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Supreme Court of New South Wales - Court of Appeal

Mailey v Sutherland Shire Council [2017] NSWCA 343 (20 December 2017)

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Court of Appeal

Supreme Court
New South Wales

Case Name:	Mailey v **Sutherland** Shire Council
Medium Neutral Citation:	[2017] NSWCA 343
Hearing Date(s):	1 December 2017
Date of Orders:	20 December 2017
Decision Date:	20 December 2017
Before:	Macfarlan JA at [1]; Meagher JA at [2]; Preston CJ of LEC at [3]
Decision:	1. The appeal is dismissed. 2. The appellants are to pay the respondent's costs of the appeal.
Catchwords:	BUILDING CONTROL – order to do work to place land in safe condition – retaining wall at imminent risk of collapse – retaining wall straddling common boundary – power to issue order - whether lower land not in safe condition – whether order can require work on upper land ownec by another person – if any part of order invalid, whether severable – whether order uncertain – whether order issued for improper purpose – order not invalid in ways challenged – claim for compensation if order invalid – source of power to award compensation
Legislation Cited:	Access to Neighbouring Land Act 2000 Conveyancing Act 1919 s 177 Environmental Planning and Assessment Act 1979 s 121B Environmental Planning and Assessment Regulation 2000 cl 98E Interpretation Act 1987 ss 3, 32 Local Government Act 1993 ss 124, 129, 136, 137, 138A, 180, 181, 676
Cases Cited:	Bank of New South Wales v Commonwealth (1948) 76 CLR 1; [1948] HCA 7 Barclay v Wollongong City Council (2005) 139 LGERA 167; [2005] NSWLEC 160 Bobolas v Waverley Council [2012] NSWCA 126; (2012) 187 LGERA 63; [2012] NSWCA Cann's Pty Ltd v Commonwealth (1946) 71 CLR 210; [1946] HCA 5 Cugg Pty Ltd v Gibo Pty Ltd (2001) 10 BPR 18,641; [2001] NSWSC 297 D'Anastasi v Environment, Climate Change and Water NSW (2011) 81 NSWLR 82; [2011] NSW(374 Daly v Thiering (2013) 249 CLR 381; [2013] HCA 45 Dehimi Pty Ltd v Barob Pty Ltd (1987) 4 BPR 97,277 Foster v **Sutherland** Shire Council (2001) 115 LGERA 130; [2001] NSWLEC 89 Genkem Pty Ltd v Environment Protection Authority (1994) 35 NSWLR 33 J & J O'Brien Pty Ltd v South Sydney City Council (2002) 121 LGERA 223; [2002] NSWCA 259

Jukes v Larter [2012] NSWSC 369

King Gee Clothing Co Pty Ltd v Commonwealth (1945) 71 CLR 184; [1945] HCA 23

Lake Macquarie City Council v Gordon [2016] NSWLEC 49

Maitland City Council v Anambah Homes Pty Ltd (2005) 64 NSWLR 695; [2005] NSWCA 455

Manly Council v Leech [2015] NSWLEC 149

McElwaine v The Owners – Strata Plan 75975 [2017] NSWCA 239

Piling Contractors (Qld) Pty Ltd v Prynew Pty Ltd [2008] NSWSC 118

Proprietors of Strata Plan 159 v Parramatta City Council (1977) 37 LGRA 74

R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603; [2009] HCA 12

Ranjon International Holdings Pty Ltd v Rockdale Council (1994) 83 LGERA 10

Tweed Shire Council v Gennacker Pty Ltd [2015] NSWLEC 3

Von Arnim v The Health Insurance Commission [2004] FCAFC 33

Williams v Keelty (2001) 111 FCR 175; [2001] FCA 1301

Category:	Principal judgment
Parties:	Geoffrey Mailey (First Appellant)
	Cresley Investments Pty Ltd (Second Appellant)
	GNK Developments Pty Ltd (Third Appellant)
	Sutherland Shire Council (Respondent)
Representation:	Counsel:
	Mr P Tomasetti SC (Appellants)
	Mr T Robertson SC and Mr R O'Gorman Hughes (Respondent)
	Solicitors:
	Swaab Attorneys (Appellants)
	Pikes & Verekers Lawyers (Respondent)
File Number(s):	2017/331883
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Land and Environment Court of New South Wales
Jurisdiction:	Civil
Citation:	[2017] NSWLEC 145
Date of Decision:	30 October 2017
Before:	Pain J
File Number(s):	2017/228813

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1. **MACFARLAN JA:** I agree with Preston CJ of LEC.

2. **MEAGHER JA:** I agree for the reasons given by Preston CJ of LEC that this appeal should be dismissed with costs.

PRESTON CJ of LEC:

Nature of appeal and outcome

3. The three appellants own land known as 2 Marlo Road, Cronulla ('the land'). The land was formerly two separate lots that were amalgamated. The land has two street frontages. Marlow Road is to the north of the land and provides vehicular access at grade to the land. Mitchell Road is to the east of the land and provides elevated pedestrian access to the land. In between Mitchell Road and the land is a series of five walls, retaining the elevated roadway. The walls extend along and across the boundary between the road and the land. At least one of the walls (which was referred to as wall D) became unstable. The respondent, **Sutherland** Shire Council ('the Council'), became concerned that wall D was at risk of failure, making the area of the land around the wall unsafe. The Council issued an order under item 21 of the Table to s 124 of the *Local Government Act 1993* ('the Act') requiring the appellants to do certain things specified in the order to place the land in a safe condition.
4. The appellants took some steps to comply with the order but then brought judicial review proceedings in the Land and Environment Court challenging the validity of the order and, if the order was held to be invalid, seeking damages for the expenses they incurred in complying with the invalid order. The proceedings were heard and determined by Pain J, who dismissed the proceedings. The primary judge determined that the order was not ultra vires in the narrow sense (that the order did not conform to the power in s 124) or the wide sense (that the order was uncertain or issued for an improper purpose). Having so held that the order was not invalid, the primary judge did not determine the appellants' claim for damages. The primary judge made orders that the proceedings be dismissed and the appellants pay the Council's costs.
5. The appellants appeal against the primary judge's decision and orders. The appellants raise numerous grounds of appeal but the errors that the appellants contend the primary judge made may be grouped in three categories:
. (a) narrow ultra vires: the order did not conform to the power under s 124 of the Act in that:
. (i) the circumstances that must exist for the order to be issued did not exist because the appellants' land was not land that was "not in a safe or healthy condition"; and
. (ii) the order required the appellants to do things on land other than the appellants' land (being in part on the Council's land);
. (b) broad ultra vires: the exercise of the power under s 124 of the Act to issue the order was outside power in that:
. (i) the order was uncertain; and
. (ii) the order was issued for an improper purpose; and
. (c) if the order was ultra vires, damages should be awarded to the appellants to compensate them for the expenses they incurred in complying with the invalid order.
6. I find that the appellants have not established that the order was ultra vires in either the narrow or the broad sense. The foundation for the appellants' claim for damages, therefore, has not been established. The primary judge was correct to dismiss the appellants' proceedings. The appeal should also be dismissed with costs.

