Setting aside subpoenas in the context of notices to provide information and records: Port Macquarie-Hastings Council v Mansfield

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A challenge to a subpoena can be made by a party to proceedings or any person having a sufficient interest.[1] Whilst the power of the court to set aside a subpoena is contained within the Uniform Civil Procedure Rules 2005 (NSW), even in summary criminal proceedings, the grounds on which the court can set aside a subpoena is found in case law.[2]

This article considers two subpoenas recently set aside by Sheahan J in *Port Macquarie-Hastings Council v Mansfield*[3] (*Mansfield*) on grounds which are less commonly raised. In this case, the defendant successfully challenged the validity of two subpoenas issued to third parties by the prosecutor. The principal challenge concerned the prosecutor's use of a notice issued pursuant to (the former) s 119J of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act), and then using its output as the basis for serving the subpoenas. The defendant argued that the s 119J notice issued by the council was not issued for a proper purpose, that is, an "investigation purpose" under the EPA Act.[4] Rather, the defendant submitted it was issued for the substantial purpose of enabling a criminal prosecution,[5] amounting to an abuse of process.[6] Ultimately this ground was sufficient in itself to lead the court to set aside the subpoenas avoiding the need to analyse the more common grounds such as whether the subpoenas were too broad, or were in the nature of discovery.

If the decision is upheld in the Court of Criminal Appeal,[7] the decision will have implications for the use of s 119J notices (or s 9.22 notices as they are now) in circumstances where a criminal prosecution is a possibility. The decision suggests that if a criminal prosecution is possible at the time of a s 119J notice, then any information obtained pursuant to that notice should not be used to formulate subpoenas issued within criminal proceedings. To do otherwise would blur the council's investigation powers with its criminal enforcement powers.

In this regard, the decision reaffirms and builds upon the Chief Judge's reasoning in *Zhang v Woodgate and Lane Cove Council*[8] (*Zhang*), by applying to circumstances where criminal proceedings have not yet occurred.

Setting aside subpoenas

The relevant principles relating to subpoenas are relatively well-trodden.

First, the scope of a subpoena must not be so wide as to amount to a mere "fishing expedition".[9] Under this requirement, the issuing party must draft its subpoena with "reasonable particularity" to identify the documents sought to be produced.[10] Subpoenas which are "too broad" and where the legitimacy of the forensic purpose is called into question may be set aside and "it is not the function of the Court to redraft [them]."[11]

Second, there must be a "legitimate forensic purpose" for the documents being sought.[12] "Mere relevance" will not be sufficient.[13] Under this principle, the issuing party bears the onus of establishing that a subpoena has a legitimate forensic purpose.[14] Put another way, the documents sought in a subpoena must have "apparent relevance to the issues"[15] in the proceedings. In the context of a criminal prosecution, it needs to be "'on the cards' that [they] will materially assist [the prosecutor's] case."[16]

Most challenges to, and negotiations surrounding, the narrowing of subpoenas relate to the above two grounds and the overlap between them, but there are a number of cases that also deal with a third area, which was of particular relevance to the recent decision in *Mansfield*. This relates to subpoenas issued based on an abuse of process or where issued for an improper purpose.

Relevant background

The proceedings concern alleged unlawful works on a site on the mid-north coast near Port Macquarie. The defendant sought to set aside two subpoenas issued to two third parties — one the defendant's town planner, and the other a company, Eagle Nest Park Pty Ltd, which the defendant was the sole director of.

Before the proceedings were commenced, and while the council was "still investigating"[17] a public complaint about the works, the defendant (among others) was served a s 119J notice — a notice requiring the provision of information. The defendant produced a number of invoices and other documents, and through this process learnt that Eagle Nest Park had been invoiced for the works allegedly carried out at the site.[18]

After the proceedings were commenced, the two subpoenas served on Eagle Nest Park and King & Campbell Pty Ltd (the town planner) sought in general terms all documents relating to the development of the land in question for work carried out in the charge period (1 November 2013 to 30 November 2015).[19] This included invoices and quotes, correspondence, plans and reports, business plans, loan applications and bank statements.[20] The defendant also brought to the court's attention that the subpoena served on Eagle Nest Park also sought documents containing instructions for the preparation of a development application outside the charge period.[21]

The court was asked to adjudicate the validity of the two subpoenas. The basis of the challenge related to:[22]

- their breadth
- having no apparent relevance
- lacking a legitimate forensic purpose
- for their inappropriate reliance on information obtained by use of coercive investigative powers in the EPA Act, such that they amounted to an abuse of process

Although each of these grounds was raised and argued, the focus of the case centred on the last of the two grounds above.

For this reason, the balance of this article focuses on the more novel grounds of challenge and the primary argument of the defendant, namely that that there was an impropriety in the prosecutor's strategy of deploying a s 119J process, and then using its output as the basis for issuing the challenged subpoenas.

