

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Chehab v City of Canada Bay Council [2002] NSWLEC 220

PARTIES:

APPLICANT

Mohammed Chehab

RESPONDENT

City of Canada Bay Council

CASE NUMBER: (1)0322 of 2002

CATCH WORDS: Question of Law

LEGISLATION CITED:

Conveyancing Act 1919 s 88B

Drummoyne Local Environmental Plan 1986 cl 27

Environmental Planning and Assessment Act 1979 s 28, s 79C

Land and Environment Court Act 1979 s 39

CORAM: Pain J

DATES OF HEARING: 24/09/2002

DECISION DATE: 05/12/2002

LEGAL REPRESENTATIVES

APPLICANT

Mr M Baird (barrister)

SOLICITORS

n/a

RESPONDENT

Mr D Baird (solicitor)

SOLICITORS

Maddocks

JUDGMENT:

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Pain J

5 December 2002

MOHAMMED CHEHAB

Applicant

v

CITY OF CANADA BAY COUNCIL

Respondent

Judgment

Introduction

1 This is a class 1 matter in which the parties are asking that the Court determine the following preliminary questions of law:

(i) Does cl 27(2) of the Drummoyne Local Environmental Plan (LEP) prevent the suspension of registered instruments where development permissible under an Environmental Planning Instrument is in conflict with the rights or interests of a public authority under a registered instrument? Or in other words does cl 27(2) of the LEP preserve the enforceability of the covenant?

(ii) Does s 39(2) of the Land and Environment Court Act 1979 (the Court Act) permit the Court to release, vary or modify the instrument where the enforceability of the instrument is expressly preserved by an Environmental Planning Instrument?

(iii) If the answer to question (ii) is "yes", whether the Court must still have regard to the instrument, as an instrument created under the Conveyancing Act 1919, pursuant to s 39(4) of the Court Act?

(iv) In the alternative, whether the Court must have regard to the instrument pursuant to s 79C of the Environmental Planning and Assessment Act 1979 (the EP&A Act), being a matter for consideration in the determination of a development application as it is a matter arising from a provision of an Environmental Planning Instrument?

(v) If the answer to question (iii) or (iv) is "yes", whether the Court must, in ascribing the weight to be attached to the instrument, give it "proper genuine and realistic consideration" or "significant weight"?

2 The parties provided an Agreed Statement of Facts which is useful to set out in full as follows:

1. *The Applicant is the registered proprietor of the property at Lot 3 DP 250661, known as 3 The Esplanade, Drummoyne (the property).*

2. *The property is within the Local Government Area of the Respondent.*

3. *The property is subject to the Drummoyne Local Environmental Plan 1986 (LEP) and the Sydney Regional Environmental Plan No. 22 - Parramatta River (SREP).*

4. *The Applicant lodged Development Application No. 206/01 (DA) with the Respondent on 15 June 2001.*

5. *The DA involves alterations and additions to the existing dwelling, including the addition of a second storey and amendment of the internal layout of the dwelling.*

6. *Council issued a Notice of Determination to the Applicant on 12 November 2001, refusing to grant approval to the DA.*

7. *One of the reasons for refusal contained in the Notice of Determination was because the DA did not comply with a Restriction as to user registered on the title of the property pursuant to s 88B of the Conveyancing Act 1919 in respect of the additional proposed storey.*

8. *The property is subject to a restriction as to user registered on the land pursuant to s 88B of the Conveyancing Act 1919 (Restriction as to user).*

9. *The Restriction as to user applies to each Lot contained in DP 250661, including the subject property.*

10. *The Restriction as to user was registered on 7 August 1975.*

11. *Pt 2 of the Restriction as to user nominates the Council of the Municipality of Drummoyne as the body empowered to release, vary or modify the Restriction as to user.*

12. By Proclamation dated 29 September 2000, the Governor, pursuant to Pt 1 of Chapter 9 of the Local Government Act 1993, amalgamated the Local Government areas of the Municipality of Drummoyne and the Concord Council under the name of the City of Canada Bay Council, the Respondent to these proceedings.

