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IN THE SUPREME COURT OF NEW SOUTH WALES:
COMMON LAW DIVISION No. 6516/76

MR. JUSTICE ASH:

San Sebastian P.L. & Anor v. the Minister administering the Environmental Planning and Assessment Act, 1979, and The Sydney City Council.

FINDINGS delivered 17th December, 1981

(total 163 pages)

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presentation during his long evidence indicated clearly that he is quite above such a level. As I have already said he took a frank and objective view of the situation. Incidentally, that praise of Mr. Clarke for the SPA was in respect of their preparation of a Study almost exactly contemporary with the subject one; I shall refer to it later.

The second matter is an evidentiary one concerning the admissibility of the reports prepared by the specialist witnesses or of parts of them; and also to many of the expressions used in oral evidence. The matter is briefly but completely dealt with in a portion of an ex tempore judgment on evidentiary matters delivered on 7th July during the hearing. Following numerous objections taken as Mr. Clarke's evidence proceeded, and the consequent "whiting-out" of portions of his report, the matter was discussed between counsel and there was agreement reached as to the adoption of the approach by the Court as there set out. Even Professor Westerman in evidence referred to his own thorough report as "submissions", and one or two later reports notwithstanding that agreement had to be revised. But that approach was adopted in the interests of time and costs.

At a later stage however after the case of the first defendant had commenced it was noted on the transcript that the parties had agreed that:

- "(a) The various studies referred to in evidence by Mr. Clarke shall be tendered in evidence.
- (b) All parties shall be free to put submissions regarding the comparability of such studies and the comments thereon made by Mr. Clarke without being bound to call expert evidence in relation to that matter or being bound to deal with the question of comparability in cross-examination.
- (c) Failure to call evidence regarding comparability or to cross-examination thereon does not imply any acceptance of any evidence or view about comparability."

Because there had been other reports already prepared there appear on the transcript objections to evidence concerning those other reports.

The thorough indexation of Mr. Clarke's report (Exhibit AS, which incidentally in his own handwriting he identified as his "evidence in chief") only indicates the very careful preparation of it. The two central matters, and as to them it is again unnecessary for a copy to be made herein, are those headed "Definitions of what constituted professional competence in 1968 and 1969", (section 5, pages 4-5) and - as mentioned above - "Critiques of the Defendants' Woolloomooloo Study and Plan", (section 7, pages 48-62) where the report then has a summary of his opinion as to the specific matters in respect of which the Study fell short. Those matters of course were expanded in his long evidence. The large number of intervening pages between those two sections with the abovementioned headings indicates the purpose of all those

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However, it will be evident because of my already stated acceptance of the evidence of Mr. Clarke that those portions of the evidence of Professor Westerman, Mr. Bayly, and Mr. McInnes which are opposed to his evidence have not been accepted; and I think it appropriate therefore to give reasons for that. Though briefly expressed these reasons go to the basis of the greater part of their evidence.

The first of those reasons resulted from a matter which was strongly pressed on behalf of the defendants throughout the hearing in evidence and in final submissions. In short, it was stressed that this "Plan" (and I shall refer to it by that word throughout these present comments) was not a development (or redevelopment) control plan, but a strategic plan; or if not wholly, then primarily. In submissions, identification of it was taken to the point where it was said that it was neither a planning scheme ordinance nor an interim development order, and I can dispose of that latter submission by agreeing with it as at August 1969. But it was the former of those distinctions which had a considerable effect on the evidence on behalf of the defendants. Although Professor Westerman expressly stated in an early part of his report (Exhibit 61) that "the plan is not a development control plan but a combination of a strategic and a development type of plan", his evidence - and this was not really disputed - in criticism of the Woolloomooloo plan and support for its satisfactory preparation was to a considerable extent based

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intangible factors. As a consequence of that, of course, there can be a considerable range of differences in opinions reached. I shall therefore set out reasons for accepting one view in preference to another or others and, as indicated, refer from time to time only briefly to specific evidence given or to extracts from exhibits. My conclusions to be expressed on that basis, were indeed draft-recorded in respect of each of the expert witnesses during and/or immediately after their actual evidence and an early re-reading of the chief portions of it.

At this point I shall interpolate comments upon two matters which relate to all the witnesses, but each of which relates especially to Mr. Clarke, the second one because it arose for decision during his evidence. The first is that in respect of criticism of witnesses at the hearing. On the matter of credibility in its sense of honesty there was, with one exception* to which I shall refer later, no such suggestion relating to any of the witnesses throughout the case. But Mr. Clarke was cross-examined by counsel for the second defendant on the suggestion that he had a "bias" against the SPA, which could produce a claim that his evidence against the standards of town-planning adopted by the SPA in respect of the subject Study would be affected. The cross-examination as such was justified, being prefatory to evidence which was ultimately given by Mr. Briger that he held that view. As it

is necessary to record a finding on that matter, I shall do so, but very clearly. I saw no sign whatever of any such bias during any part of the long evidence of Mr. Clarke or in his demeanour. I formed the firm opinion that Mr. Clarke's evidence from start to finish was frank and objective. It may well be that a number of his comments and at times his picturesque phrases appearing in his evidence could call for comment; and suggestions of some "arrogance" and of having a "powerful personality" were made. But those matters even if accepted are collateral to the Court's attitude to evidence in this case. Mr. Clarke was a professional man of high quality and experience, and that has only been confirmed by witnesses on the "other side" of this case.

It could be that Mr. Clarke's firm criticism of the SPA in relation to the preparation of that Study resulted from the opinions he had formed concerning the Woolloomooloo area while he was engaged in that other Study of which he had been placed in charge, but he has also praised the SPA in respect of other work by them. I would require more evidence on this matter before accepting Mr. Briger's view of a general "antipathy" to or "bias" against the SPA. But even if I were to accept it, that would be completely overridden in relation to Mr. Clarke's evidence in this case. When a person has a responsibility to express an objective view it is serious if that view is influenced by a personal complex or bias towards another person or a corporation. Mr. Clarke's

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