The evidence

The most important evidence arose from the council officer who both issued the s 119J notices and made the decision to commence proceedings.[23] One of his affidavits deposed that:

> … I **issued the [s 119J] Notice to investigate** what had been built, what was exempt development, what work required development consent, what was prohibited, who had authorised the work, who undertook the work, and to work out what to do next.[24]

He further deposed that "when I issued the Notice I had not turned my mind to what Council would do about the works" and that "there were a number of options on the table."[25]

During cross-examination, he was asked whether the information gathered under the s 119J notice was at least in part to support a prosecution. The council officer stated, "it turns out that it was, but it wasn't that wasn't the sole purpose of it when we were asking for it, it was to help with the investigation."[26]

The defendant's arguments seeking that the subpoenas be set aside

The defendant submitted that there was an invalid use of s 119J to obtain evidence for a prosecution, and the subpoenas amounted to an abuse of process.[27] The reason for this, it was argued, was that a council is restricted to issuing a s 119J notice for the purpose of enabling it to exercise its functions under the EPA Act, and criminal prosecution is not one of those functions, since that function is set out in the Criminal Procedure Act 1986 (NSW) and Local Government Act 1993 (NSW).[28]

The defendant cited Preston CJ's decision in *Zhang* as support for this proposition. Given the importance of the decision to this argument, it is instructive to set out this decision in some detail, which was also summarised by Sheahan J.[29]

The facts surrounding the case of *Zhang* involved the council commencing a local court prosecution for excavating beyond what the development consent allowed. Before the hearing, but after the proceedings had been commenced, the prosecutor issued a notice under s 118BA of the EPA Act to a witness who was a director of a company who prepared two statements of environmental effects concerning a modification application to the consent.[30] *Zhang* commenced Class 4 proceedings against the council in relation to the notice, on the basis it constituted an abuse of process and was ultra vires.[31]

Preston CJ held that the notice was ultra vires because it was issued in aid of the pending criminal proceedings against Mr Zhang, and the function of such a notice is not a function under the EPA Act.[32] This was because the function of a council to prosecute for an offence against the EPA Act is not conferred by the EPA Act but rather by other statutes.[33]

While the facts were not identical to *Zhang*, given the effluxion of time between the s 119J notices and the commencement of proceedings, the defendant argued that the critical part of the reasoning in *Zhang* was that a s 118BA notice would be ultra vires if issued to enable a council to exercise its function to prosecute since that would not be an "investigation purpose" which was the permitted purpose.[34]

The defendant built upon the above argument drawing on recent case law in other areas of law by arguing that the improper purpose did not need to be the sole purpose, but simply that it be a substantial purpose.[35] It was argued that "if it had not been for this tainted dual purpose, the 119J Notice would have been issued"[36] and "that there were really two coordinate purposes, both very substantial but relevantly, one which was entirely impermissible, having regard to the scope of 119J".[37]

The prosecutor's arguments

The prosecutor argued that the notices were issued during a council investigation, where criminal proceedings comprised only one possible response.[38] Relevantly, criminal proceedings only materialised more than 18 months after the notices were issued, and it was argued that the purpose in issuing the s 119J notices was to decide what action to take.[39] In this regard, the council needed information to form a decision whether to take Class 4 (civil enforcement) or Class 5 (criminal) proceedings.[40] The prosecutor argued that at the date of the s 119J notices, the council did not have a firm position as to what it would do in relation to the alleged unauthorised work.[41] Accordingly, the prosecutor's primary argument was that the council was not gathering evidence for the prosecution, but was investigating in order to decide what action to take.[42]

The prosecutor then argued that even if it was not accepted that the council was investigating in order to decide what action to take, and that it was in fact gathering evidence for a prosecution, the EPA Act as it stood at the time of the issue of the notice identified gathering evidence of commission of an offence as something that was part of the council's functions.[43] It was submitted that the EPA Act changed after *Zhang*, and these changes made it "quite clear that an investigation purpose included gathering evidence of an offence".[44] Further, it was submitted that:

> *The mere fact that a Council contemplates the possibility of prosecuting the recipient of a notice does not render that notice invalid. The EPA Act specifically notes that an order may be issued in circumstances where the recipient might subsequently be prosecuted.*[45]

The prosecutor argued that if the defendant's argument was accepted it would mean that a council would "*have to make up its mind first that it is not going to prosecute* someone and only then it could issue the notice".[46]

Sheahan J's findings

Whilst his Honour found "some substance" in the defendant's arguments on the more conventional grounds for challenge (ie, breadth, etc), his Honour refrained from analysing these grounds in detail.[47]

His Honour found that while the council officer may have ultimately decided on taking "no action", the council officer said he "needed some kind of follow up" or a "better picture" to inform a "final view" on taking some more serious action (ie, in Class 4 or Class 5).[48] He also found that the council officer, by his use of the s 119J notices, "was seeking to clarify matters, which would later found 'particulars of charge', rather than to inform any decision by him as between Class 4 and Class 5 proceedings."[49] His Honour considered that the council officer "may well have had a 'dual purpose', but the Class 5 (ie criminal) option was a very "substantial", if not his only, or his primary, purpose in using s 119J."[50]