13. The Proclamation transferred the rights, liabilities and assets of the Council of the Municipality of Drummoyne to the Respondent.

14. The Respondent accordingly is empowered pursuant to Pt 2 of the Restriction as to user to release, vary or modify the Restriction as to user.

15. At no time has the Respondent empowered the release, variation or modification of the Restriction as to user in relation to the property or to any other property within The Esplanade, Drummoyne.

16. A term of the Restriction as to user provides, inter alia:

A. Not more than one main building shall be erected on the Lot burdened and such building shall be a single storey dwelling only.

17. Clauses 27(1) and (2) of the LEP provides:

(1) If any agreement, covenant or similar instrument prohibits or restricts development permitted under this plan, the agreement, covenant does not apply to that development to the extent necessary to allow that development to be carried out except where the development is within the land to which cl 11 of the Sydney Environmental Plan No 22 - Parramatta River applies, or where the covenant, agreement or instrument only restricts building materials.

(2) Nothing in subclause (1) affects the rights or interests of any public authority under the registered instrument.

18. The Respondent is a public authority.

3 As the Agreed Statement of Facts note, by a proclamation of 29 September 2000 the rights of the former Council of Drummoyne were transferred to the City of Canada Bay Council. It is accepted for the purposes of this Notice of Motion that the power to vary or modify a restriction as to user is a right transferred under that proclamation to the City of Canada Bay Council. It is also accepted that cl 27(2) would preserve the power of the Council to vary, modify or release the restriction as to user. The Council submitted it would not consent to the modification of the restriction as to user.

Section 28 the EP&A Act

4 Section 28 of the EP&A Act is relevant to the questions of law posed as it is the basis for cl 27(1) and (2) of the LEP. It states:

(1) In this section, "**regulatory instrument**" means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.

(2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.

(3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.

Accordingly cl 27(1) and (2) are validly made, assuming cl 28(3) has been complied with. The parties agreed that it had.

First question of law

5 The parties agreed that the effect of cl 27(2) of the LEP preserves the enforceability by the Council of the restriction as to user and I see no reason to differ from that view. Accordingly the first question is answered in the affirmative.

Second question of law

6 The second question of law raises a fundamental issue as to whether s 39(2) of the Court Act applies to permit the Court to release, vary or modify the restriction as to user where its enforceability is expressly preserved by cl 27(2) of the LEP as provided for by s 28(2) of the EP&A Act. Section 39(2) of the Court Act provides that:

In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

This must be answered in light of s 28(2) of the EP&A Act and cl 27(2) of the LEP.

Applicant's arguments

7 The Applicant argued that the power of the Court under s 39(2) of the Court Act has been considered and given wide scope particularly in the decision of the Court of Appeal in *McDougall v Warringah Shire Council* (1993) 80 LGERA 151. This was followed also in *Ross Karp & Associates Pty Limited v Randwick City Council* (1999) 106 LGERA 397 by Cowdroy AJ, where he noted at 400 that "Numerous authorities have followed the principle that the Court has the same functions and discretions of the council when considering an appeal". (see also *Claude Neon Ltd v Manly Municipal Council* (1981) 50 LGRA 281 at 284; *Canterbury Municipal Council v Philip Morris Ltd* (1985) 58 LGRA 178 at 179 and *McDougall*).

8 Also of relevance to this matter are cases concerning restrictions as to user. The Applicant submitted that this case was very similar to the decision of Stein J in *Willoughby Municipal Council v Huxley Homes Pty Ltd* (Stein J, NSWLEC, 16 November 1989, unreported). That case was an appeal against a decision of a Commissioner in which the Commissioner granted development consent that required the variation of a restrictive covenant which limited the building to a single storey. The covenant was able to be varied with the consent of both the Council and the adjoining neighbour. The evidence before the Commissioner was that the neighbour consented to the variation yet the Council did not. Stein J stated:

It is not a question of the Land and Environment Court usurping the role or jurisdiction of the Supreme Court under s. 89 of the Conveyancing Act. The power of the Council which falls to the Court under s. 39(2) is to agree, as an incident to the building application, to release the restriction of user and not the jurisdiction of the Supreme Court to entertain an application for an order to modify or extinguish a restriction on user.