The order that was issued

7. The Council issued an order under s 124 of the Act to the appellants on 13 April 2017. The order was given, and was expressed in the order to be given, in an emergency. As a consequence, the Council did not need to observe the procedures in Div 2 of Pt 2 of Ch 7 of the Act before giving the order (see s 129 of the Act).
8. The order specified:
. **(a) the premises** to be the land at 2 Marlo Road, Cronulla;
. **(b) the persons to whom the order was given** to be the three appellants;
. **(c) the circumstances** that the Council considered existed to be:

> "A recent inspection of the subject premises by Council's Executive Engineer Mario SHERRIE has revealed there are four (4) different types of construction methods of retaining walls along the eastern boundary.
>
> Mr SHERRIE has indicated that one (1) of the retaining walls in the rear yard of the subject premises is showing signs of a large amount of rotation and may collapse without further warning.
>
> Furthermore, Council's in receipt of a dilapidation report dated 22 February 2017, Ref: 20160464.04A prepared by Mr Daniel COUPE of Jones Nicholson Consulting Engineers.
>
> Mr COUPE has listed in his report the four (4) retaining walls as A, B, C and D. He has indicated that one (1) of the walls 'D' has failed and appears to be unstable. With no significant foundations encountered during investigation and severely deteriorated soldier piles, therefore, the wall is at risk of failure.
>
> Council now believes the area around wall 'D' is unsafe and as such, there is risk to person(s) and/or property should partial or complete failure occur.
>
> **Sutherland** Shire Council, being the responsible authority for such matters, considers that in view of the circumstances a sufficiently reasonable basis exists for the issue of an EMERGENCY ORDER...";

(d) the things required to be done to be:

> "Carry out the following works in order to ensure the area around retaining wall 'D' is made safe.
>
> 1. Erect and maintain fencing so as to isolate the area above and below retaining wall 'D' to prevent unauthorised entry to the area. The fence to the lower area (rear yard) of the subject premises will need to have exclusion zone distances of (2)

times the height of the retaining wall as recommended in the Jones Nicholson dilapidation report.

The fencing must comprise metal type fencing (or similar) with a minimum height of 1.8m above the natural ground levels and be erected in such a manner so as to adequately isolate and restrict access into the area.

A chain wire & post system (such as 'Cyclone' type fencing), and/or a combination of prefabricated site fencing (such as 'ATF' construction fencing) would be suitable. Furthermore, such fencing is to be rigidly founded so that it cannot be easily pushed over.

2. As recommended in the Jones Nicholson dilapidation report. Engage the services of a suitably qualified and registered professional such as a Geotechnical Engineer to provide a full assessment and detailed report on retaining wall 'D' and the risk of collapse to any Council assets.

The report is to make recommendations and give details so that the Structural Engineer can prepare a report (as outlined in item three [3] below) in conjunction with the geotechnical report.

A copy of this report should be forwarded to Adrian Walker at SSC PO Box 17, **SUTHERLAND** NSW 1499.

3. Engage the services of a suitably qualified and registered professional such as a Structural Engineer to provide a full assessment, detailed report and recommendation for the construction of a new retaining wall to replace wall 'D'.

The Jones Nicholson dilapidation report makes no mention of the two (2) storey structure at the very most south-eastern boundary of the subject premises. This structure also appears to form a retaining wall extension to wall 'D'.

The Jones Nicholson report also makes mention of wall "B" and the stability of this section of wall will be weakened by removing the garage and staircase structures.

As such, the stability of walls 'B', 'C' and the extension part to wall 'D' are likely to be compromised by the proposed demolition of all structures and therefore, this needs to be investigated further.

Council require certification from the Engineer to the effect that walls 'B', 'C' and the extension to wall 'D' will be stable and fit for purpose following demolition of the garage, staircase and the two (2) storey structure at the subject premises.

Supply Council with a copy of the Engineers detailed report, including design plans for all proposed work(s). The design plans will need to show the location of all new retaining wall(s).

A copy of this report and plans should be forwarded to Adrian Walker at SSC PO Box 17, **SUTHERLAND** NSW 1499.

Note: No works shall commence until Mr SHERRIE has provided confirmation the report and plan is acceptable.

4. Provide temporary support to retaining wall 'D' as recommended by the Engineer and under the supervision of the Engineer.

A certificate from an Engineer is to be provided to Council following completion of the work. This Certificate must state that the temporary support is adequate for its purpose.

A copy of this report should be forwarded to Adrian Walker at SSC PO Box 17, **SUTHERLAND** NSW 1499.

5. Engage the services of a suitably qualified surveyor. The surveyor is to supply key survey points prior to the retaining wall(s) being constructed. All retaining wall(s) are to be constructed wholly within the subject premises.

At the completion of the works the Surveyor to provide a detailed survey report showing the location of the newly constructed retaining wall(s).

A copy of this report and plans should be forwarded to Adrian Walker at SSC PO Box 17, **SUTHERLAND** NSW 1499.

6. Carry out all necessary works as recommended by the Engineers detailed reports as referred to in point two (2) and three (3) above. All works to be carried out under the direct supervision of a suitably qualified and experienced Engineer.

7. On completion of the works being carried out, provide Council with certification from the Engineers, confirming that the proposed works are structurally adequate, have been constructed in accordance with their detailed design plans as referred to in point two (2) and three (3) above including an updated survey showing the location of the newly constructed retaining wall.

A copy of the certification report and survey report should be forwarded to Adrian Walker at SSC PO Box 17, **SUTHERLAND** NSW 1499."

(e) the reasons for the order (see s 136 of the Act) to be:

"1. The rotation and further vertical movement of retaining wall 'D' is evident, which demonstrates the retaining wall may not be in a stable condition.

2. The severely deteriorated soldier piles and the unknown stability of retaining wall 'D' needs to be investigated further to adequately assess and determine if the wall requires removal and/or further works upon it.

3. There is a potential risk to life and property should the retaining wall collapse.

4. Council considers the premises are not being kept in a safe or healthy condition as the retaining wall is prejudicial to person(s) and/or property. As such, may pose a potential risk to personal and/or public health & safety and not promote the safety of person(s)";

(f) the period for compliance with the order (see s 137 of the Act) to be:

"Work required in 1) within seven (7) days from the date of the Order.

Work required in 2) within fourteen (14) days from the date of the Order.

Work required in 3) within twenty eight (28) days from the date of the Order.

Work required in 4) within seven (7) days from the date of the Order.

Work required in 5) prior to the retaining wall(s) being constructed and at the completion of the work(s).

Work required in 6) within sixty (60) days from the date Council confirms the reports and plans, referred to in 2) and 3) are acceptable.

Work required in 7) within seven (7) days from completion of the work(s)."

The narrow ultra vires challenges

9. The appellants contended that the order did not conform to the power under s 124 of the Act, which was relied upon by the Council to issue the order. Section 124 provides that:

"A council may order a person to do or to refrain from doing a thing specified in Column 1 of the following Table if the circumstances specified opposite it in Column 2 of the Table exist and the person comes within the description opposite it in Column 3 of the Table."

10. Item 21 is in the part of the Table entitled "Orders requiring the preservation of healthy conditions" and provides:

Column 1 **To do what?**		**Column 2** **In what circumstances?**	**Column 3** **To whom?**
21	To do or refrain from doing such things as are specified in the order to ensure that land is, or premises are, placed or kept in a safe or healthy condition	The land or premises are not in a safe or healthy condition	Owner or occupier of land or premise

11. The appellants contended that the order issued by the Council did not conform to the power in two respects: first, the circumstances specified in Column 2 did not exist and, secondly, the order required the appellants to do things that were not things specified in Column 1 of item 21 of the Table.

The circumstances that existed

12. The appellants argued that the series of walls along the boundary, including wall D, was erected for the most part in Mitchell Road. Wall D was rotating and falling over into the appellants' land. This meant that the Council's land (Mitchell Road) was not in a safe or healthy condition. The primary judge was correct to so find. However, it did not mean that the appellants' land was not in a safe and healthy condition. The primary judge was incorrect to so find.

