



GREENWAY CHAMBERS

Has Al Maha been taken too far? Conciliated Agreements in the LEC

Michael Astill & Matt Harker



Has Al Maha been taken too far?

1. Section 34
2. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245
3. What is a jurisdictional precondition?
4. What has the Court treated as a jurisdictional precondition?
5. Tips on getting a 34 agreement over the line

Section 34

- (3) *If, either at or after a conciliation conference, agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings that would be acceptable to the parties **(being a decision that the Court could have made in the proper exercise of its functions)**, the Commissioner—*
- (a) ***must dispose of the proceedings in accordance with the decision, and***
 - (b) *must set out in writing the terms of the decision.*



The only issue for the Court

If agreement is reached, then the Court's role is very significantly circumscribed: the only issue is whether the resultant decision is one which could have been made in the proper exercise of the Court's functions.

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces (2021) 105 NSWLR 152, [16] (Meagher and Leeming JJA)



What are the LEC's functions in Class 1?

1. Determine appeals including in relation to DAs and modification applications: *Land and Environment Court Act 1979*, s 17(d).
2. Exercise all the functions of the consent authority: *Environmental Planning and Assessment Act 1979*, s 8.14.
3. In the case of a requirement for concurrence or general terms of approval:
 - a. determine the appeal irrespective of whether concurrence/GTAs were granted;
 - b. vary or revoke conditions imposed by a body who has granted concurrence: EPA Act, ss 8.14(3) and (4).
4. Grant all remedies to which any of the parties appear to be *entitled* so that, as far as possible, all matters in controversy between the parties may be completely and finally determined: LEC Act, s 22.



Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245

1. Judicial review by an objector of a commissioner's decision to grant consent pursuant to a s 34 agreement.
2. Main issue in the proceedings:

Whether the decision was one that the Court could have made in the proper exercise of its functions.
3. Challenge on this point was on multiple grounds:
 - a. Absence of owner's consent;
 - b. Failure to form the requisite opinions required by cl 4.6;
 - c. Plans were inconsistent such that the decision was irrational or unreasonable.



Al Maha Pty Ltd v Huajun Investments Pty Ltd

Was the decision one that the Court could have made in the proper exercise of its functions?

A “decision that the Court could have made in the proper exercise of its functions” under s 80(1) now s 4.16(1) of the EPA Act is one which the Court, exercising the functions of the consent authority, has jurisdiction to make.

... A development application can only be made for consent to carry out development that an environmental planning instrument provides may not be carried out except with development consent (s 77 now s 4.9 of the EPA Act). A development application cannot be made for consent to carry out development that does not need consent (s 76(1) now s 4.1(1) of the EPA Act) or that is prohibited (s 76B now s 4.3(1) of the EPA Act).

Preston CJ of LEC at [76].

Al Maha Pty Ltd v Huajun Investments Pty Ltd

Was the decision one that the Court could have made in the proper exercise of its functions?

The requirement in the EPA Act and the EPA Regulation that a development application contain evidence of the owner's consent to the application and the requirement in the applicable environmental planning instrument that development consent not be granted except if some condition is satisfied, are jurisdictional prerequisites that need to be satisfied in order for the consent authority (and the Court on appeal exercising the functions of the consent authority) to be able to exercise the function of determining a development application by granting consent to the development application. Under s 34(3) of the Court Act, if the jurisdictional prerequisites to the exercise of the function of determining a development application by granting consent to the development application are not satisfied, a decision to grant consent to the development application will not be "a decision that the Court could have made in the proper exercise of its functions." The Court could not make that decision.

Preston CJ of LEC at [79].



What is a jurisdictional prerequisite?

1. Concern is with jurisdictional prerequisites *to* the exercise of the power.
2. Not the matters that are ordinarily relevant to the exercise of the power.



What is a jurisdictional prerequisite?

Preconditions *to - v -* conditions *on* the exercise of power

*The check on jurisdiction required by s 34(3) will not usually require the Commissioner to check whether there will be an abuse of power if the power were to be exercised in a particular way. For example, the Commissioner would not be required, in determining the development application by the grant of consent, to take into consideration the relevant matters in s 4.15(1) of the EPA Act. **The requirement to consider relevant matters is a condition on the exercise of the power to determine a development application, but it is not a condition to the exercise of the power in the first place.** The check on jurisdiction required by s 34(3) is that the decision could have been made in the proper exercise of the relevant power, **that is to say, that there is power to make the decision, not on how the power, if it can be exercised, should be exercised.***

Preston CJ of LEC, at [217].



