Land and Environment Court
New South Wales

Medium Neutral Citation:	**Dobrohotoff v Bennic [2013] NSWLEC 61**
Hearing dates:	23 April, 1 and 2 May 2013
Decision date:	02 May 2013
Jurisdiction:	Class 4
Before:	Pepper J
Decision:	See orders at [100].
Catchwords:	DEVELOPMENT CONSENT: whether short term holiday rental accommodation was prohibited development within the relevant zone - whether the development was "for the purpose of" use as a "dwelling-house" - whether the property was a "dwelling" - whether the property was being used or occupied or capable of being used or occupied as "a separate domicile" - development prohibited. DECLARATIONS AND INJUNCTIONS: whether appropriate to make declaration - declaration made - whether appropriate to grant interlocutory relief - injunction granted but stayed for limited period of time to mitigate financial impact on respondent - whether appropriate to make notification order of declaratory and injunctive relief granted - notification order refused.
Legislation Cited:	Civil Procedure Act 2005 Environmental Planning and Assessment Act 1979, ss 4, 76B, 123, 124, 149 Interpretation Act 1987, s 33 Land and Environment Court Act 1979, ss 16(1A), 20(2), 22 Uniform Civil Procedure Rules 2005

Gosford Planning Scheme Ordinance

Cases Cited:

ACR Trading Pty Ltd v Fat-Sel Pty Ltd (1987) 11 NSWLR 67

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27

Ashfield Municipal Council v Australian College of Physical Education Ltd (1992) 76 LGRA 151

Blacktown City Council v Haddad [2012] NSWLEC 224

Botany Bay City Council v Saab Corp Pty Ltd [2011] NSWCA 308; (2011) 183 LGERA 228

Capital Airport Group Pty Ltd v Director-General of the Department of Planning [2010] NSWLEC 5; (2010) 171 LGERA 440

Certain Lloyd's Underwriters Subscribing to Contract No lH00AAQS v Cross [2012] HCA 56; (2012) 87 ALJR 131

cf Great Lakes Council v Lani [2007] NSWLEC 681; (2007) 158 LGERA 1

City of Sydney Council v Waldorf Apartments Hotel Sydney Pty Ltd [2008] NSWLEC 97; (2008) 158 LGERA 67

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297

Council of the City of Sydney v Mae [2009] NSWLEC 84

Cranbrook School v Woollahra Municipal Council [2006] NSWCA 155; (2006) 66 NSWLR 379

Director-General, Department of Environment, Climate Change and Water v Venn [2011] NSWLEC 118

Dooralong Residents Action Group Pty Limited v

Wyong Shire Council [2011] NSWLEC 251; (2011) 186 LGERA 274

Egan v Hawkesbury City Council (1993) 79 LGERA 321

Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 87 ALJR 98

Foster v Sutherland Shire Council [2001] NSWLEC 89; (2001) 115 LGERA 130

GrainCorp Operations Limited v Liverpool Plains Shire Council [2012] NSWLEC 143

Hill Top Residents Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008 (No 4) [2011] NSWLEC 6

House of Peace Pty Ltd v Bankstown City Council [2000] NSWCA 44; (2000) 48 NSWLR 498

KJD York Management Services Pty Ltd v City of Sydney Council [2006] NSWLEC 218; (2006) 148 LGERA 117

Leichhardt Municipal Council v Mansfield (1985) 57 LGRA 214 at 221

Marrickville Council v Tanwar Enterprises Pty Ltd [2009] NSWLEC 127

Matic v Mid-Western Regional Council [2008] NSWLEC 113

Moore v Secretary of State for Communities and Local Government [2012] EWCA Civ 1202

Najask Pty Ltd v Palerang Council [2009] NSWLEC 39; (2009) 165 LGERA 171

New South Wales Crime Commission v Kelly [2003] NSWCA 245; (2003) 58 NSWLR 71

North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 21 NSWLR 532

	Olsson v Goulburn Mulwaree Council [2010] NSWLEC 169; (2010) 176 LGERA 71
	Potter v Minahan [1908] HCA 63; (1908) 7 CLR 277
	Simpson v Wakool Shire Council [2012] NSWLEC 163; (2012) 190 LGERA 143
	South Sydney Municipal Council v James (1979) 35 LGRA 432
	Sunshine Coast Regional Council v EBIS Enterprises Pty Ltd [2010] QCA 379
	Warlam Pty Ltd v Marrickville Council [2009] NSWLEC 23; (2009) 165 LGERA 184
	Warringah Shire Council v Jennings Group Ltd (1992) 75 LGRA 402 at 407
	Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335
	Wilson v State Rail Authority of New South Wales [2010] NSWCA 198; (2010) 78 NSWLR 704
	Winn v Director-General of National Parks and Wildlife [2001] NSWCA 17; (2001) 130 LGERA 508
	Wollondilly Shire Council v 820 Cawdor Road Pty Ltd [2012] NSWLEC 71
	Wollongong City Council v Vic Vellar Nominees Pty Ltd [2010] NSWLEC 266; (2010) 178 LGERA 445
Texts Cited:	Macquarie Dictionary, online edition
	Oxford English Dictionary, online edition
Category:	Principal judgment
Parties:	John Dobrohotoff (First Applicant) Rosemary Dobrohotoff (Second Applicant) Rhonda Louise Bennic (Respondent)
Representation:	Mr J Lazarus (Applicants) Ms K Millist-Spendlove (Respondent) Conditsis Lawyers (Applicants) The Law Company (Respondent)

File Number(s): 40145 of 2013

EX TEMPORE JUDGMENT

MS BENNIC RENTS OUT HER HOLIDAY HOUSE AT TERRIGAL

1 Terrigal is an idyllic seaside town located on the central coast of New South Wales in the Gosford Local Government Area ("LGA"). A row of Norfolk Island pines lines the beachfront esplanade situated at the southern end of a picturesque four kilometre beach. Terrigal's reputation as a good surfing spot, combined with its location at Broken Head and offering the usual array of seaside activities, have made it a popular holiday destination.

2 For those wishing to visit Terrigal and stay overnight, the town offers a variety of accommodation. This accommodation includes self-contained short term holiday rentals, hotels and motels, bed and breakfasts, resorts, backpacker hostels, cabins and spa retreats.

3 These proceedings concern one of the self-contained short term holiday rentals located at 24 Charles Kay Drive, Terrigal ("the property"). Ms Rhonda Bennic, the respondent, owns the property and has done so since 31 March 2011. The previous owners of the property, Mr Richard Keogh and his wife ("the Keoghs"), also used the property as a self-contained short term holiday rental. At the time Ms Bennic bought the property in March 2011, she intended to continue this use. Ms Bennic does not live at the property, rather it is used by her to generate income.

4 The property has six bedrooms and can accommodate a maximum of 12 or 13 persons. The property is typically rented for up to a week at a time. It is only rented out as a whole, that is to say, the individual rooms are not rented separately. The property is advertised on websites such as Stayz (a holiday accommodation rental website).