13. The appellants argued that the circumstances in Column 2 of item 21 of the Table to s 124 of the Act (that "the land or premises are not in a safe or healthy condition") can only exist if the cause of the lack of safety or health occurs on the land or premises. In this case, the cause of the lack of safety or health is the collapsing wall D, which is located mostly on the Council's land. Hence, the Council's land is not in a safe or healthy condition. But because the cause of the lack of safety is not on the appellants' land, the appellants' land cannot be described as being not in a safe or healthy condition.

14. The Council rebutted the appellants' construction. The Council had recorded in the order that a Council engineer (Mr Sherrie) had indicated that one of the retaining walls, wall D, "is showing signs of a large amount of rotation and may collapse without further warning"; that a dilapidation report by the appellants' engineer (Mr Coupe) indicated that wall D "has failed and appears to be unstable" and that "with no significant foundations encountered during investigations and severely deteriorated soldier piles, therefore, the wall is at risk of failure"; and that the Council believed that

"the area around wall D is unsafe and as such, there is risk to person(s) and/or property should partial or complete failure occur". The primary judge found that because of this risk of the wall collapsing onto the appellants' land, the appellants' land is also unsafe (at [77] of the judgment). The Council submitted that this finding was appropriate on the evidence.

15. I reject the appellants' construction of the circumstance in Column 2 of item 21 of the Table to s 21 of the Act. There is no justification in the text, context or purpose of item 21 of the Table to s 124 for limiting the circumstance to where the cause of the lack of safety or health of the land is on the land. Such land is not in a safe or healthy condition, but so too can be adjoining or other land that may be impacted by the cause of the lack of safety or health. Land downhill and within a zone of impact from uphill land at imminent risk of landside or rock fall can be described as being not in a safe or healthy condition. Beachside land at imminent risk of erosion and inundation by coastal processes, such as severe storms and waves, can also be described as not being in a safe or healthy condition. The circumstance is concerned with the condition of the land, whether it is not safe or healthy, not the cause of the land being in that condition.

16. On this proper construction of the circumstance, it was clearly open to both the Council and the primary judge to find on the evidence that the appellants' land was not in a safe or healthy condition because of the imminent risk of collapse of wall D onto the appellants' land, potentially harming people or property on that land.

The doing of things on other land

17. The appellants contended that the order required the appellants to carry out "works" not only on the appellants' land but also on Mitchell Road owned by the Council. Point 1 of the order required the appellants to "erect and maintain fencing so as to isolate the area above and below retaining wall D to prevent unauthorised entry to the area". The area below wall D is on the appellants' land but the area above wall D is on the verge of Mitchell Road, which is the Council's land.

18. Point 3 of the order required a structural engineer to "provide a full assessment, detailed report and recommendation for the construction of a new retaining wall to replace wall D". Wall D straddles the boundary and hence is in some part (the appellants contended for the most part) on the Council's land of Mitchell Road. Point 5 of the order requires that "all retaining wall(s) are to be constructed wholly within the subject premises". Any work to demolish wall D, in preparation for constructing a replacement retaining wall on the appellants' land, would need to occur in part on the Council's land, at least to the extent necessary to remove the part of the wall that is erected on the Council's land.

19. The appellants' also pointed to other works required by the order with respect to other walls than wall D. Point 3 of the order required the appellants to investigate the stability of walls B, C and E, which was likely to be compromised by the proposed demolition of the garage, staircase and two storey dwelling house on the appellants' land in preparation for carrying out the development that had been approved by the Council. The appellants contended that wall B was mainly and wall C was wholly on the Council's land of Mitchell Road and wall E straddled the boundary and hence was partly on the Council's land of Mitchell Road. The work of investigation of these walls would therefore need to be undertaken, for the most part, on the Council's land.

20. The appellants argued that the things that an order can require to be done in Column 1 of the Table to s 124 of the Act can only be done on the land that is not in a safe or healthy condition (identified pursuant to Column 2) and that is owned or occupied by the person to whom the order has been given (identified pursuant to Column 3). Put another way, the appellants argued that the owner or occupier of land that is not in a safe or healthy condition can only be ordered to do a thing specified in Column 1 on the land owned or occupied by the person that is not in a safe or healthy condition.

21. In this case, the appellants could only be ordered to do things on the appellants' land, not on the Council's land. If things needed to be done on the Council's land to place it in a safe or healthy condition, an order would need to be directed to the owner of that land, namely the Council itself.

22. The appellants submitted that the primary judge correctly accepted "that the Council cannot issue an emergency order requiring work to be done on someone else's land" (at [82] of the judgment). The primary judge therefore held that "the Council could not order the Applicants to place safety barriers on Mitchell Road above Wall D as that remains the Council's responsibility as landowner" and to the extent that the order so required, it was invalid (at [82] of the judgment). The appellants submitted that, in so finding, the primary judge was correct.

23. The appellants contended, however, that the primary judge was incorrect in finding that the whole order was not invalid as a consequence. The primary judge held that the order was "lawful as it was generally issued within the power conferred by item 21 of s 124 apart from the requirement to cordon off the area above Wall D on Mitchell Road" (at [83]). The appellants submitted that in this regard the primary judge fell into legal error.

24. The appellants submitted that an order under item 21 of s 124 is "either wholly valid or wholly invalid". The question is whether the Council had the power to give the order that it did. If the Council did not have the power to give the order in the terms that it did, the order was ultra vires. An order cannot be "generally issued within the power". The power to issue the order either exists or not.

25. The appellants contended that no question of severability arises. If the order requires the doing of things, for some of which there is power but for others there is no power, the whole order is ultra vires. The invalid part cannot be severed from the valid part. One reason is that a recipient of an order cannot be expected to know what part of the order is invalid in advance of a determination by a court of competent jurisdiction. A recipient cannot be expected to make a subjective judgment as to whether part of the work required by the order was beyond power and could be safely ignored.

26. The Council filed a notice of contention that the primary judge erred in holding that there was no power under item 21 of the Table to s 124 to require the doing of things on land other than the land owned or occupied by the person to whom the order was given. The Council submitted that "there is nothing in the wording, context or purpose of item 21 of s 124 which suggests an order cannot require work on another person's land, provided the other requirements of the section (e.g. making the recipients' land safe) are satisfied". The Council submitted that the purpose of the provision is to ensure that unsafe land is made safe. There may be cases where the source of the danger (to the safety or health of the land) is a retaining wall or a party wall which straddles the boundary or even extends beyond the boundary. In these circumstances, the work to address the source of the danger, and to place the land into safe or healthy condition, may need to be carried out on the adjoining land. It is often impractical to repair boundary walls without carrying out repairs to the wall on both sides of the boundary. This is especially so when wall reconstruction is involved, or repairs involve the installation of anchors or bolts, or the removal of a retaining wall which is currently supporting land on the other side of the boundary.

27. The Council submitted that construing item 21 of the Table to s 124 so as to prevent a person from being ordered to carry out work on another person's land may result in there being no means by which an order could be issued that could adequately deal with the danger to the safety or health of the land. Such a construction would frustrate the purpose of the provision.

