Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd [2020] NSWCA 50

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The Court of Appeal recently considered and upheld a judicial review decision, *Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [2019] NSWLEC 117 ("**Universal 1**"). As a result, we now have a unanimous decision from the Court of Appeal of NSW that the statutory requirements found in Schedule 5 of the *Environmental Planning and Assessment Act* 1979 to afford procedural fairness to a recipient of a section 9.34 Notice are sufficient to exclude any remaining common law rights.

Universal 1 was a decision made by Justice Biscoe in the Class 4 jurisdiction of the Land and Environment Court, in relation to the validity of a Development Control Order No. 10, Restore Works Order issued under section 9.34 and 9.35 and Schedule 5 of the *Environmental Planning and Assessment Act* 1979 ('the Act').

This case also deals with the validity of orders (pursuant to section 9.34) issued to an Owner of a building (the landlord), as opposed to an Occupier.

Facts

The case concerned a large Greek national flag that had been etched into the southern wall of the ground floor of a hotel in Martin Place by the Occupier of the Premises, which had been etched at the same time as renovations which had been approved.

The 5 storey, ornate Victorian Italianate style building is heritage listed under both the Sydney Local Environmental Plan 2012 and the State Heritage Register (since 1999) The Council argued that the flag element required planning approval and that none had been obtained and that the "flag works" seriously compromised the heritage significance of the Premises, and would continue to do so, unless remedied, by the Owner "reinstating the render to match the existing render".

The Owner, being the recipient of the Order, had accepted that the wall of the Premises was required to be made good under the lease and it can be implied that the Owner was holding the Occupier liable under their lease arrangement. With a declining commercial relationship, the Owner had sent a breach of lease notice to the Occupier.

The Occupier argued that the Flag was simply artwork, not requiring approval from the Heritage Office or Council. They also raised an argument that having regard to requirements under Clause 13, Part 7 of Schedule 5 of the Act, the Council had denied "the person who is best able to do the works" the opportunity to make representations or submissions to the Council.

Findings

In Universal 1, Justice Biscoe found for the Council as the Development Control Order was not invalid under the well established "*Wednesbury"* grounds, as the statutory requirements to afford procedural fairness were satisfied in the case. In his view, there was no case raised by the Applicant to persuade the Court that there was any remaining common law obligation on the Council to afford procedural fairness, above and beyond anyone other than the recipient of the Order. Accordingly, the decision was not unreasonable.

The Court of Appeal confirmed and upheld this decision, ultimately applying *Annetts v McCann (1990) 170 CLR 596,* that whilst a requirement under the general law to afford procedural fairness can only be excluded "by plain words of necessary intendment", Schedule 5 of the Act contains such "sufficiently plain words".

Conclusion

Ultimately, this is a significant case for Councils as it clarifies that the drafting of Schedule 5 of the Act has been very deliberate, and is very well-detailed in its procedures required to issue Notices and Orders.

We can now conclude that the Schedule 5 is so robust, that if a Council is diligent in "dotting their I's and crossing their T's" under Schedule 5, then that should be enough to meet the requirements of procedural fairness and natural justice.

Of course, every case must be decided on its facts. For instance, in this case, the Court of Appeal would not entertain any arguments raised by the Occupier that it had been denied procedural fairness, as its Principal Certifier was not given notice of the order, because this argument was raised too late.

Ultimately, if you need advice on whether the Council's obligations under the Act have been met in the particular scenario you are dealing with, please do not hesitate to contact Simone Brew or Keli Law.

Additionally, Council Officers need to be alert to the possibility that what may seem to be minor works, such as etching, carried on at the same time as other approved works, may be significant, and need to be investigated early on in the piece.