5 While Terrigal undoubtedly depends on the revenue derived from tourism, it can readily be inferred that not everyone who lives in the town is employed in a tourism related industry. Teachers, small business owners and doctors, for example, all reside in Terrigal. Moreover, in order to attract tourists to the town, services and amenities must be offered that require a permanent population to provide them.

6 Thus, amongst the short term holiday rental accommodation, long term accommodation for the local residents of Terrigal exists. These are the individuals and families who, once the school holidays and long weekends are over, remain. They are people who foster the town's identity and provide an important sense of community.

7 The applicants in this case, Dr John Dobrohotoff and Mrs Rosemary Dobrohotoff ("the Dobrohotoffs"), are such an example. They reside, together with their two children, in the house next door to the property in question, at 26 Charles Kay Drive. They have done so since 2001, that is to say, well prior to the purchase of the property by Ms Bennic. It is not unreasonable for them, as permanent residents of Terrigal, to expect a degree of peace and quiet in the use of their house and backyard. Distressingly for the Dobrohotoffs, this expectation has not been met. On the contrary, they have been subjected to the very opposite of what any family living in a residential area should otherwise be entitled to enjoy.

8 The Dobrohotoffs record a history of noisy and disruptive tenants who have rented the property both before and after its sale to Ms Bennic. These tenants have often engaged in antisocial behaviour that has significantly adversely impacted the amenity of the Dobrohotoffs. Loud music, flashing lights, bucks and hens nights "(sometimes involving strippers, or worse)", and frequent parties, often extending into the early hours of the morning, are recurrent themes. Understandably, this has caused the Dobrohotoffs, and in particular Mrs Dobrohotoff, a significant amount of stress and anxiety. It has resulted in the Dobrohotoffs making arrangements to vacate their house on weekends and during school holidays in order to avoid the almost inevitable disturbance caused by the groups of people who rent the property. They are contemplating selling their house and moving elsewhere.

9 The Dobrohotoffs have complained to the Gosford City Council ("the council") about the use of the property in this way, but to no avail. This is so notwithstanding that, somewhat astonishingly, the council appears to have acknowledged that short term holiday rental of residential premises may be a prohibited use under the relevant planning instrument, the Gosford Planning Scheme Ordinance ("the GPSO").

10 Frustrated by the council's refusal to get involved and exasperated by the constant disturbance of their peace and quiet, the Dobrohotoffs have brought these proceedings.

11 Meanwhile, Ms Bennic has listed the property for sale. It was the listing of the property for sale that caused the matter to be effectively expedited by the Court thereby obviating the need for the Dobrohotoffs' claim for an interlocutory injunction restraining any alleged unlawful use of the property to

be decided pending a final hearing. The need for expedition has arisen because once the property has been sold the proceedings will be otiose.

12 It is against this background that the current case falls to be determined by this Court.

13 Before doing so, however, the following observation should be made about the council's handling of the issue to date. Aware of the equivocal nature of its planning instrument in respect of the use of short term holiday rental accommodation, the council has not sought to resolve the ambiguity by way of amendment, thereby providing a simple and cost effective solution to the current dispute and providing certainty to the great number of persons who find themselves in a similar situation to that of the present parties. Other councils in New South Wales have made such an amendment (for example, Byron Shire Council and Shoalhaven City Council). By clarifying the law in this regard, the council could have avoided the need for this litigation, with all of the attendant legal and emotional costs to the parties.

14 For example, the provisions of the draft Gosford Local Environmental Plan 2009 ("the draft Gosford LEP") propose the allowance of "short-term holiday letting of dwellings" in the 2(a) Residential Zone with a maximum of four bedrooms as exempt development (cl 3.1 and the definition of "short term holiday letting of dwellings" in Sch 2) and with a maximum of six bedrooms permissible with development consent (cl 5.4A(3)). Under the draft Gosford LEP, therefore, it is likely that the property could be lawfully put to its current use by Ms Bennic. It was an agreed fact, however, that although the draft Gosford LEP has been placed on public exhibition, it is neither certain nor imminent.

15 Rather, it appears that the council has been content for the Court to resolve the matter. On any view, this is unsatisfactory and amounts to an effective abrogation by the council of its fundamental duties and responsibilities. These duties include, amongst other things, to manage development and coordinate the orderly and economic use of land within the area under its control. By leaving it to the Court to determine this important issue, the council, by its inaction, has, in my opinion, failed to fulfil its core functions and has failed its constituents.

16 It should also be noted that the Court entertains a considerable degree of sympathy for Ms Bennic, who at no point has ever been told by the council that the use of the property as a short term holiday rental property was, or even might be, prohibited and who genuinely believed at the time that she purchased the property and until October 2012, that the current use of the property was lawful.

17 But notwithstanding this sympathy, it is not the Court's role to, by judicial fiat,

remedy any perceived deficiencies inherent in the council's planning instrument. To reiterate, this is a task for the council. Rather, it is the Court's function to determine, having regard to the words of the instrument and the existing case law, whether the present use of Ms Bennic's property is prohibited under the council's current zoning laws. Upon the proper construction of the GPSO as at 8 February 2013, the use of the property as short term holiday rental accommodation is prohibited. This is principally because the use of the property is not sufficiently permanent to comprise a "dwelling-house" for the purposes of the relevant zoning under the GPSO.

18 In arriving at this conclusion, the Court is mindful that this decision may cause, initially at least, a degree of inconvenience and financial disruption for property owners who provide short term holiday rental accommodation throughout Gosford. How expeditiously and painlessly this disruption is alleviated is squarely in the hands of the council.

19 Finally, it should be noted that at the commencement of the proceedings I disclosed to the parties that I owned a holiday house on the south coast of the State, that from time to time was let on a short term basis for the purpose of holiday accommodation. Both parties indicated to the Court that they did not have an issue with me nevertheless hearing the case.

ISSUES FOR DETERMINATION

20 The issues for determination by the Court were as follows:

(a) first, is the property a "dwelling-house" for the purpose of the 2(a) Residential Zone pursuant to the GPSO;

(b) second, if not, is the present use of the property as short term holiday rental accommodation prohibited under the GPSO;

(c) third, if it is prohibited, should the Court grant the following relief:

(i) a declaration that, in breach of s 76B of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"), Ms Bennic has carried out development that is prohibited, namely, the use of the property for short term holiday rental accommodation;

(ii) an order that Ms Bennic be restrained from using the property for the purpose above, including advertising, soliciting or permitting the property to be used for this purpose;

(iii) an order that, in the event that the draft Gosford LEP comes into effect permitting such use with the consent of the council, Ms Bennic be restrained

from using the property for short term holiday rental accommodation without first obtaining consent from the council for this use; and

(iv) an order that Ms Bennic notify in writing any party interested in purchasing the property of the orders above.

21 The latter order was sought by way of an amendment to the summons. At the hearing I deferred granting leave to the Dobrohotoffs to amend the summons because I was not convinced that the Court had the power to make such an order or, if it did, that it was appropriate to do so.