28. The Council noted that the primary judge had invoked "the common law presumption that no one can interfere with someone else's property rights in the absence of a clear statutory intention to enable that", referring to *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; [2009] HCA 12 at [40]- [44]. The primary judge held that "no such intention arises explicitly or implicitly in item 21 of s 124" (at [82] of the judgment).
29. The Council submitted that the primary judge put the presumption against statutory interference with common law rights too highly and overlooked the clear intention in item 21 of the Table to s 124 of the Act to infringe the existing property rights of individuals. The Council noted that in *R & R Fazzolari Pty Ltd v Parramatta City Council*, French CJ at [43] noted that where a statute is capable of more than one construction, that construction will be chosen which interferes least with property rights. To the extent that having work done on one's land is an interference with a property right, s 124 of the Act "evinces an unmistakable intention to cut back those rights": *Daly v Thiering* (2013) 249 CLR 381; [2013] HCA 45 at [33]. Moreover, the Council submitted, the presumption against interference with rights does not necessarily trump a statutory scheme designed to vindicate the public interest in protecting the health and safety of persons, in a context where the freedom from interference in the use of property has been substantially withdrawn or qualified by legislation: *McElwaine v The Owners – Strata Plan 75975* [2017] NSWCA 239 at [1]- [4] per Basten JA.
30. The Council rebutted the appellants' contention that, if the power under item 21 of the Table to s 124 of the Act were to be construed as permitting the Council to order a person to do things on someone else's land, that would be to authorise a trespass. The Council submitted that the Court below and this Court does not need to find, for the purposes of these proceedings, that an order under item 21 of the Table to s 124 of the Act can authorise a trespass to another's land. It is open to a Council, for example, to order one land owner to do work on a retaining wall which straddles a boundary (and carry out work on a neighbour's land subject to obtaining the neighbour's consent), and at the same time to order the neighbour to consent to such work, so long as the neighbour's land is also at risk. The terms of the section are broad (to do "such things..."). The order in the present case did not authorise a trespass. The Council owns the road reserve. To the extent that it was necessary to carry out work on the road reserve, the Council gave its consent to the work when it gave the order which required the erection of the safety fence above the wall or to do such other work, including investigation, on the Council's land.
31. The Council submitted that there is authority for an order issued under s 124 being able to require the recipient to carry out work on another person's land, being *Ranjon International Holdings Pty Ltd v Rockdale Council* (1994) 83 LGERA 10. In that case, the council had given a person an order under item 4 of the Table to s 124 of the Act to carry out rectification works to an off-site water main "to ensure that the water flow rate for fire fighting purposes" at the subject land complied with certain requirements. Item 4 of the Table to s 124 empowered a council to give an order in circumstances that included that "provisions for fire safety or fire safety awareness are not adequate to prevent fire, supress fire, or suppress the spread of fire or to ensure or promote the safety of persons in the event of fire". An order under item 4 of the Table could be given "to do or refrain from doing such things as are specified in the order so as to ensure or promote adequate fire safety or fire safety awareness." The order had required the doing of works to a water main that was off the site of the land of the recipient of the order, where there was a lack of fire safety.
32. Pearlman J, considering the power under s 124 of the Act to give orders, held at 15 that:

> "It is clear, in that context, that the power of a council to give orders is for the purpose of regulating the general environment and protecting persons and property. It is a power exercisable in the public interest. In my opinion, in those circumstances, the power should be given a wide and beneficial interpretation, consistent with the scope and purpose of the Act.
>
> ...
>
> Adopting a wide and beneficial construction of s 124.4 rather than a limited one, I conclude that an order given by a council under s 124.4 need not, for its effectiveness, only specify things to be done directly on or to premises. That is not to say that the things to be done need have no connection at all with the premises of which the recipient of the order is the owner. If an owner is to be bound to do or refrain from doing things in the interest of fire safety, those things should have a relationship or connection to the premises of which that person is the owner. That is the case here. The work which is required to be done is actually outside the subject property, but it is work related to the subject property, because it is work that is intended to increase the water flow rate upon the subject property."

33. Ultimately, Pearlman J held that the order in that case was defective because it would require the recipient to do an act which would interfere with the proprietary right of the Water Board and put him at risk of committing an offence under the *Water Board Act 1987* (at 17).
34. The Council in this case submitted that the power considered by Pearlman J, under item 4 of the Table to s 124 of the Act, is similar to the power exercised by the Council in this case under item 21 of the Table to s 124. The reasoning of Pearlman J that the power extended to require the recipient of an order to do things on land other than the recipient's land, provided that the things have a relationship or connection to the recipient's land and will achieve the purpose for which the order was issued, is equally applicable to the present case. The Council submitted that the ultimate reason why Pearlman J held that the order in that case was defective, because it would put the recipient of the order at risk of committing an offence under the *Water Board Act*, is not applicable to the present case. There would be no interference with the proprietary right of the Council and the appellants would commit no offence in undertaking the works required by the order on the Council's land.
35. The Council submitted, therefore, that the language of the section, and the consequences of the alternative construction, favour construing item 21 of the Table to s 124 as permitting an order requiring work to be carried out on another person's land.
36. Alternatively, if the power under item 21 of the Table to s 124 of the Act does not authorise issuing an order requiring the doing of or refraining from doing things on land other than the land owned or occupied by the recipient of the order, the Council contended that the parts of the order that required the carrying out of work on the Council's land were severable. The Council challenged the appellant's argument that an order under s 124 is either wholly valid or wholly invalid and that there can never be severance of the valid from the invalid. Such a bald proposition was rejected by the Court of Appeal in relation to a similar type of statutory order under s 121B of the *Environmental Planning and Assessment Act 1979* ('EPA Act') in *J & J O'Brien Pty Ltd v South Sydney City Council* (2002) 121 LGERA 223; [2002] NSWCA 259 at [41], [42].
37. Severance of an invalid portion of an instrument is permissible provided the residue does not operate in a manner wholly different from the original document: s 32 of the *Interpretation Act 1987*; *Maitland City Council v Anambah Homes Pty Ltd* (2005) 64 NSWLR 695; [2005] NSWCA 455 at [165]- [167]; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; [1948] HCA 7 at 371 per Dixon J.
38. The Council submitted that the principles of severance do apply to an exercise of power under s 124 of the Act. Section 32 of the *Interpretation Act* provides that an instrument is not affected if a provision of it or "the application of any such provision to any person, subject matter or circumstance" is in excess of power. The order under s 124 of the Act is an instrument: see s 3 of the *Interpretation Act*.

39. There is nothing that suggests that the residue of the order made by the Council was incapable of performing its purpose (the safety of the appellants' land) or that removal of the parts of the order that were outside power (the fencing above wall D and carrying out of other work on the Council's land) made it impossible to comply with the residue, or that the residue operated in a different manner to the original order.

40. Contrary to the appellants' argument, the Council submitted that the fact that breach of an order under s 124 of the Act might give rise to a criminal penalty is not a reason to disapply s 32 of the *Interpretation Act* or to oust the common law principles of severance. The Council submitted that there are few greater invasions of rights than the execution of search warrant, resistance to which has serious criminal consequences, yet severance principles apply: *Von Arnim v The Health Insurance Commission* [2004] FCAFC 33 at [25]- [27], citing Hely J in *Williams v Keelty* (2001) 111 FCR 175; [2001] FCA 1301 at [151]. Breach of development consent under the EPA Act may give rise to criminal liability yet severance principles apply: *Maitland City Council v Anambah Homes Pty Ltd* at [176]. Orders made under s 121B of the EPA Act have been found to be severable: *Cugg Pty Ltd v Gibo Pty Ltd* (2001) 10 BPR 18,641; [2001] NSWSC 297 at [97] per Hodgson CJ in Eq.

41. I find that the order issued by the Council in this case was not outside power. First, I do not consider that item 21 of the Table to s 124 of the Act necessarily precludes the issue of an order that requires the doing of, or refraining from doing, a thing on land or premises other than the land or premises owned or occupied by the recipient of the order. The text, context and purpose of item 21 of the Table to s 124 do not support such a narrow construction.