I see no need to call in aid s. 33 of the Interpretation Act but it is obvious that the object or purpose of s. 39 will be met if the Court can exercise the Council's power to release the restriction as an incident to the power to grant or refuse the building application. Similarly, I see no need to rely upon the wide wording in s. 22 of the Land and Environment Court Act.

9 Other cases which the Applicant relied on in which the Court has considered the operation of restrictive covenants include *Challister Ltd v Blacktown City Council* (1992) 76 LGRA 10. I note however that in *Challister*, the requirement in s 28(3) of the EP&A Act that the Governor must approve a provision in the LEP made pursuant to s 28(2) of the EP&A Act was not satisfied, so that the issue that arises in this case was not debated in that case.

10 Given that the existing case law is clear, the Applicant argues the power of the Court under s 39(2) of the Court Act must extend to the power to release, vary or modify the restriction as to user over the Applicant's land as that power relates directly to the development application the subject of these proceedings. This power is not affected by cl 27(2) of the LEP.

Council's arguments

(i) Statutory context

11 The Council argued that in the context of this particular restriction as to user and cl 27(2) of the LEP the authorities relied on by the Applicant, particularly *Huxley Homes*, should be distinguished.

12 The three cases where the question of s 39(2) of the Court Act have been considered in relation to s 88B instruments are *Huxley Homes*, (see par 8) *Magadan Pty Ltd v Gosford City Council* (Stein J, NSWLEC, 20 March 1995, unreported) and *Challister* (see par 9). In *Magadan*, Stein J made *obiter* remarks (the issue did not need to be finally determined) that the restriction as to user which in that case was in favour of the Council and was included on each lot title by a s 88B instrument under the Conveyancing Act 1919 could be released, modified or varied by the Court.

13 Having regard to the facts of *Huxley* and *Magadan* the Council submitted the circumstances in which s 39(2) of the Court Act allows the Court to release, modify or vary an instrument created pursuant to s 88B of the Conveyancing Act are where:

1. the Council's power to exercise the power or function to release, modify or vary the instrument is necessary for the Consent Authority's approval of the development application, being a matter before the Court; and
2. the Council is the only body empowered under the instrument to release, vary or modify the instrument (or where there are additional persons with such power, their consent has been obtained); and
3. the Council is the only body benefiting from the instrument (or where there are additional persons who benefit from the instrument, their consent has been obtained).

14 The Council relied on the comments of Talbot J in *Gibson v Mosman Municipal Council* (2001) 114 LGERA 416 where he stated that:

It must be accepted that the authorities establish that the exercise of a function pursuant to s 39(2) must be considered in the context of the individual case, even to the extent that a function and discretion might be properly exercised in one case but not necessarily in another... In all the cases where the Court has held that it is appropriate to exercise a function pursuant to s 39(2) of the Court Act, the matter the subject of the appeal was also the matter in respect of which the Council was empowered to exercise another function or discretion.

15 The Council argued that no case is authority for the proposition that the Court may release, vary or modify an instrument made pursuant to s 88B of the Conveyancing Act where the instrument is specifically preserved in an environmental planning instrument, as is the case with cl 27(2) of the LEP. Accordingly, the circumstances of this case can be distinguished from the facts in *Huxley Homes* and *Magadan*.

(ii) Effect of cl 27(2) of the LEP

16 The Council made two arguments in relation to the effect of cl 27(2) of the LEP. Firstly, by virtue of cl 27(2) of the LEP the legal efficacy of the restriction as to user is restored. Consequently the legal efficacy arises under the LEP rather than the Conveyancing Act. If the Court were to assert that it had the power to vary the covenant by virtue of s 39(2) of the Court Act this would effectively be an amendment or repeal of the terms of the LEP. This is beyond the power accorded to the Court by s 39(2). The only circumstance where the Court may amend or repeal a Council's environmental planning instrument is in Class 4 proceedings commenced pursuant to s 35 of the EP&A Act if those proceedings are commenced within three months of the gazettal of the LEP by the Minister.