THE PLANNING AND LEGISLATIVE SCHEME

22 It was common ground that the property is zoned 2(a) Residential under the provisions of the GPSO. Given its central importance to the resolution of this case, the wording of the Zone is reproduced in full (emphasis added):

> **ZONE NO. 2(a) RESIDENTIAL**
>
> **Objectives of the zone**
>
> The objectives of Zone No. 2(a) are:
>
> (a) to make provision for the orderly and economic development of suitable land for a variety of low density housing forms which are essentially domestic in scale and which have private gardens; and
>
> (b) to provide for other uses, but only where they:
>
> (i) are compatible with a low density residential environment and afford services to residents at a local level; and
>
> (ii) are unlikely to adversely affect residential amenity or place demands on services beyond the level reasonably required for low scale housing.
>
> **1 DEVELOPMENT THAT DOES NOT REQUIRE CONSENT**
>
> Development (other than exempt development) for the purpose of:
>
> agriculture; home occupations; recreation areas.
>
> Exempt development
>
> **2 DEVELOPMENT THAT NEEDS CONSENT**
>
> **Cluster development**
>
> *Development (other than exempt development) for the purpose of*
>
> bed and breakfast accommodation; boatsheds; child care centres; communication facilities; community facilities; **dual occupancies-attached; dual occupations-detached; dwelling-houses;** educational establishments; exhibition homes; general stores; home businesses; home industries; hospitals; places of public worship; roads; utility installations.
>
> Subdivision.

Note: Development or related activities in this category indicated in **BOLD** may comprise complying development. An application may be made to Council or an accredited certifier for a complying development certificate. Details of such development or related activities are specified in Schedule 11.

3 PROHIBITED DEVELOPMENT

Any development not included in Item 1 or 2.

23 Section 76B of the EPAA states:

76B Development that is prohibited

If an environmental planning instrument provides that:

(a) specified development is prohibited on land to which the provision applies, or

(b) development cannot be carried out on land with or without development consent,

a person must not carry out the development on the land.

24 The term "development" is defined in s 4(1) of the EPAA to include "(a) the use of land".

25 Section 123(1) of the EPAA states:

123 Restraint etc of breaches of this Act

(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

26 Section 124 of the EPAA relevantly provides as follows:

124 Orders of the Court

(1) Where the Court is satisfied that a breach of this Act has been committed or that a breach of this Act will, unless restrained by order of the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.

(2) Without limiting the powers of the Court under subsection (1), an order made under that subsection may:

(a) where the breach of this Act comprises a use of any building, work or land-restrain that use,

(b) where the breach of this Act comprises the erection of a building or the carrying out of a work-require the demolition or removal of that building or work, or

(c) where the breach of this Act has the effect of altering the condition or state of any building, work or land-require the reinstatement, so far as is practicable, of that building, work or land to the condition or state the building, work or land was in immediately before the breach was committed.

(3) Where a breach of this Act would not have been committed but for the failure to obtain a consent under Part 4, the Court, upon application being made by the defendant, may:

(a) adjourn the proceedings to enable a development application to be made under Part 4 to obtain that consent, and

(b) in its discretion, by interlocutory order, restrain the continuance of the commission of the breach while the proceedings are adjourned.

(4) The functions of the Court under this Division are in addition to and not in derogation from any other functions of the Court.

THE CURRENT USE OF THE PROPERTY IS PROHIBITED WITHIN THE ZONE BECAUSE IT IS NOT FOR THE PURPOSE OF A "DWELLING-HOUSE"

27 Initially the parties sought to adduce expert evidence from their respective town planners to purportedly assist the Court in the proper construction of the 2(a) Residential Zone in the GPSO. After some discussion, it was agreed that this evidence could not assist the Court in this task, and, it not being relevant to any other issue in the proceedings, would be otherwise inadmissible. Accordingly, the parties did not seek to rely upon this evidence. This decision was correct.

28 It is necessary to determine whether the use of the property for short term holiday rental accommodation is a permissible use within the 2(a) Residential Zone. For this purpose, it was common ground that the property was not being used for "home occupations" or for "bed and breakfast accommodation" because there is no permanent resident (as stated above, Ms Bennic does not live at the property).

29 If the use of the property does not fall within either items 1 or 2 of the 2(a) Residential Zone, then it is prohibited development pursuant to the express and unambiguous words of item 3.

30 The use of any land, such as the use of the property the subject of these proceedings, constitutes "development" for the purpose of items 1 or 2 (see the definition of that term at s 4(1) of the EPAA).

31 Ms Bennic did not submit that the use of the property as short term holiday rental accommodation fell within the description of development that did not require consent in accordance with item 1. She could not because it did not.

32 Therefore, the issue became whether or not the use to which the property was being put was development within item 2 that required consent. It was also common ground that none of the uses listed in item 2 were relevant except that of a "dwelling-house". The term "dwelling-house" is defined in the GPSO at cl 3(1) to mean "a building containing 1, but not more than 1, dwelling". The term "dwelling" is defined to mean "a room or number of rooms occupied or used, or so constructed or adapted as to be capable of being occupied or used, as a separate domicile". The term "domicile" is not, however, defined in the GPSO, but has been the subject of numerous decisions of this and other courts, which are discussed below.

33 The definition of "dwelling" has two limbs. The first concerns the actual occupation or use of a room or rooms as a separate domicile and the second deals with the hypothetical test of whether a room or rooms are "so constructed or adapted as to be capable of being occupied or used" as a separate domicile (*Leichhardt Municipal Council v Mansfield* (1985) 57 LGRA 214 at 221; *Warringah Shire Council v Jennings Group Ltd* (1992) 75 LGRA 402 at 407; *Wollongong City Council v Vic Vellar Nominees* Pty Ltd [2010] NSWLEC 266; (2010) 178 LGERA 445 at [28] and *Wollondilly Shire Council v 820 Cawdor Road Pty Ltd* [2012] NSWLEC 71 at [19]). Both limbs were relied upon by Ms Bennic.

34 It is convenient to set out some of the fundamental principles applicable to determining the meaning of a provision in an environmental planning instrument. First, the meaning must be ascertained having regard to its text, context and purpose (see s 33 of the *Interpretation Act* 1987 and *Cranbrook School v Woollahra Municipal Council* [2006] NSWCA 155; (2006) 66 NSWLR 379 at [37]-[46] and [63]; *Matic v Mid-Western Regional Council* [2008] NSWLEC 113 at [7]-[9]; *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198; (2010) 78 NSWLR 704 at [12]-[13] and *Vic Vellar* at [39]). This includes having regard to the objectives of the 2(a) Residential Zone.