42. The text of item 21, both in Column 1 specifically as well as Columns 2 and 3, does not expressly or impliedly limit the land on which things can be ordered to be done or not done. The wording of Column 1 is wide. The order can require the recipient to do or refrain from doing "such things as are specified in the order". The only qualification, which is expressly stated, is that "such things" as are specified in the order be "to ensure that land is, or premises are, placed or kept on a safe or healthy condition". The land or premises referred to is the land or premises that are not in a safe or healthy condition and of which the recipient of the order is the owner or occupier. The qualification fixes the purpose for which "such things" as are specified in the order can be required to be done or not to be done: placing land that is not in a safe or healthy condition into a safe or healthy condition. The doing of or refraining from doing the things specified in the order needs to be for this purpose and to achieve this result.

43. This qualification of the purpose for which things can be required to be done or not to be done might indirectly limit the location of the land on which things can be specified to be done or not to be done. The further away from the land that is not in a safe or healthy condition things are required to be done or not to be done, the less likely that the doing or refraining from doing the things will "ensure that the land is, or the premises are, placed or kept in a safe or healthy condition". But the qualification of purpose does not demand that the thing specified in the order be done or not be done on the land that is not in a safe or healthy condition. The qualification of purpose only fixes a relationship or connection to that land.

44. Hence, there is no limitation on the location of the land on which the things that can be specified in an order under item 21 of the Table to s 124 to be done or not to be done.

45. The context of item 21 of the Table to s 124 of the Act does not support reading it as being subject to such a limitation. Item 21 is in the part of the Table to s 124 that deals with "Orders requiring the preservation of healthy conditions". The other items in this part share the characteristic of enabling orders to be given to achieve a purpose of putting land or premises in a safe or healthy condition (although they are expressed in various ways). The things that can be ordered to be done or not to be done all must have this as their purpose.

46. For all of the items in this part other than item 21, there is a further express qualification on the giving of an order that the things ordered to be done or not to be done need to be on the land or premises specified in the item. This specification of the location on which the things are to be done or not to be done in items 20, 22, 22A, 23, 24 and 25 stands in contrast to the lack of express specification of the location of the land on which the things are to be done or not to be done in item 21.

47. In the context and purpose of s 124 generally, as Pearlman J observed in *Ranjon International Holdings Pty Ltd v Rockdale Council* at 15, "the power of a council to give orders is for the purpose of regulating the general environment and protecting persons and property" and is "a power exercisable in the public interest". The power "should be given a wide and beneficial interpretation consistent with the scope and purpose of the Act". Such a wide and beneficial construction of item 21 of the Table to s 124 of the Act empowers a council to give an order requiring things to be done or not to be done on any land, and not only the land owned or occupied by the recipient of the order, provided that the purpose of requiring the doing of or refraining from doing the things is to ensure that the land owned or occupied by the recipient of the order is placed or kept in a safe or healthy condition.

48. Second, I do not consider that such a wide and beneficial construction of the power authorises a trespass or other infringement of another person's property rights. The order can be construed as subject to an implied condition that any requisite authority, at common law or under statute, to enter upon and carry out the work specified in the order be obtained before doing the works specified in the order.

49. Such an authority would include the consent of the owner or occupier of the land on which the works are to be carried out. In this case, the Council has, by the issuing of the order requiring the carrying out works on its land (Mitchell Road), impliedly given its consent to the appellants doing so. But in another case, if consent of another person is required, the order could be construed as subject to a condition precedent that consent of the owner or occupier of the land be obtained before carrying out the works required by the order on that land. Such consent could be granted directly by the owner or occupier of the land or by a court exercising some statutory or common law power. Statutory power to grant access would include the power to make a neighbouring land access order or a utility service access order under the *Access to Neighbouring Land Act 2000*. Common law power might include the power of a court to give to a person who benefits from an easement (such as a right of way, easement for drainage or utility services, or an easement for support) access to the land burdened by the easement.

50. Other statutory authority may also be required before carrying out works directed by an order under s 124 of the Act. Section 138A of the Act does relieve a recipient of an order under s 124 of the Act of the necessity to obtain approval under the *Environmental Planning and Assessment Act 1979* to carry out the work required by the order. But there is no other provision relieving a recipient of an order under s 124 of the Act from obtaining any necessary approval under any other legislation to carry out the work required by the order. The order under s 124 of the Act would be construed as being subject to a condition that all such necessary statutory approvals be obtained before carrying out the work required by the order. Put another way, the order would not be construed as authorising a contravention of (and a likely offence against) a statutory obligation to obtain prior approval to carry out the works required by the order.

51. Construed this way, the power to issue an order under s 124 of the Act requiring the recipient of the order to carry out work on another person's land does not necessitate an infringement of the other person's property rights or a breach of any statutory obligation to obtain approval before carrying out the work.

52. The Council's notice of contention on this point should therefore be upheld. The primary judge was incorrect in holding that s 124 of the Act did not authorise the Council to issue the order requiring the carrying out of work on the Council's land (Mitchell Road) and that the part of the order that did require such work was invalid. Instead, the order was valid in its entirety.

53. This conclusion means that it is not necessary to determine whether, if part of the order was invalid, it was able to be severed, leaving an otherwise valid order. Had it been necessary to determine the question, however, I would find that the invalid part could be severed. The principles of severance do apply to an exercise of power to issue an order under s 124 of the Act. If a provision of an order is in excess of the power of s 124 of the Act, that provision can be severed, leaving the remainder of the order unaffected, if severance does not result in the remainder operating in a manner differently to the manner in which the whole order would have operated: see s 32(2) of the *Interpretation Act*; *Bank of NSW v Commonwealth* at 371; *J & J O'Brien Pty Ltd v South Sydney City Council* at [41], [42]; *Maitland City Council v Anambah Homes Pty Ltd* at [162]-[167], [176].
54. In the case of this order, severance of the requirement to erect fencing above wall D on the Council's land would not affect the requirement to fence below wall D on the appellant's land or to carry out any other works required by the order. Similarly, insofar as the order required investigation and certification of the stability of walls B, C and E, which were partly or wholly located on the Council's land, that requirement could be severed without affecting other requirements of the order to carry out works in relation to wall D. The remainder of the order in each case would not operate, in relation to the works required by the remainder of the order, in a different manner to the manner in which the whole order would have operated.
55. The primary judge was therefore correct in concluding that the part of the order that she held to be invalid did not cause the whole order to be invalid.

The broad ultra vires challenges

56. The appellants contended that the making of the order under s 124 was beyond power because the order was uncertain and issued for an improper purpose.