17 Secondly, a separate submission put in relation to the application of cl 27(2) was based on the decision of *Codlea Pty Ltd v Byron Shire Council* (1999) 105 LGERA 370. The issue is the extent to which the Court can exercise, under s 39(2) of the Court Act, decisions of a Council reserved to the Council under an LEP. In *Codlea* the LEP required that the Council form an opinion prior to granting development consent for a subdivision as to whether or not prior adequate arrangements had been made for the provision of sewerage services. The question was whether the Court could exercise the function of the Council under the LEP in relation to forming an opinion about the provision of sewerage services. The Court of Appeal held the exercise of discretion was outside the purview of the planning matters which the Court could consider. While not exactly the same situation as arises in this case, it was argued that it provides a useful analogy. The discretion which accrued to the Council in relation to the restriction as to user is of a similar nature to that in *Codlea*.

(iii) Beneficiaries of the covenant

18 The Council submitted that in this case it stands as trustee for the other parties who benefit from the terms of the restriction as to user, being lots 1, 2, 4, 5 and 6. All the residents of those lots have the legal right to approach the Supreme Court to enforce their entitlements under the restriction as to user. The people benefiting from the restriction as to user have expectations that their amenity will be preserved.

19 The discretion the Council holds in relation to the modification or release of the covenant is separate from its planning discretion. It stands as a quasi trustee for the rights and privileges of other parties as the only party with the power to release or modify. To that extent it is analogous to, although not identical to, the case in *Strathfield Municipal Council v Drew* (1985) 55 LGERA 310. That case was a decision of the Court of Appeal concerning the application of the Public Health Act 1902 where it was held the Land and Environment Court did not have power under s 39(2) of the Court Act to make decisions under the Public Health Act. (I note the approach in *Drew's* case was specifically rejected by Stein J in *Huxley Homes*).

20 Furthermore, unlike the Council, the Court cannot notify the owners of the allotments benefiting from the restriction as to user of its intention to release or vary the instrument, invite those persons to make submissions and then consider those submissions prior to making a decision.

21 Further on the basis of *Codlea* the Council must be satisfied that it should release or modify the restriction as to user in light of the beneficiaries' interests and this is a discretion it holds by virtue of cl 27(2). This circumstance also distinguishes it from *Huxley Homes* and *Magadan*.

Finding

22 While I found the Council's argument most interesting, I consider, as the Applicant has argued, the law is clear in the cases I have been referred to that, pursuant to s 39(2) of the Court Act, the Court has all the functions and discretions of the Council in respect of the matter which is the subject of the appeal. This includes the discretion to release, vary or modify the restriction as to user, the enforceability of which is preserved (in relation to the Council) by cl 27(2) of the LEP.

23 Cases commencing with *McDougall* in the Court of Appeal emphasise the broad power exercisable under s 39(2) of the Court Act. In *McDougall* the Council resolved pursuant to s 289(e) of the Local Government Act 1919 (the LG Act) to "control and regulate" the property where the appellant resided by prohibiting the keeping of pigeons on it. The applicant appealed against the Council's refusal of his application to alter his pigeon loft. Pearlman J held this Court did not have power to vary the resolution made by the Council pursuant to s 289(e) of the LG Act. The Court of Appeal held the Court did have the power to vary, modify or rescind the resolution on an appeal against the refusal of the building application. Kirby J held that the Court had the power to exercise:

all the functions and discretions the council could have exercised when considering the application are open to the Land and Environment Court on appeal and not only those strictly necessary to the approval.

24 His Honour preferred this view over a line of authority that had stemmed from *Kogarah Municipal Council v Kent* (1981) 46 LGRA 334, which took a more restrictive view of the Court's powers under s 39(2) of the Court Act, namely that: *The jurisdiction of the Land and Environment Court to exercise the powers and functions of a council has been held to extend only to those functions "necessary" to, or "essential" for, or "at the heart of" the decision in question.*

25 Mahoney JA, in *McDougall*, approached the matter by asking two questions: "what is the "matter" the subject of the appeal; and whether the function of the Council under s 289(e) is a function "in respect of" that matter." (at 163). Cripps JA stated at 170:

...it was relevantly "at the heart of the matter". The circumstance that it is not legally "necessary" for a resolution to be varied or modified does not, of itself, deny the power. In my opinion, the power exists provided there is a relevant nexus between the matter the subject of appeal and the discretion or function proposed to be exercised.