35 Second, although the concepts of context and purpose are broad in scope, the proper interpretation of a planning instrument is "not to be discerned by reference to pre-conceived ideas or vague notions of what might or might not be desirable" (*Matic* at [8] and *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 87 ALJR 131 at [26]). The process of determination is objective and begins and ends with an examination of the text of the instrument, albeit considered in its context (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[2009] HCA 41; (2009) 239 CLR 27 at [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 87 ALJR 98 at [39] and *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* at [23]).

36 Third, when determining the objective intention of the draftsperson, the Court should avoid a construction of the instrument that produces irrationality or absurdity (*Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 304; *New South Wales Crime Commission v Kelly* [2003] NSWCA 245; (2003) 58 NSWLR 71 at [20] and *Capital Airport Group Pty Ltd v Director-General of the Department of Planning* [2010] NSWLEC 5; (2010) 171 LGERA 440 at [23]-[24]), bearing in mind that planning instruments are "not always drafted with pellucid clarity or with a keen eye to taxonomy" (*Olsson v Goulburn Mulwaree Council* [2010] NSWLEC 169; (2010) 176 LGERA 71 at [15] and *Egan v Hawkesbury City Council* (1993)

79 LGERA 321 at 331). But this is not a licence to depart from language that is unambiguous and is not otherwise inconsistent with the context and purpose of the instrument, however undesirable the result.

37 In respect of the first limb of the definition of "dwelling", Ms Bennic submitted that, first, when consent was given for the building of a "dwelling-house", as was originally the case with the property, implicit within the consent was the use of the property for any purpose for which a dwelling-house would ordinarily be used, including for lease to tenants, however short term. There was nothing within the definition of either "dwelling-house" or "dwelling" that expressly or impliedly precluded the use of the property for lease to tenants on a short term or temporary basis, or conversely, that demanded permanent occupation. Second, and as a corollary of the first submission, Ms Bennic contended that, provided that the property has the physical characteristics of a "dwelling-house" or "dwelling", which the property here did, this was sufficient.

38 The submissions of the Dobrohotoffs in reply may be stated succinctly. First, they contended that when regard is had to the ordinary meaning of the term "dwelling-house", the property was not being occupied in the same way that a family group in the ordinary way of life would occupy it. Second, they refuted the argument that the term "dwelling" or "dwelling-house" was a physical description only of the building. Third, they submitted that when regard was had to the ordinary meaning of the term "domicile", the requisite degree of residential permanency was plainly not demonstrable where the maximum tenancy of the property is a week.

39 In my opinion the Dobrohotoffs' submissions must be accepted.

40 In *South Sydney Municipal Council v James* (1979) 35 LGRA 432, Reynolds JA said the following in relation to the concept of a "dwelling-house" (at 440):

> In my opinion a building is used as a dwellinghouse within the meaning of cl. 23 if its use is such that it can fairly be said as a matter of fact that it is occupied in much the same way as it might be occupied by a family group in the ordinary way of life and that it is not a use and occupation more appropriately described in other categories of residential buildings.

41 In *James* the term "dwelling-house" was relevantly defined by Samuels JA to mean "a building designed for use as a dwelling for a single family" (at 442). True it is that Samuels JA also said in that case that "a dwellinghouse is a building designed for use as a dwelling for a single family 'in the sense of its physical appearance and lay out'" (at 444) and Reynolds JA said that "an inquiry as to whether the person or persons who will or may occupy the building could properly be described as a single family is irrelevant" (at 439). But these statements are not authority for the proposition contended for by Ms Bennic that satisfaction of the physical attributes of a "dwelling-house"

will, of themselves, satisfy the definition of that term in item 2 of the 2(a) Residential Zone in the GPSO. This is because, as the Dobrohotoffs correctly submitted, item 2, read properly, permits with consent "development...*for the purpose of*.... dwelling-houses" (emphasis added). Interpolating the definition of "development" in s 4(1) of the EPAA into the item, item 2 therefore permits with consent "the use of land...*for the purpose of*... dwelling-houses". Thus it is not sufficient that the building on the property has the physical characteristics of a "dwelling-house", the property must also be used "for that purpose". For the reasons elaborated upon below, this cannot be demonstrated on the evidence.

42 *James* was described as "a useful guide" and applied in *Ashfield Municipal Council v Australian College of Physical Education Ltd* (1992) 76 LGRA 151 by Pearlman J (at 153). In that case the relevant planning instrument defined "dwelling" in identical terms to the GPSO. In dispute was whether or not residential accommodation offered by an educational institution for students constituted a boarding house rather than a dwelling-house, the former of which was prohibited. Her Honour held that the accommodation constituted a boarding house because (at 155):

> When one considers the evidence that the premises are owned by the respondent...whose students apply to it for an agreement to occupy a numbered room, for rent, with services provided, and with a sharing of common facilities in each house, it seems inescapable that what is more appropriately described here is letting the houses as lodgings and not using them in the same way as a family group in the ordinary way of life.

43 Whether a building is a "dwelling-house" is a question of fact and degree. Subject to any requirement of permanency, there are a number of situations where buildings may be "dwelling-houses" even though they are only occupied infrequently. A holiday house that is used exclusively for a limited amount of time during the year by a family (or even time shared between several families) or a house owned by a company that is rented out to executives and their families for short durations may all nevertheless constitute "dwelling-houses" (*Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202 at [19]).

44 In the present case, however, the property was not a "dwelling-house" because it could not be fairly said, looking at its use as a whole as short term holiday accommodation, that, as a matter of fact, the property was being occupied in the same way that a family or other household group in the ordinary way of life would occupy it. A tenancy granted to persons who are residing in a group situation for periods of a week or less for the purpose of bucks and hens nights, parties or for the use of escorts or strippers, is, in my opinion, not consistent with a use or occupation by a family or household group in the ordinary way of life, and therefore, not consistent with the use of the property as that of a "dwelling-house" (*Blacktown City Council v Haddad* [2012]

NSWLEC 224 at [35]).

45 Furthermore, when considering the first limb of the definition of "dwelling", regard must be had to the notion of "domicile" contained within it (*820 Cawdor Road* at [24]), and the critical element of permanence. Inherent within the term "domicile" is, as a long line of authority in this jurisdiction has established, the notion of a permanent home or, at the very least, a significant degree of permanence of habitation or occupancy (*Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 288; *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd* (1990) 21 NSWLR 532 at 538A-B; *KJD York Management Services Pty Ltd v City of Sydney Council* [2006] NSWLEC 218; (2006) 148 LGERA 117 at [8]-[18]; *City of Sydney Council v Waldorf Apartments Hotel Sydney Pty Ltd* [2008] NSWLEC 97; (2008) 158 LGERA 67 at [38]; *Warlam Pty Ltd v Marrickville Council* [2009] NSWLEC 23; (2009) 165 LGERA 184 at [35]-[36]; *Najask Pty Ltd v Palerang Council* [2009] NSWLEC 39; (2009) 165 LGERA 171 at [15]; *Vic Vellar* at [32]; *Dooralong Residents Action Group Pty Limited v Wyong Shire Council* [2011] NSWLEC 251; (2011) 186 LGERA 274 at [110]; *820 Cawdor Road* at [24]; *GrainCorp Operations Limited v Liverpool Plains Shire Council* [2012] NSWLEC 143 at [20]-[27] and *Haddad* at [47]).