Whether the order was uncertain

57. The appellants argued that the order was uncertain in many respects in specifying the works to be carried out by the appellant. The appellants contended that to be a valid order under s 124 of the Act, the order must require the recipient to do or refrain from doing such things as are "specified" in the order to ensure that land is, or premises are, placed or kept in a safe or healthy condition. The appellants submitted it is a necessary condition of the valid exercise of the power that the order should specify the work to be executed and the things to be done by the person to whom the order is given, citing *Proprietors of Strata Plan 159 v Parramatta City Council* (1977) 37 LGRA 74 at 85 and *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33 at 49. The validity of the order depended on strict compliance with the statutory conditions governing its issue, and will not be enforced unless it is expressed in clear and unambiguous language: *Manly Council v Leech* [2015] NSWLEC 149 at [22] and cases therein cited.
58. The appellants, both before the primary judge and on appeal, gave a list of words, phrases and statements throughout the whole of the order that they contended were uncertain. However, only those in the section specifying the works to be carried out could conceivably affect the validity of the order. On the appellants' argument, the order must specify the works to be carried out in order to be a valid exercise of power. Hence, the focus must be on that part of the order specifying the works to be carried out. I will select what I understand to be the key complaints about the works specified in the seven points in the section "To do what" of the order.
59. The first complaint concerned points 2 and 3 of the order that require the appellants to engage a geotechnical engineer and a structural engineer respectively. The appellants argued that the order did not with certainty state who is the engineer in each instance to be engaged, referring to "a suitably qualified and registered professional such as a Geotechnical Engineer" in point 2 and a "suitably qualified and registered professional such as a Structural Engineer" in point 3. The appellants made a similar complaint about the requirement in point 5 to engage the services of "a suitably qualified surveyor".
60. The second complaint concerned the works required by point 3. The appellants construed point 3 as requiring the carrying out of physical works not only to wall D, but also to walls B, C and E, including constructing new retaining wall(s) to replace all of those walls. Starting from this construction, the appellants seized upon many phrases in the description of work in relation to walls B, C and E that they said were uncertain and left the appellants unclear as to what work they were required to do in relation to walls B, C and E. The appellants argued that there were a variety of alternatives that could potentially satisfy the terms of the order. This was unsatisfactory. The Council had the responsibility to specify in concise terms what it required to be done. The failure to do so made the order uncertain, applying *Barclay v Wollongong City Council* (2005) 139 LGERA 167; [2005] NSWLEC 160 at [36]- [38].
61. The third complaint concerned the works required by point 6, namely "all necessary works" as recommended by the engineers' detailed reports as referred to in points 2 and 3. The appellants contended that, because the engineers had a discretion as to what works to recommend, it was uncertain as to what would be the "necessary works" that must be carried out under point 6. The appellants submitted that, just as in *Barclay v Wollongong City Council* where the order requiring the recipient to implement "all action necessary" to bring about the compliance of their subdivision was held to be so uncertain that it was unenforceable (see at [36]-[38]), the order in this case that the appellants carry out "all necessary works" is uncertain. The order does not "particularise in concise terms what it requires to be done". The order also is devoid of an objective standard for the newly constructed retaining wall.
62. The fourth complaint was that the order required the appellants to make extensive inquiries of and consult with a structural engineer (point 3), a geotechnical engineer (point 4) and a surveyor (point 5). The appellants relied on *D'Anastasi v Environment, Climate Change and Water NSW* (2011) 81 NSWLR 82; [2011] NSWCA 374 at [76] that a notice requiring some search for information by the addressee will not make it invalid, but it must not require the addressee to make extensive inquiries of others.
63. The fifth complaint was that the order failed to state with certainty the basis for the appellants' liability to comply with the order. The appellants submitted that the mere reference to the retaining wall being "along the eastern boundary" is ambiguous and does not explain why the appellants have the legal responsibility of complying with the order, relying on *Tweed Shire Council v Gennacker Pty Ltd* [2015] NSWLEC 3 at [88].
64. The primary judge addressed these and other complaints that the order was uncertain (see [100]-[109] of the judgment). The primary judge concluded that the order was not void because of uncertainty (at [109]). The primary judge did, however, comment that the order "does have some additional arguably superfluous wording such as stating that the applicants must 'engage the services of a suitably qualified and registered professional such as a Geotechnical Engineer' (order 2, see similar wording in relation to a structural engineer in order 3). These words can be easily ignored and the meaning of the order is not compromised. It is certain in my view" (at [107]).
65. The appellants seized on this comment. They argued that this wording in point 2 and point 3 of the order could not be ignored, easily or otherwise, as to do so would change the intention and operation of the order. They also contended that the wording cannot be "arguably

superfluous". A recipient of an order cannot be expected to make a subjective judgment as to what wording in the order is superfluous, let alone arguably superfluous.

66. The Council rebutted the appellants' complaints about uncertainty, contending instead that the order "set out in meticulous detail what was required to be done".

67. The Council submitted that there is no separate ground of invalidity at common law for uncertainty: *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184; [1945] HCA 23 at 194-196; *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210; [1946] HCA 5 at 227-228. However, there is no doubt that an order must convey to a reasonable reader what it is that must be done in order to comply with it: *Bobolas v Waverly Council* (2012) 187 LGERA 63; [2012] NSWCA 126 at [44], [49]. The order must therefore be intelligible, but the consequences of non-compliance "do not authorise any unusual rigour in the construction of the document or create any doubt as to its meaning which would otherwise not be there...and the whole document must be given a reasonable construction": *Dehimi Pty Ltd v Barob Pty Ltd* (1987) 4 BPR 97,277 at 5.35 per Bryson J.

68. The Council submitted that the order particularised the things that the appellants were required to do:

. (1) erect safety fencing around the failing retaining wall D;

. (2) engage a geotechnical engineer to assess and report on retaining wall D to the structural engineer;

. (3) engage a structural engineer:

. (a) to assess, report on and make recommendations for the construction of a new retaining wall to replace retaining wall D;

. (b) to investigate and certify that walls B, C and E will be stable and fit for purpose following demolition of the existing structures on the land; and

. (c) to supply the Council with a copy of the engineer's detailed report, including design plans for all proposed works, which must be approved by the Council before any works commence;

. (4) provide temporary support to retaining wall D and a certificate from the engineer that the temporary support is adequate for its purpose;

. (5) engage a surveyor:

. (a) to supply key survey points prior to the new retaining wall being constructed; and

. (b) to provide a detailed survey at the completion of the works showing the location of the newly constructed retaining wall wholly on the appellants' land;

. (6) carry out all the works recommended by the engineers in points 2 and 3; and

. (7) provide the Council with the certification from the engineers confirming that the walls are structurally adequate and constructed in accordance with their detailed design plans referred to in points 2 and 3.

69. The Council submitted that the order did not have the consequence of leaving the appellants in a position of not knowing whether they would be in breach of the order, as in the cases of *Foster v* ***Sutherland*** *Shire Council* (2001) 115 LGERA 130; [2001] NSWLEC 89; *Barclay v Wollongong City Council*; and *Lake Macquarie City Council v Gordon* [2016] NSWLEC 49 cited by the primary judge. The order required a design to be submitted to the Council for approval. Once approved, there could be no issue as to what was required to comply with the order. It was either approved – in which case the order required the work to be carried out within a further 60 days – or it was not approved, in which case the period for compliance did not expire. It did not raise the potential for continuing breaches (contrast *Foster v* ***Sutherland*** *Shire Council*).

70. The Council noted that requiring the recipient of an order to submit a design that achieves the purpose of the order and, subject to approval by the Council, requiring them to carry out work in accordance with that design, is a practical approach commonly employed by councils. It does not leave the person in a position of now knowing what they need to do to comply with the order. It was also not ambiguous as to whether it was a warning notice or a final notice (as was the case in *Bobolas v Waverley Council* and *Manly Council v Leech*).

71. The Council submitted that there is a distinction to be drawn between an order which provides flexibility to the recipient in achieving an outcome (as were the final orders in *Lake Macquarie City Council v Gordon* at [150]) and an order which, because of ambiguity or lack of specificity, presents an unacceptable risk of continuing breaches by the recipient (as was the case in *Foster v* ***Sutherland*** *Shire Council*, *Barclay v Wollongong City Council* and the original council order in *Lake Macquarie Council v Gordon*).

72. The Council contended that the words, phrases and sentences of the order, selected by the appellants as being uncertain, cannot be construed in isolation, but rather must be looked at in the context of the whole document, which together specifies what things need to be done by the appellants to ensure that the land is placed in a safe and healthy condition.

73. I find that the appellants have not established that the order is uncertain in the various ways alleged. As the primary judge observed, the order must be read as a whole and mindful of the circumstance in which the order was issued and the purpose that it seeks to address (at [103]). The circumstance in which the order was issued was the imminent risk of collapse of retaining wall D, which made the area of the appellants' land around wall D unsafe. The purpose of the order was to place the appellants' land in a safe condition. The means by which this purpose was to be achieved was by carrying out the works specified in the order (in the section "To do what").

