfied as to matters prescribed by statute as a condition precedent to the exercise of jurisdiction), lie peculiarly within the knowledge and records of the body responsible for the decision. It is no small matter to cast upon, say, the beneficiary of a development consent the primary burden of mounting a defence to such a ground. Be that as it may, the rule is clear.

9. Judicial review proceedings can only be commenced by summons, not by statement of claim: r 59.3. Following the Supreme Court's former procedure, forms of summons and statement of claim were approved on

23 July 2010 by the Chief Judge of the Land and Environment Court pursuant to s 77A of the *Land and Environment Court Act* 1979. The approved form of statement of claim should be deleted in light of UCPR r 59.3. The Chief Judge's Approval and the forms can be accessed on the Land and Environment Court's website. Schedule 1 to this Approval indicates in paragraph 5c that references to "plaintiff" and "defendant" in the forms are to be replaced by "applicant" and "respondent". This is sometimes overlooked by practitioners – understandably so since it is rather hidden away - with the consequence that Class 4 summonses sometimes refer to "plaintiff" and "defendant". The Court should make this clearer.

10. Rule 59.4 is prescriptive as to the contents of the summons. A significant innovation is that the summons must state "with specificity" the grounds on which relief is sought.

11. Rule 59.5 allows only five days for service of the summons after it is filed (unless the Court directs otherwise). This is indicative of the pace at which judicial review matters should proceed.

12. Although pleadings are not provided for in the new rules, an innovation is that the respondent must within 21 days after service (or such other times as the Court may direct) file and serve "a response" stating whether the respondent "opposes the relief sought and, if so, on what grounds": r 59.6.

13. Evidence must be by way of affidavit (unless the Court directs otherwise): r 59.7(1).

14. Cross-examination is permitted only by leave of the Court which, if practicable, should be sought prior to the hearing: r 59.7(3). This rule assumes that cross-examination is an exceptional procedure. However, sometimes (for example, in jurisdictional fact cases) expert evidence is tendered in the Land and Environment Court and, if admitted, it is to be expected that leave to cross-examine would readily be granted.

15. Rule 59.8 contains provisions of a type which traditionally have been dealt with in a Practice Note. It requires the parties to confer and prepare a paginated and indexed Court Book in a white folder. It is prescriptive as to its contents, including that it contain a summary of the applicant's arguments (not exceeding 10 pages). The applicant must file and serve the Court Book within 2 working days before the hearing. The respondent must, at least 4 working days before the hearing, file and serve a summary of the respondent's argument (not exceeding 10 pages). The applicant must file and serve a summary of any argument in reply at least one working day before the hearing. However, the rule is subject to any direction of the Court. In more complex cases, parties might seek a direction that the parties' summaries of argument be filed and served earlier and with more spacing than provided by the rule.

16. Rule 59.9 provides for a special procedure where a public authority is a defendant, as is typically the case in the Land and Environment Court. It will supersede much of a similar procedure provided for in r 4.3 of the Land and Environment Court Rules. Under this new rule:

(a) the applicant may (not must) within 21 days of commencing the proceedings (or such other time as the Court directs), serve on the public authority a notice requiring the public authority to provide to the applicant a copy of the decision and a statement of reasons for the decision;

(b) the statement of reasons for the decision must set out findings on material questions of fact, refer to the evidence and other material on which the findings were based, and explain why the decision was made.

(c) if the public authority does not comply with the notice within 14 days, or if the applicant has not served a notice within 21 days of commencing the proceedings, the applicant may apply to the Court for an order that the public authority provide the applicant with those

documents. It is to be hoped that any such application will be made at the first directions hearing.

17. Under r 59.10 there is a new time limit for commencing judicial review proceedings. They must be commenced within three months of the date of the decision unless the Court extends that time. Matters which the Court should take account of when considering whether to extend time are listed. However, the rule does not apply to proceedings in which there is a statutory limitation period for commencing the proceedings (for example, s 101 of the *Environmental Planning and Assessment Act* 1979, where the three months time limit runs from the date on which public notice is given). Nor does it apply to any proceedings in which the setting aside of a decision is not required.

18. Finally, the new rules set their face against security for costs in judicial review proceedings: r 59.11. An applicant is not to be required to provide security for costs except in exceptional circumstances. Where an applicant invokes an open standing provision or commences representative proceedings, the Court is not to treat the applicant as bringing proceedings for the benefit of a third party for the purpose of considering whether exceptional circumstances exist.

Conclusion

19. In light of the new UCPR judicial procedure rules, the Court will shortly review the Land and Environment Court rules, Class 4 Practice Note and approved forms. On behalf of the Court, I invite practitioners to provide me with their suggestions.