46 Mindful of the caution with which dictionaries may be used to interpret instruments (*House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44; (2000) 48 NSWLR 498 at [25]-[29] and *GrainCorp* at [26]), these decisions are consonant with and supported by the ordinary meaning of the word "domicile". In the *Macquarie Dictionary* (online ed), for example, the word is defined to mean "**1**. a place of residence; an abode; a house or home. **2.** *Law* a permanent legal residence." Likewise the *Oxford English Dictionary* (online ed) defines it as "**1.** A place of residence or ordinary habitation; a dwelling-place, abode; a house or home. **2.a.** *Law*. The place where one has his home or permanent residence, to which if absent, he has the intention of returning."

47 In the present case, the facts disclose an absence of any permanent habitation or occupation. Tenancies of no more than a week are antithetical to this concept.

48 Alternatively, Ms Bennic argued, relying on the decision in *Masters v Padley* (1984) 53 LGRA 417 (at 422 per King CJ), that the term "domicile" meant "a room or suite of rooms designed to be used as a separate and more or less self contained domestic establishment as distinct from part of a common establishment such as a boarding house or hotel". Because the property as a whole has been designed to be used as a domicile, it falls within the definition of "dwelling" and accordingly "dwelling-house".

49 This submission relies on the hypothetical second limb of the definition of "dwelling" adverted to above. It is to the effect that because the property is "so constructed or adapted as to be capable of being occupied or used as a separate domicile", which plainly it is, this capacity is sufficient to constitute a "dwelling-house" for the purpose of the Zone.

50 In support, Ms Bennic relied upon the decision in *Sunshine Coast Regional Council v EBIS Enterprises Pty Ltd* [2010] QCA 379. That case concerned a detached house that was frequently let to groups of people not exceeding 20 persons. The average length of tenancy was a minimum of two to three days to a maximum of one to two weeks. An enforcement order was issued to the owners to restrain the allegedly unauthorised use of the house. At issue was whether the house comprised a "dwelling unit". If it did, then the use was authorised. The relevant instrument defined "dwelling unit" to mean "any building or part of a building comprising a self contained unit designed, adapted or used for the exclusive use of one household". The Court held that because the building was designed for the exclusive use of one household, it satisfied the definition of "dwelling unit" and there was no need to inquire further as to whether or not the premises were to be used for the exclusive use of "one household" (at [26] and [32]).

51 I did not find this authority to be of assistance, even by analogy. The definition of "dwelling unit" was sufficiently removed both in substance and form from that of "dwelling" in the GPSO, particularly when construed in the context of item 2 of the 2(a) Residential Zone, that it is entirely distinguishable from this case.

52 Ms Bennic also relied on the authority of *Leichhardt*. At issue in that case was whether a radiology practice in a two storey terrace house in Glebe, comprising two flats downstairs and one flat upstairs, fell within the definition of "professional consultingrooms". That term was defined as "a room or a number of rooms forming either the whole or part of, attached to or within the curtilage of a dwellinghouse...". The term "dwellinghouse" was defined in identical terms to the definition contained in the GPSO. It was proposed that the downstairs flats would be converted into professional consulting rooms and the first floor would be converted into a single dwelling. The capacity of the downstairs flats to be used as separate domiciles was not, on the plans, affected by the proposed development. The Court upheld an appeal from the decision of an assessor of this Court on the basis that he had not examined the rooms on the lower floor to determine whether they were "so constructed or adapted as to be capable of being occupied or used" as a separate domicile, notwithstanding their intended professional use.

53 Again, this decision may be distinguished. In *Leichhardt* it was the interpretation of the term "professional consultingrooms" with which the Court was

concerned. It construed the term "dwellinghouse" in that particular context. Moreover, unlike the facts of these proceedings, at the time of the assessment the intended use had not commenced.

54 In my opinion, Ms Bennic's submission with respect to the second limb must be rejected because it ignores the actual use of the property, which I have determined is not "as a separate domicile", and therefore, not as a "dwelling-house". It is this use that constitutes the "development" at issue in item 2 of the Zone ("development...*for the purpose of*... dwelling-houses", emphasis added). It is this use that is impugned. And it is this use that, for the reasons above, is unlawful (see *KJD York* at [9]-[18] where a similar argument to that raised by Ms Bennic was rejected).

55 As counsel for the Dobrohotoffs observed, if Ms Bennic's argument were correct, then logically, any building having the physical characteristics of a "dwelling-house" could be used, albeit with consent, for any form of development. Such a result defies commonsense, would undermine the GPSO and is therefore unlikely to have been the intention of the council when drafting item 2 of the 2(a) Residential Zone.

56 A reply submission by the Dobrohotoffs, was that the second limb in the definition of "dwelling" was not engaged by reason of the actual occupation and use of the property.

57 It is true that most of the cases the Court was referred to concerning the hypothetical test of the definition of "dwelling" concerned the intended, and not actual, use and occupation of the property thereby enlivening the second limb. Such a construction would, superficially at least, appear to conform with the purpose and context of the relevant zoning provisions. But on its face, the disjunctive nature of the definition by the use of the word "or" between the two limbs suggests the contrary position. Given the expedited nature of the proceedings and in light of the reasoning and findings above, which are sufficient to finally dispose of this matter, it is not necessary for me to determine this issue and I refrain from doing so.

58 I note that the conclusion I have reached above concerning the proper construction of item 2 of the 2(a) Residential Zone and the term "dwelling" conforms with the purpose of that Zone as evident from its stated objectives. While the property may be "a low density housing form" that is "essentially domestic in scale" (objective (a)), there is, in my opinion, nothing compatible with the current use of the property as short term holiday rental accommodation and that of "a low density residential environment" that "affords services to residents at a local level" (objective (b)(i)). The services the property affords are, on the contrary, to residents outside Terrigal. Moreover, the evidence discloses that the use to which the property is being

put in fact "adversely affect[s] residential amenity" and "places demands on services", on the police and the council in particular, by having to deal with complaints relating to its use, in a manner well "beyond the level reasonably required for low scale housing" (objective (b)(ii)).

59 Finally, Ms Bennic sought to draw comfort from the draft Gosford LEP to argue that it was, as that instrument evidenced, the intention of the council to permit short term holiday rental accommodation. In my view, the instrument provides no such succor. First, as the parties agreed, it is neither certain nor imminent. Second, I do not accept that a draft planning instrument is relevant to the task of interpreting another planning instrument currently in force, namely, the GPSO, particularly when the likelihood of its adoption is so unsure.

60 In summary, the current rental of the property as holiday accommodation for periods of a week or less to persons using or occupying it other than in the ordinary family or household way, does not constitute a "domicile", does not constitute a "dwelling", and therefore, does not constitute a "dwelling-house" for the purpose of item 2 in the 2(a) Residential Zone. The use of the property not being otherwise permissible, it is prohibited within the Zone and it constitutes development in breach of s 76B of the EPAA.