74. This section begins with the statement "carry out the following works in order to ensure the area around retaining wall D is made safe". This statement informs the interpretation of the works that are specified in the following seven points of the order. For example, the various requirements for the construction of new retaining wall(s) are to be construed as relating to replacing the failing wall D, because those works are necessary to ensure that the area around wall D is made safe.

75. As the primary judge held, the order "provides a scheme whereby the Applicants are required to obtain expert engineering advice about Wall D and how it should be replaced, including survey advice and options for replacement, as identified in Orders 2, 3 and 5. The Council engineer is to approve the work implementing any such option before it commences (Order 3)" (at [104]).

76. Dealing with the five categories of complaint summarised above, first, the prefatory words describing the engineers or the surveyor to be engaged (in points 2, 3 and 5 of the order) are not unclear and do not make unclear what things the appellants are required to do. A requirement that an engineer or surveyor be "suitably qualified" and "registered" is readily understandable. Indeed, as the Council submitted, the appellants, as the recipients of the order, had no problem in understanding the requirement and complied with it by engaging suitably qualified and registered engineers and a surveyor to undertake the work required by points 2, 3 and 5 of the order.

77. In this respect, I do not agree with the primary judge's comment that the wording in points 2, 3 and 5 that the appellants engage a "suitably qualified and registered professional such as..." a geotechnical engineer or a structural engineer, is "additional arguably superfluous wording". It is not to the point whether the wording was over and above what was required to specify the engineer to be engaged (i.e. superfluous), the question was whether the wording made the specification of the work required so uncertain as not to be a valid specification of the thing to be done for the purposes of item 21 of the Table to s 124 of the Act. I do not consider it did.

78. As to the second and third complaints, the appellants have misconstrued the work required by point 3 (and point 6) of the order. The primary things required by point 3 to be done concern wall D. These are stated in the first, sixth and seventh paragraphs and the note in point 3:

> "Engage the services of a suitably qualified and registered professional such as a Structural Engineer to provide a full assessment, detailed report and recommendation for the construction of a new retaining wall to replace wall D.
>
> Supply Council with a copy of the Engineer's detailed report, including design plans for all proposed work(s). The design plans will need to show the location of all new retaining wall(s).
>
> A copy of this report and plan should be forwarded to Adrian Walker at SSC PO Box 17, **SUTHERLAND** NSW 1499.
>
> Note: No works shall commence until Mr Sherrie has provided confirmation the report and plan is acceptable."

79. The secondary things required to be done concern walls B, C and E. These are stated in the second to fifth paragraphs in point 3 of the order:

> "The Jones Nicholson dilapidation report makes no mention of the two (2) storey structure at the very most south eastern boundary of the subject premises. This structure also appears to form a retaining wall extension to wall 'D'.
>
> The Jones Nicholson report also makes mention of wall 'B' and the stability of this section of wall will be weakened by removing the garage and staircase structures.
>
> As such, the stability of walls 'B', 'C' and the extension part to wall 'D' [referred to as wall E] are likely to be compromised by the proposed demolition of all structures and therefore, this needs to be investigated further.
>
> Council require certification from the Engineer to the effect that walls 'B', 'C' and the extension to wall 'D' [wall E] will be stable and fit for purpose following demolition of the garage, staircase and the two (2) storey structure at the subject premises."

80. The required engineer's detailed report and design plans for all proposed works only concerned wall D and the new retaining wall to replace wall D. The engineer is only required to investigate and provide certification that walls B, C and E will be stable and fit for purpose following demolition of the existing structures on the land. The engineer is not required to provide a detailed report or design plans for new retaining walls to replace walls B, C and E.
81. Once this is understood, the appellants' complaint of uncertainty about this point in the order loses force. There are not a variety of alternative works that could satisfy the order. The "necessary works" for the new retaining wall required by the order are to replace wall D and make the area around wall D safe. The work required in relation to walls B, C and E is limited to investigation and certification of those walls' stability and fitness for purpose. In these ways, the order does particularise in concise terms what it requires to be done.
82. As to the fourth complaint, the order does require the appellants to engage engineers and a surveyor. This does not make the order uncertain. These requirements are quite different to the circumstance referred to in *D'Anastasi v Environment, Climate Change and Water NSW* of requiring recipients of a notice to make extensive inquiries of others in order to be able to comply with the notice.
83. As to the fifth complaint, there is no uncertainty in stating the basis for the appellants' liability to comply with the order. The order was given to the appellants on the basis that they were (and are) the owners of the land (under Column 3 of item 21 of the Table to s 124 of the Act) and that their land was not in a safe condition (under Column 2 of item 21 of the Table) because of the risk of failure of wall D along the eastern boundary of the appellants' land. The appellants could not reasonably, and in fact did not, have any doubt about the basis for their liability to comply with the order.
84. The primary judge was therefore correct in concluding the order was not void for uncertainty.

Whether order issued for an improper purpose

85. The appellants contended that the order was void as the power to give the order was exercised for an improper purpose.
86. The appellants firstly argued that the Council issued the order for the purpose of having the appellants bear the cost of building a wall on the appellants' land in order to make the Council's land safe and then for the appellants to maintain it in perpetuity for the benefit of the Council. The appellants argued that the Council knew or ought to have known it had no right at common law to require the appellants to use their land to support Mitchell Road. The Council must have known that, if the wall was a Council asset (being on the Mitchell Road reserve) and it was in danger of imminent collapse, making it safe would involve the Council in significant cost. Yet, the appellants argued, the Council sought to avoid incurring this significant cost by issuing the order requiring the appellants to rebuild the wall on the appellants' land to make the Council's asset safe.
87. The appellants secondly argued that the order was issued for an improper purpose because the Council was aware that the wall was on Mitchell Road, yet issued the order requiring the appellants to investigate it, make it safe, and build a new wall in a way that would be satisfactory to the Council.
88. The appellants thirdly argued that the order was issued for an improper purpose by requiring the new wall, to replace the wall on Mitchell Road, to be built on the appellants' land.
89. The appellants finally argued that the Council knew that the appellants wished to act on the development consent that they had obtained and had promptly commenced work. The Council issued the order in circumstances where it knew or ought to have known that the appellants would come under commercial pressure to replace the wall at their own cost so as not to delay the project. The appellants argued that to issue the order in these circumstances was to do so for an improper purpose.
90. The appellants submitted that the primary judge was in error in concluding that the appellants had not established that the order was issued for an improper purpose (at [115] of the judgment). The appellants submitted that the primary judge's reasons for dismissing the claim are manifestly unreasonable.
91. The Council submitted that the appellants have not established, on the evidence, that the order was issued for an improper purpose in any of the ways argued by the appellants. The Council referred to the statement of reasons for the decision to issue the order that was admitted into evidence without objection. The statement of reasons set out the findings of the decision maker (Mr Pracy, the acting manager of the Council) on material questions of fact, which were that (a) that the appellants owned the property, (b) the property was not in a safe condition, and (c) the order required the appellants to do things which would ensure the property was kept or placed in a safe condition.