The Grounds in Al Maha

Ground 1: absence of owner's consent

The giving of owner's consent to the making of a development application with respect to the owner's land for the purpose of cl 49 of the Regulation is an essential prerequisite to, and part of the process of, a consent authority's determination of the application. That is to say, the giving of owner's consent is necessary to enable the consent authority to exercise its function to grant development consent to the application if it be minded to do so.

Preston CJ of LEC, at [92]



The Grounds in Al Maha

Ground 2: failure to form the requisite opinions required by cl 4.6

Cl 4.6(4) Development consent **must not** be granted for development that contravenes a development standard unless—

(a) the **consent authority is satisfied** that—

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

1. Jurisdictional fact of a special kind: *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, [25].
2. Precondition *to* the exercise of power.

The Grounds in Al Maha

Ground 3: plans were inconsistent such that the decision was irrational or unreasonable

Basten JA (in obiter), at [16]

If a decision of the Land and Environment Court could be set aside or declared invalid by this Court, it is not “a decision that the Court could have made in the proper exercise of its functions”. Nor would it make sense to read s 34(3) as implicitly authorising such a decision. If the development application lacked essential elements, the deficiencies could render a consent one which could not have been granted in the proper exercise of the Court’s functions. However, Al Maha framed its ground as a challenge based on the legal unreasonableness of the consent. It is not necessary to determine whether this was an appropriate formulation of the ground, nor whether the deficiencies in the plans were such as to allow them to be characterised in this way. Al Maha succeeds on other grounds.



The Grounds in Al Maha

Ground 3: plans were inconsistent such that the decision was irrational or unreasonable

Preston CJ in LEC, at [217]-[218]

The check on jurisdiction required by s 34(3) will not usually require the Commissioner to check whether there will be an abuse of power if the power were to be exercised in a particular way ...

Al Maha contended that the Commissioner's decision to grant consent to the development application with these deficiencies lacked certainty and was legally unreasonable. The check on jurisdiction required by s 34(3) of the Court Act required the Commissioner to determine whether the development application with these deficiencies was a development application that answered that description under the EPA Act and EPA Regulation. This is because the power under s 4.16 of the EPA Act is to determine "a development application."



Ground 3: plans were inconsistent such that the decision was irrational or unreasonable

1. Concern is with non-compliance with essential statutory prescriptions.
2. Any irrationality or unreasonableness needs to be tied to a prerequisite *to* the exercise of power.



What is a precondition to the exercise of power?

1. Development application
2. Owner's consent
3. Clause 4.6 objection
4. Substantially the same development (on a modification)
5. Jurisdictional facts (including of a special kind):
 - a. Permissibility;
 - b. *Development consent must not be granted unless the consent authority is satisfied...*



What has the Court treated as a jurisdictional precondition?

Some examples



What has the Court treated as a jurisdictional precondition?

The Hub Austral Pty Ltd v Liverpool City Council [2023] NSWLEC 1078

In granting consent under s 34:

Section 4.15(1) of the EPA Act requires a consent authority to take into consideration certain other matters as relevant:

- *Mindful of subs (1)(a)(iii), I have given consideration to Liverpool Growth Centre Precincts Development Control Plan 2012. Here I note the relevant particulars included in the parties' jurisdictional note.*
- *In regard to subs (1)(d), I note the advice in the parties' jurisdictional note that public notification occurred but that no submissions were received.*
- *I have also given attention to the likely impacts of the proposal, site suitability and the public interest, mindful of the requirements of subs (1)(b), (c) and (e) of the EPA Act.*

Section 4.15 is a jurisdictional precondition...



What has the Court treated as a jurisdictional precondition?

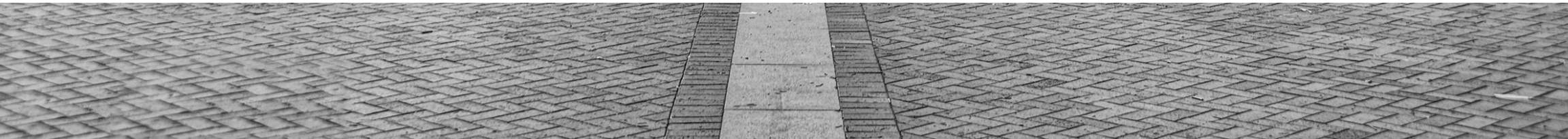
***Ma v Georges River Council* [2023] NSWLEC 1085**