IT IS APPROPRIATE TO GRANT THE DECLARATORY AND INJUNCTIVE RELIEF SOUGHT

61 Overwhelmingly, the evidence adduced in this case was admitted for the purpose of determining whether or not the relief sought by the Dobrohotoffs in the summons should be granted. All of the relief sought in the summons is discretionary in nature. All of the relief sought was opposed by Ms Bennic.

62 The declaratory and injunctive relief sought is clearly within the jurisdiction of the Court (see ss 123 and 124 of the EPAA).

THE EVIDENCE OF THE DOBROHOTOFFS

63 The two affidavits of Dr Dobrohotoff (filed 1 and 20 March 2013 respectively) were to the following effect:

(a) disruptive, noisy and antisocial behaviour has occurred at the property since at least 2006, when the Keoghs owned the property;

(b) these problems did not abate when the property was sold to Ms Bennic in early 2011;

(c) initially, cordial communications occurred between Dr Dobrohotoff and Ms Bennic concerning the disruption emanating from the property;

(d) but throughout 2012 the property continued to be let to large groups of people who engaged in antisocial behaviour. This behaviour included shouting, screaming obscenities, strippers, escorts, who appeared topless in full view on the deck of the property, and the discovery of shards of a broken glass on his property located closest to the dividing fence between the two properties, which, it may be inferred, emanated from Ms Bennic's property;

(e) that the antisocial behaviour often continued into the early hours of the morning, intruding upon the sleep of Dr Dobrohotoff and his family;

(f) Dr Dobrohotoff and his family have vacated their house in order to avoid the disruptive behaviour during weekends and school holiday periods;

(g) complaints to the police and the council concerning the noise and the antisocial behaviour have not resulted in the diminution or cessation of either; and

(h) that the relationship between the Dobrohotoffs and Ms Bennic has now broken down.

64 Dr Dobrohotoff was cross-examined, but the evidence above was accepted by the Court.

65 The evidence of Mrs Rosemary Dobrohotoff was similar in content. She gave several illustrations of the antisocial activities she witnessed occurring on the property. One example, in particular, demonstrates starkly, in my view, the detrimental effect the behaviour of the tenants at the property has had on her family. She deposed that in mid 2012 her son came inside from playing basketball in the backyard because, "the people [next door at the property] are saying stuff and swearing and it's making me feel uncomfortable". This is plainly unacceptable. Children should be able to feel secure in their own backyard.

66 Mrs Dobrohotoff stated in her written evidence that she finds herself becoming increasingly anxious as the weekends and school holidays approach. She makes arrangements for herself and her family to go away during these periods in case any disruptive tenants are staying at the property. She does not regularly invite friends to socialise at her home or allow her children to have their friends to sleep over as she is concerned that the tenants of the property may behave inappropriately. As a consequence of the stress caused by the use of the property, she has been attending a psychologist intermittently over the past three years and has been taking antidepressants since September 2012.

67 Finally, she deposed that as a consequence of the situation that she and her family find themselves in, she has been searching for another home in the area but to date she has not been able to find one that is suitable.

68 None of Mrs Dobrohotoff's evidence was challenged by Ms Bennic.

THE EVIDENCE OF MS BENNIC

69 Ms Bennic swore an affidavit on 16 April 2013 stating that:

(a) she obtained the money to purchase the property by taking a mortgage on her home in Kincumber and using her savings and money from the sale of her parents' house in Tamworth;

(b) she is the carer for her 82 year old mother who suffers from dementia;

(c) she purchased the property in order to provide rental income to live on to support herself, her partner and her mother;

(d) when she purchased the property the previous owners, the Keoghs, told her that they were using the property for short term rental accommodation and that she planned to continue this use until she no longer needed to care for her mother, whereupon it was her intention to reside at the property and use it as a bed and breakfast;

(e) before taking a booking for the property she emails prospective tenants a copy of the House Rules and the Stayz Holiday House Code of Conduct. It is only once the prospective tenant emails back confirming they have read, understood and agreed to abide by these Rules and the Code of Conduct, that she confirms their booking. Moreover, prior to the booking commencing she meets with the tenants and ensures that they sign the House Rules. She also verbally advises them of the House Rules to ensure that they completely understand what is required of them with respect to their behaviour while they are occupying the property. In addition, she takes their licence details, confirms their identity, and takes a cash bond;

(f) the local police have confirmed that no fines or convictions have been recorded with respect to the property;

(g) she has attempted to respond to the Dobrohotoffs' complaints when they are received, however, typically this is not until the next day when it is too late for her to remedy the situation;

(h) on 8 March 2013 she listed the property for sale. She decided to sell the property in mid February 2013 because it had ceased to be a viable investment; and

(i) if she is not able to continue renting the property as short term holiday accommodation prior to its sale, she will suffer hardship and have difficulty paying her living expenses and would default on her mortgage.

70 The latter evidence was somewhat inconsistent with a letter dated 22 April 2013 tendered by the Dobrohotoffs. The letter was not objected to by counsel for Ms Bennic. The letter was from Ms Bennic's solicitor to the solicitor of the Dobrohotoffs. The letter contained an offer of settlement, the first paragraph of which stated:

> That the Respondent by her servants and agents do not use the dwelling-house at 24 Charles Kay Drive Terrigal NSW for the provision of temporary or short-term accommodation. For the purpose of this order "temporary or short-term accommodation" is defined as any period up to 3 months.

71 Ms Bennic was cross-examined. The cross-examination was to the effect that:

(a) contrary to assertions that she had made in various print media that she was "shocked" by the litigation, she had in fact been put on notice since October 2012 of the potential unlawful use of the property and of the Dobrohotoffs' intention to commence proceedings in this Court if the use did not cease;

(b) that at the time the property was purchased by her she had potentially been put on notice that the Planning Certificate issued in accordance with s 149 of the EPAA and attached to the contract of sale, listed the possible lawful uses of the property. On its face, the Certificate did not indicate that the use of the property in the manner contemplated by Ms Bennic was permissible with or without consent. It was for this reason that in a letter dated 28 March 2011 from Premier Conveyancing sent to Ms Bennic concerning the purchase of the property, she was advised to:

> Please carefully read the zoning certificate (Section 149 Certificate) attached to the contract, and the other information with it. It is only possible to use the property for the purposes shown in this Certificate. All other uses will be prohibited. No matter what you want to do with the property it is almost certain council approval will be needed.