92. The unchallenged evidence was that Mr Pracy had regard to four documents in making the decision to issue the order: the dilapidation report, the memorandum of a Mr Sherrie dated 30 March 2017, a customer request management system record and the Council's electronic land ownership record. The Council submitted that there is nothing in these documents to support the appellants' case that Mr Pracy issued the order for an improper purpose. The documents showed:

. (a) Mr Pracy, as acting manager, was responsible for issuing the order, was not acting on instructions from any other person, and made his own decision based on the material before him;

. (b) The dilapidation report made quite clear that the appellants' land was unsafe (concluding that the wall was at risk of failure and recommending that an exclusion zone be created on the appellants' land around the wall);

. (c) The memorandum from the Council's engineer, Mr Sherrie, noted that (i) the responsibility for maintenance of a retaining wall rested with the party who created the need for a retaining wall; (ii) if the owner of the lower land excavated to create a level difference, that owner was responsible; and (iii) in this case, the level difference occurred when the appellants' land was previously excavated to produce level building areas. Reference was also made to s 177 of the *Conveyancing Act 1919*.

93. The Council noted that it had led evidence from its engineer, Mr Pepper. In Mr Pepper's opinion, the walls had been constructed in several stages following excavation of the appellants' land. According to Mr Pepper, the structures adjacent to walls B and E (the garage, stairs and outbuilding) provided support which had replaced the support the appellants' land in its natural state formerly provided Mitchell Road. The Council submitted that, if Mr Pepper's evidence is correct, the appellants had a duty of care not to do anything which would remove the support which their land would have provided in its natural state to Mitchell Road: s 177 of the Conveyancing Act. This duty extended to the support provided to the structures on the road: *Piling Contractors (Qld) Pty Ltd v Prynew Pty Ltd* [2008] NSWSC 118 at [52]- [55]; *Jukes v Larter* [2012] NSWSC 369 at [29]. It was a mandatory condition of development consent that the road and walls be supported and protected when the land was to be excavated for its basement parking, below the level of the footings of the walls and the road: see cl 98E of the *Environmental Planning and Assessment Regulation 2000*.

94. The Council submitted that the appellants had failed to establish that the Council was motivated by the improper purpose alleged by the appellants when issuing the order.

95. I agree with the primary judge that the appellants have not established that the order was issued for an improper purpose. The reasons for issuing the order, both those stated in the order itself and those given in the statement of reasons for the decision to issue the order, accord with the statutory conditions for the exercise of the power to issue an order under item 21 of the Table to s 124 of the Act. None of those reasons disclose an improper purpose.

96. For the reasons I have given earlier, the power to issue an order under item 21 of the Table to s 124 is not limited to requiring the recipient of the order to do things only on the recipient's land, but can also require the doing of things on other land. It was not outside power for the Council to have issued the order requiring the appellants to do works on the Council's land (Mitchell Road), including investigating and demolishing the retaining wall wholly or partly built on the Council's land. It certainly was not outside power for the Council to have required the appellants to build a replacement retaining wall on the appellants' land. Once the proper ambit of the power is appreciated, the exercise by the Council of the power to issue an order requiring the doing of things that are within power cannot be seen to be for an improper purpose. It is not improper to do what is within power.

97. Furthermore, an exercise by the Council to issue an order within power does not become for an improper purpose by reason of the potential for the Council to benefit in some way from the recipient of the order carrying out the work required by the order. In this case, the failing wall D, straddling the boundary between the Council's land and the appellants' land, caused both lands not to be in a safe condition. The order required the appellants to do work to wall D to ensure the area around wall D on the appellants' land was made safe, including demolishing wall D and constructing a replacement retaining wall on the appellants' land. A collateral benefit of doing those works would be to make the Council's land around wall D safe also. But the likely achievement of this collateral benefit did not make the issuing of the order to the appellants to be for an improper purpose.

98. Finally, the evidence did not establish that the Council issued the order knowing and seeking to take advantage of the appellants' commercial pressure to carry out the development that had been approved by the Council.

The claim for damages

99. The appellants made a claim for damages for the expenses they incurred in complying with the order issued by the Council. This claim was dependent on the order being found to be ultra vires.

100. The appellants argued that the court below had power to order damages as this would be to remedy the breach of the Act involved in the Council issuing the order outside the power in s 124 of the Act. Under s 676(1) of the Act, the Land and Environment Court, if satisfied that a breach of the Act has been committed, may make "such order as it thinks fit to remedy or restrain the breach". The appellants contended that an order that the person who committed the breach pay damages to a person who has suffered by reason of the commission of the breach is one such order that the Court could make.

101. The appellants claimed damages for the costs they incurred in complying with the order until the time they elected to bring judicial review proceedings challenging the validity of the order.

102. The Council submitted that, at the outset, the appellants are not entitled to claim damages because they have not established that the order was issued in breach of the Act. In any event, however, the Council submitted that the appellants are out of time to claim damages. The Council submitted that the Act specifically provides a right to claim compensation for any expense incurred in complying with an order under the Act that is unsubstantiated or unreasonable. Section 181 of the Act provides:

> "(1) The Land and Environment Court, on the hearing of an appeal or otherwise, has a discretion to award compensation to a person on whom an order is served for any expense incurred by the person as a consequence of the order, including the cost of any investigative work or reinstatement carried out by the person as a consequence of the order, but only if the person satisfies the Court that the giving of the order was unsubstantiated or the terms of the order were unreasonable.
>
> (2) A claim for compensation may not be made more than 28 days after the date on which the Court gives its decision on the appeal or more than 3 months after the date of the order if an appeal is not made against the order.

(3) Compensation under this section is to be awarded against the council."

103. The appeal referred to is the appeal under s 180 of the Act that a person on whom the order is served may bring against the order. The Court, on hearing such an appeal, has the power, amongst other things, to revoke or modify the Council's order, to substitute for the Council's order any other order the Council could have made, to make such order with respect to compliance with the order as the Court thinks fit or to make any other order with respect to the order as the Court thinks fit (s 180(4) of the Act). The appellants elected not to appeal under s 180(1) of the Act against the Council's order.
104. The Council submitted that the specific right and specific power of the Court in s 181 of the Act to award compensation displaces any power of the Court to award damages under the general power, in s 676 of the Act, to remedy a breach of the Act.
105. The specific right to claim compensation under s 181 of the Act, however, has a time limit: 28 days after the date on which the Court gives its decision on an appeal under s 180(1) (which did not apply as the appellants did not appeal) or 3 months after the date of the order if an appeal is not made against the order (which did apply). The order was issued on 13 April 2017. The appellants' proceedings challenging the validity of the order were commenced on 27 July 2017, more than 3 months after the issue of the order. Any claim for compensation pursuant to s 181 of the Act was therefore out of time.
106. The Council also sought to raise, by notice of contention, various other matters as to why the Court should not award damages in the circumstances of the case. It is not necessary to deal with these contentions.
107. The primary judge determined that the appellants had not established that the order was ultra vires and dismissed the proceedings. For the reasons I have given above, I too consider that the appellants have not established that the order is ultra vires, in either a narrow or a broad sense, and, hence, that it was issued in breach of s 124 of the Act. There is no basis, therefore, to make any order under s 676(1) of the Act to remedy a breach of the Act, including awarding damages to a person who has incurred expense as a consequence of a breach of the Act.
108. It is, therefore, unnecessary to determine the Council's contention that the specific right to claim compensation under s 181 of the Act displaces any general right to claim damages as a remedy for a breach of the Act under s 676(1) of the Act. My preliminary view is, however, that there is force in the Council's argument that s 181 of the Act is the sole source of the right to claim, and the power of the Court to award, compensation for expenses incurred as a consequence of an order under s 124 of the Act that is unsubstantiated or the terms of which are unreasonable.

Conclusion and order

109. The appellants have not established that the order issued by the Council is outside the power of s 124 of the Act in any of the ways alleged. The appeal should therefore be dismissed with costs.
110. In my view, the orders of the Court should be:
. (1) The appeal is dismissed.
. (2) The appellants are to pay the respondent's costs of the appeal.

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