- *The development application includes earthworks for the provision of the basement level. Based on the comments in the Jurisdictional Statement, the Geotechnical Investigation dated September 2021, and the proposed conditions of consent, I have considered the matters set out in cl 6.2(3) of the KLEP.*
- *The development application was notified for a period of 28 days from 27 October 2021 to 24 November 2021, and 16 submissions were received. I have considered the issues raised in those submissions.*



CI 6.4: Earthworks

- (3) Before granting development consent for earthworks (or for development involving ancillary earthworks), the consent authority ***must consider*** the following matters—
- (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
 - (b) the effect of the development on the likely future use or redevelopment of the land,
 - (c) the quality of the fill or the soil to be excavated, or both,
 - (d) the effect of the development on the existing and likely amenity of adjoining properties,
 - (e) the source of any fill material and the destination of any excavated material,
 - (f) the likelihood of disturbing relics,
 - (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
 - (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.



What is consideration?

“proper, genuine and realistic consideration upon the merits”

Khan v the Minister of Immigration and Ethnic Affairs (1987) 14 ALD 291

Adopted in Weal v Bathurst City Council & Anor [2000] NSWCA 88

... the duty to take noise into consideration required more than simple advertence to the noise issue. I agree with Giles JA that there had to be an understanding of relevant matters and their significance to the decision required to be made, as well as a process of evaluation sufficient to warrant the description of the matters being taken into consideration. Legally sufficient consideration of the noise issues extended to consideration as to appropriate conditions limiting and controlling noise if consent was to be forthcoming.

The very thing not permitted by s 34



What has the Court treated as a jurisdictional precondition?

Back to *Al Maha*

*The **requirement to consider** relevant matters is a **condition on the exercise of the power** to determine a development application, but it is **not a condition to the exercise of the power in the first place**. The check on jurisdiction required by s 34(3) is that the decision could have been made in the proper exercise of the relevant power, that is to say, that there is power to make the decision, not on how the power, if it can be exercised, should be exercised.*

Preston CJ of LEC at [217]



A different approach?

Kara-Ali v Hawkesbury City Council [2023] NSWLEC 1075

The parties have had regard to the relevant provisions of HDCP. In particular, the parties have had regard to the clauses noted in the SOFAC and the particularised Contentions. The Court is satisfied that the Proposed Development **can be approved as the parties have had regard** to the provisions of the HDCP and section 4.15(1)(a)(iii) of the EPA Act in reaching their agreement as to the merits of the Proposed Development including the terms of the agreed conditions of consent.



The problems with this approach

1. Consideration of the DCP is not a precondition *to* the exercise of power.
2. If it was, parties cannot simply agree that the Court has jurisdiction, the Court has to form that view itself.
3. Whether someone else has that view is usually irrelevant: *Smith v The Queen* (2001) 206 CLR 650, [11].

It is trite that a court must always be satisfied that it has jurisdiction before exercising jurisdiction in a matter. Further, a court must always be satisfied before making an order that there is power to do so. ... The fact that the parties agree as to jurisdiction or power does not avoid the need for the Court to be satisfied.

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces (2021) 105 NSWLR 152, [16]
(Meagher and Leeming JJA)

Different formulation

Does the Court need to be satisfied that it had sufficient information before it that it *could* have considered relevant matters?



Different formulation

Does the Court need to be satisfied that any decision would have an evident and intelligible basis, or not otherwise be unreasonable?



The answer is in Al Maha

The check on jurisdiction required by s 34(3) will not usually require the Commissioner to check whether there will be an abuse of power if the power were to be exercised in a particular way.

Al Maha contended that the Commissioner's decision to grant consent to the development application with these deficiencies lacked certainty and was legally unreasonable. The check on jurisdiction required by s 34(3) of the Court Act required the Commissioner to determine whether the development application with these deficiencies was a development application that answered that description under the EPA Act and EPA Regulation. This is because the power under s 4.16 of the EPA Act is to determine "a development application."

Preston CJ of LEC at [217-218]

Tips to get a s 34 agreement over the line

1. Identify jurisdictional preconditions early
2. Use Council's assessment report to your advantage
3. Avoid saying '*the parties agree*'
4. Prepare a bundle
5. Point to the evidence in your jurisdictional statement
6. Stand firm on what is not a jurisdictional precondition
7. Deploy Al Maha