(c) Ms Bennic readily conceded that she did not read the terms of the contract for sale in detail. She stated that she did not comprehend the significance of the warning given to her by Premier Conveyancing. Rather, she relied on the fact that the conveyancer knew the use to which the property was to be put, as did the real estate agent who sold her the property, and likewise the vendors (the Keoghs). Because she did not contemplate that the use could be

prohibited given the number of short term holiday rental accommodation venues available in Terrigal, she did not seek legal advice. In short, "I was trusting the people I was paying to do this work for me to advise me knowing - you know, telling them what I was going to do - you know, that it was running as a holiday house and that I was going to be continuing to run it as a holiday house" (T45.11-45.14);

(d) at no time has the council ever told her that the use of the property as short term holiday rental accommodation is unlawful; and

(e) she readily agreed that she could not guarantee compliance with the House Rules or the Code of Conduct. As Ms Bennic stated, "I have no control over any other person do I really, in realism [sic], I can only control my own conduct I can't control other - other people's conduct." (T57.41-57.43)

Declaration

72 Ms Bennic opposed the making of the declaration on the basis that, first, she was not aware that her actions were unlawful. Second, because of the large number of persons within Terrigal who also engage in this conduct, to make the declaration would be unjust . Third, because the property was on the market to be sold as "a family home", and not as short term holiday accommodation, there was no utility in making the declaration for a limited period of time. And fourth, because of the delay by the Dobrohotoffs in commencing proceedings against her.

73 In my opinion, it is appropriate for the Court to grant the declaration sought by the Dobrohotoffs in light of the fact that the current use of the property constitutes development that is prohibited within the Zone in breach of s 76B of the EPAA (cf *Great Lakes Council v Lani* [2007] NSWLEC 681; (2007) 158 LGERA 1 where no declaration was made).

74 As to the first reason, although, as I have expressed above, I have great sympathy for the position that Ms Bennic now finds herself in, this is not sufficient. First, at all times Ms Bennic has, as is her right, denied any breach of the GPSO and thus of the EPAA (*Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118 at [279]). Second, the breach is not merely technical (*Simpson v Wakool Shire Council* [2012] NSWLEC 163; (2012) 190 LGERA 143 at [84]). Third, the breach is continuing (*Marrickville Council v Tanwar Enterprises Pty Ltd* [2009] NSWLEC 127 at [37] and *Venn* at [280]). Fourth, there is a demonstrable purpose in making the declaration insofar as it serves to declare the law and advances the regulatory objects of the GPSO and the EPAA. Furthermore, the making of the declaration will assist in serving the public interest by ensuring compliance with the GPSO and the EPAA (*Council of the City of Sydney v Mae*

[2009] NSWLEC 84 at [29]).

75 As I stated in *Hill Top Residents Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008 (No 4)* [2011] NSWLEC 6 (at [20], quoted with approval in *Venn* at [281]):

> ...the making of the declarations marks the disapproval of the Court of conduct that Parliament has proscribed. It also serves to discourage others from acting in a similar way and may, therefore, be seen to have a deterrent and educative element. The granting of the declaration may accordingly be seen as advancing the regulatory objects of the EPAA (s 5 of the EPAA and *Humane Society v Kyodo Senpaku* [2006] FCAFC 116; (2006) 154 FCR 425 at [22]-[27]).

A similar sentiment was expressed in *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17; (2001) 130 LGERA 508 (at [308], also quoted in *Venn* at [282]).

76 These comments are equally apposite here.

77 As to the second reason, although perhaps a matter of inference given Terrigal's reputation as a premier holiday destination, there was no direct evidence of the widespread nature of the unlawful conduct (the provision of short term rental holiday accommodation contrary to the GPSO) said to be engaged in by others. In any event, even assuming the submission to be factually correct, this is, in my view, all the more reason to make the declaration.

78 As to the third reason, while the property is being marketed for sale in a manner that suggests that its present unlawful use may cease ("large family home"), this cannot be guaranteed by Ms Bennic.

79 As to the fourth reason, this was premised on the contention that because the unlawful use had been ongoing since 2001 when the Dobrohotoffs first purchased their property, they were at fault by waiting until Ms Bennic had bought her property prior to commencing this action.

80 This submission must be rejected in the strongest terms. Any delay in the commencement of the proceedings can only be relevant as between the parties. Put another way, any delay in commencing the present proceedings can only be measured as at the commencement of the ownership by Ms Bennic. In this regard, I find that at all times the Dobrohotoffs have acted in a timely and reasonable manner. Ms Bennic purchased the property on 31 March 2011. The Dobrohotoffs initially attempted to informally resolve the ongoing problems with the use of the property with Ms Bennic. It was only when these attempts failed that litigation was contemplated by them. And it was only after fair warning was given to Ms Bennic commencing in October 2012 that legal proceedings would ensue if the use of the property for the purpose of short term holiday rental accommodation did not cease, that the summons was filed. In short, there was no delay by the Dobrohotoffs

whatsoever in commencing proceedings, in my opinion, let alone delay sufficient to disentitle them to the relief they seek, declaratory or injunctive.

Injunction

81 The Dobrohotoffs also seek an injunction to restrain the continuing unlawful use of the property. The evidence of Ms Bennic discloses that she intends to continue the use until such time as the property is sold.

82 The principles governing the exercise of the Court's discretion to grant injunctive relief were analysed in the seminal decisions of *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341 and *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67 at 82. They are well settled (see *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308; (2011) 183 LGERA 228 at [149]) and have been applied in this Court on many occasions. Applying these principles necessitates an examination of, amongst other things:

(a) the nature of the breach of the EPAA;

(b) whether the breach was more than merely technical in nature;

(c) the hardship and other matters personal to the Dobrohotoffs;

(d) the hardship and other matters personal to Ms Bennic; and

(e) the harm to the environment generally caused by the unlawful conduct.

83 Having regard to the evidence of both parties and applying the factors stated above, in my opinion, the injunction sought should be granted, but it should be initially stayed to mitigate any financial detriment flowing to Ms Bennic as a consequence of its imposition. I have reached this conclusion because:

(a) first, the breach by Ms Bennic offends and undermines the planning regime of the Gosford LGA and ultimately of the State. While brought in their private capacity, the enforcement of the relevant planning law by the Dobrohotoffs is nevertheless in the public interest;

(b) second, as found above, the breach is not trivial in nature;

(c) third, also as found above, the breach, if not restrained, will continue until such time as the property is sold;

(d) fourth, the harm caused to the environment is not limited to the undermining of the planning regime. The adverse impact on the amenity and wellbeing of the Dobrohotoffs has been, as the evidence overwhelmingly demonstrates, severe. Although Mrs Dobrohotoff's stress and anxiety caused

by the unlawful use of the property commenced while the property was owned by the Keoghs, her condition has been exacerbated by the continued unlawful use of the property by Ms Bennic;

(e) fifth, because of the ongoing impact on the amenity and wellbeing of the Dobrohotoffs, the eventual sale of the property by Ms Bennic affords no remedy to them as she has suggested. There was no evidence that a sale was imminent, there was no evidence that the unlawful use would cease pending the sale, and, as noted above, the sale provides no guarantee that the unlawful use will cease once the new owner takes possession; and

(f) sixth, the relief is sought against a development that is not static and cannot be regularised by, for example, the granting of development consent because it is prohibited within the 2(a) Residential Zone (see item 3). I repeat that it was an agreed fact that the draft Gosford LEP is neither certain nor imminent.