On this basis, the court held that as the issuing party could not satisfy the court that the notices were truly "legitimate", in the *Zhang* sense, in all the circumstances of the subsequent prosecution, the prosecutor had not satisfied the court that its forensic purpose in issuing the subpoenas was "legitimate".[51]

His Honour also reaffirmed the decision in *Zhang*. On this, his Honour held that the subsequent legislative changes did not erode the reasoning of the decision,[52] and embraced (in full) the defendant's submissions in this regard.[53] His Honour stated that "the Council appears to contend that changes were made to the EPA Act because of the decision in Zhang, but there is no evidence of that."[54]

Finally, the court also accepted that the s 119J notice had been issued for an "ulterior purpose" because there was no evidence that the notice would have been issued "absent that ulterior purpose of being able to obtain the information for use in criminal proceedings".[55]

Comments

The decision in *Mansfield* highlights some broader and less well-known parameters controlling the legitimacy of subpoenas particularly in the context of criminal proceedings in a local government context. The concepts of "fishing", "discovery", breadth and the legitimacy of the forensic purpose are well-known, but the abuse of process ground successfully ran in *Mansfield* serves as a useful reminder of this more obscure ground.

Bearing in mind that the decision is under appeal, if it is dismissed, subpoenas in criminal proceedings which are issued based on knowledge gained from (now) a s 9.22 notice will be at risk of being set aside. Specifically, where a subpoena is issued in criminal proceedings on the basis of third party documents obtained during or before those proceedings through a s 9.22 notice, a risk arises that the subpoena will be set aside.

The decision in *Mansfield* has much broader application than simply the law of subpoenas, since the contention in the case overlaps with issues that could equally arise in the context of tendering such documents at trial, challenging the admissibility of documents tendered, and the probative value of any such documents that are admitted — something acknowledged by Sheahan J.[56] Moreover, the decision will have important impacts on the deployment of s 9.22 notices in certain circumstances and the type of proceedings, if any, commenced after the issue of such a notice.

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[1] Uniform Civil Procedure Rules 2005 (NSW), r 33.4.

[2] *Tony Azzi Automobiles Pty Ltd v Volvo Car Australia Pty Ltd* [2006] NSWSC 283; BC200602227 at [4].

[3] *Port Macquarie-Hastings Council v Mansfield* [2018] NSWLEC 107; BC201806067.

[4] Above, at [280].

[5] Above n 3, at [84].

[6] Above n 3, at [93].

[7] The prosecutor filed a Notice of Application for Leave to Appeal Against Interlocutory Judgment or Order on 30 July 2018.

[8] *Zhang v Woodgate and Lane Cove Council* (2015) 208 LGERA 1; [2015] NSWLEC 10; BC201500518.

[9] *Alister v R* (1984) 154 CLR 404 at 414.

[10] *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 573–75.

[11] *Lowery v Insurance Australia Ltd* (2015) 90 NSWLR 320; 72 MVR 537; [2015] NSWCA 303; BC201509490 at [25].

[12] *Portal Software International Pty Ltd v Bodsworth* [2005] NSWSC 1115; BC200510136 at [29].

[13] Above n 3, at [144] citing *Carroll v A-G (NSW)* (1993) 70 A Crim R 162 at 182–83.

[14] *R v Ali Tastan* (1994) 75 A Crim R 498 at 508.

[15] *National Employers' Mutual General Association Ltd v Waind and Hill; Waind and Hill v National Employers' Mutual General Association Ltd* [1978] 1 NSWLR 372 at 373.

[16] *Attorney General (NSW) v Chidgey* (2008) 182 A Crim R 536; [2008] NSWCCA 65; BC200801976 at [64].

[17] Above n 3, at [174].

[18] Above n 3, at [226].

[19] Above n 3, at [29] and [31].

[20] Above n 3, at [29]–[32].

[21] Above n 3, at [108]–[109].
[22] Above n 3, at [240].
[23] Above n 3, at [213].
[24] Above n 3, at [213].
[25] Above n 3, at [213].
[26] Above n 3, at [224].
[27] Above n 3, at [276].
[28] Above n 3, at [104].
[29] Above n 3, at [94]–[107].
[30] *Zhang v Woodgate and Lane Cove Council* (2015) 208 LGERA 1; [2015] NSWLEC 10; BC201500518 at [4].
[31] Above, at [7].
[32] Above n 3, at [71].
[33] Above n 3, at [24].
[34] Above n 3, at [280].
[35] Above n 3, at [282].
[36] Above n 3, at [283].
[37] Above n 3, at [283].
[38] Above n 3, at [246].
[39] Above n 3, at [256].
[40] Above n 3, at [260].
[41] Above n 3, at [283].
[42] Above n 3, at [256].
[43] Above n 3, at [264].
[44] Above n 3, at [257].
[45] Above n 3, at [258].
[46] Above n 3, at [260].
[47] Above n 3, at [289].
[48] Above n 3, at [308].
[49] Above n 3, at [315].
[50] Above n 3, at [316].
[51] Above n 3, at [317].
[52] Above n 3, at [318].
[53] Above n 3, at [320]
[54] Above n 3, at [319].
[55] Above n 3, at [321].
[56] Above n 3, at [19].