84 I do not accept, however, as a matter going to the exercise of my discretion, that, as the Dobrohotoffs submitted, Ms Bennic is entirely the author of her own misfortune because she did not heed the notice purportedly given to her by her conveyancer upon the purchase of the property. True it is that once the potential unlawful use of the property was raised with her by the Dobrohotoffs' legal representatives in October 2012 she should have sought legal advice, but her failure to do so at the time she bought the property was not unreasonable given all of the circumstances.

85 Moreover, I accept that, as Ms Bennic deposed in her affidavit, and notwithstanding the term of the settlement offer quoted above, the granting of an injunction will cause her financial hardship. Although individual hardship ought not be permitted to erode the general operation of planning schemes (*Sedevcic* at 346 per Mahoney JA), given that, as I have found, Ms Bennic was not sufficiently put on notice when she purchased the property in 2011 that her intended use was unlawful, and given that at no point in time has the council ever communicated to her that she was acting contrary to the GPSO, I take the likely adverse financial effect of the restraint on her into account. It is for this reason that I propose to stay the commencement of the injunction for a period of approximately two months.

The Draft Gosford LEP

86 An order is sought, in the event that the draft Gosford LEP comes into effect, to restrain Ms Bennic from using the property as short term holiday rental accommodation absent development consent.

87 Given that the draft LEP is, as was agreed, neither certain nor imminent, and because neither party addressed the Court as to the proper construction of any relevant provision (it is possible, for example, that Ms Bennic's property is exempt development. The sales marketing material describes the house as four, not six, bedrooms), I decline to grant this relief.

Notification Order

88 The Dobrohotoffs also seek an order not only restraining Ms Bennic but, by way of amendment to the summons, an order notifying any prospective purchasers of the property of the orders granting declaratory and injunctive relief. The proposed order is in the following terms:

> An order that, in the event that the Property is listed for sale, the respondent must notify any parties interested in purchasing the Property of the orders made by the Court in relation to the Property, in writing.

89 This gives rise to a question as to the source, if any, of the Court's power to make such an order. The Dobrohotoffs rely, in this regard, on ss 123 and 124 of the EPAA, ss 16(1A), 20(2) and 22 of the *Land and Environment Court Act* 1979 ("the LEC Act"), and the Court's general powers of case management under the *Civil Procedure Act* 2005 ("the CPA") and the Uniform Civil Procedure Rules 2005 ("the UCPR").

90 The immediate difficulty with the order proposed is that there is no evidence that any prospective purchaser of the property has breached, is breaching, or will breach the GPSO and hence the EPAA. Moreover, it is not the case that Ms Bennic, in selling her property, is, has, or will be, committing a breach of the GPSO and the EPAA. In other words, the order does not seek to remedy or restrain a breach of the EPAA by either Ms Bennic or any interested buyer. In these circumstances I remain unconvinced that ss 123 and 124 of the EPAA are engaged.

91 Likewise, I am of the opinion that the Dobrohotoffs cannot avail themselves of ss 16(1A) and 20(2) of the LEC Act. Section 16(1A) permits the Court to hear and dispose of matters "ancillary" to its conferred statutory jurisdiction. The provision amplifies the range of subject matters that the Court can entertain, but this is not to be conflated with the conferral of additional power to make orders where none otherwise exists.

92 Section 20(2) of the LEC Act is in the following terms:

> **20 Class 4-environmental planning and protection and development contract civil enforcement**
>
> (2) The Court has the same civil jurisdiction as the Supreme Court would, but for section 71, have to hear and dispose of the following proceedings:
>
> (a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract,

(b) to review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract,

(c) to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function,

(d) whether or not as provided by section 68 of the Supreme Court Act 1970-to award damages for a breach of a development contract.

93 But there is nothing in the powers of the Supreme Court that I was referred to that would permit such an order being made under either s 20(2)(a), (b), (c) or (d) of the LEC Act.

94 Section 22 of the LEC Act provides:

22 Determination of matter completely and finally

The Court shall, in every matter before the Court, grant either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by that party in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters may be avoided.

95 While arguably s 22 confers on the Court the necessary power to make the notification order sought, I am of the opinion that, absent any evidence of a breach of the GPSO and the EPAA by any prospective purchaser of the property, or by Ms Bennic in selling the property, it would not be appropriate to make such an order pursuant to this provision. First, it is not clear to me that this is a remedy to which either of the Dobrohotoffs "appears to be entitled", and second, the order is not necessary as "between the parties" to completely and finally resolve all matters in controversy between them. Once the declaration is made and the injunctive relief granted, the controversy between the Dobrohotoffs and Ms Bennic will be quelled.

96 As for the Court's case management powers under the UCPR and the CPA, I do not think they are apposite. For example, an order compelling a non-party to litigation to produce documents pursuant to a subpoena is tangibly different from a notification order of the type sought here insofar as, unlike the present situation where the class of persons to whom the order is ultimately directed is at large, the non-party is identifiable at the time the order is made.

97 In addition, in the terms sought, the order is uncertain. It is not clear to me who constitutes "any parties interested in purchasing the property". Does this include anyone who makes a telephone enquiry? Or who attends an inspection? Or is it limited to persons who have taken out a contract for sale? Court orders are required to be formulated in precise terms (*Foster v Sutherland Shire Council* [2001] NSWLEC 89; (2001) 115 LGERA 130 at [8]).

98 Finally, even if all of the above reasoning is wrong, I would not, as an exercise of my discretion, make the notification order sought, first, on the basis that it is not necessary. Given the extensive media (both print and television) coverage

these proceedings have had to date, it is highly unlikely that any potential purchaser will not be aware of the orders made today. And second, I am of the opinion that the terms of the injunction are sufficient to protect the Dobrohotoffs in this regard, covering as it does, the advertising, soliciting and permitting of the unlawful use of the property during the sale.

99 Accordingly, I refuse leave to amend the summons to include the notification order.

Orders

100 In conformity with the reasons given above, the orders of the Court are as follows:

(1) leave to amend the summons is refused;

(2) the Court declares that, in breach of s 76B of the *Environmental Planning and Assessment Act* 1979, the respondent has carried out development that is prohibited, namely, the use of land for short term holiday rental accommodation at 24 Charles Kay Drive, Terrigal ("the property");

(3) that the respondent, by herself and her servants and agents, be restrained from using the property for short term holiday rental accommodation, including, without limitation, advertising, soliciting or permitting the property to be used for that purpose. "Short term holiday rental accommodation" means accommodation for a period of less than three months;

(4) the Court stays the operation of Order (3) until 29 June 2013; and

(5) that the respondent to pay the applicants' costs of the proceedings, unless, within 14 days either party seeks, by way of notice of motion and supporting affidavit, some other form of costs order.

****

Decision last updated: 21 August 2013