26 In *Magadan* Stein J stated at 123:

It is patent that the requirements of s 39(2) of the Land and Environment Court Act 1979 are met and the Court is empowered to vary or modify the Restriction as to User in the context of a development appeal where the circumstances warrant. Nothing in the ratio of McDougall v Warringah Shire Council (1993) 80 LGERA 151 indicates otherwise. Indeed, to the contrary. The "tests" are satisfied whether examining President Kirby's preferred view (161 - 162), that of Mahoney JA (163 - 164) or Cripps JA at 170.

27 I consider his Honour's conclusion applies in this case. The power to release, vary or modify the restriction as to user is a function that is "at the heart of" the decision in question. Therefore, whether I apply the tests in *McDougall* or the test stemming from *Kent*, the Court clearly has the power under s 39(2) of the Court Act to release, vary or modify the restriction as to user in this case. I am not able to agree with the argument put by the Council which sought to distinguish *Huxley Homes* and *Magadan*.

28 I cannot agree with the Council's submission that cl 27(2) of the LEP is the source of the legal efficacy of the restriction as to user such that it becomes part of the LEP and cannot be modified by the Court on appeal as it would result in an amendment to the LEP. The restriction as to user is not incorporated as part of the LEP by cl 27(2). All that cl 27(2) does is preserve the rights and interests of the Council, as a public authority, under the restriction as to user, which is a separate instrument made under the Conveyancing Act 1919. I do not think that this means the provisions of the restriction as to user are incorporated into the LEP.

29 I furthermore reject the Council's submission that this case is analogous to *Codlea*. The decision in *Codlea* turned on the specific wording of a provision in the LEP which identified a precondition of the Council's consent to the carrying out of development. The decision is usefully summarised in the decision of Talbot J in *Alvanos v Shoalhaven Shire Council* (2001) 119 LGERA 403 at [28] - [32] as follows:

Clause 45 of the Byron Local Environmental Plan 1988 (NSW) made it a pre-condition of the council's consent to the carrying out of development, that it be satisfied that prior adequate arrangements have been made for the provision of certain services to the land.

Stein JA came to the point succinctly when he identified two elements in the provisions of cl 45. He said in par 378 [43] as follows:

"One is the making of the 'prior adequate arrangements' by the council and the second is the 'satisfaction' with them prior to granting approval."

He went on in that same paragraph to state as follows:

"The former is not 'in respect of the matter the subject of the appeal' and the latter is."

So what his Honour decided in that case was that it was not open for the Court to in some way make the prior adequate arrangements for the provision of services to the land as the Commissioner in this Court had attempted to do at first instance. However, it was within the function of the Court, contemplated by s 39(2), as part of the process of determining the development application to be satisfied that those arrangements had been made.

In other words it was a pre-condition to the granting of consent that the consent authority, in whose shoes the Court stood, should be satisfied about something. But it was not open for the Court to stand in the shoes of the consent authority to do the something about that which it needed to be satisfied.

There is no wording which suggests the Council's decision to release, vary or modify the restriction as to user under cl 27(2) is a precondition in this case. This case is different to the provisions in the LEP in *Codlea*.

30 It also seems to me that if I apply the Council's reasoning as to the effect of cl 27(2) then cl 27(1) would have little, if any, effect. Given the wide power conferred by cl 28(2) of the EP&A Act on which that clause of the LEP must be based, this limitation on cl 27(1) does not appear open.

31 The fact there are a large number of beneficiaries under the restriction as to user is not sufficient ground to suggest that s 39(2) of the Court Act cannot apply. Section 28 of the EP&A Act clearly allows for provisions such as cl 27(2) of the LEP to exist regardless of the number of beneficiaries of a regulatory instrument. The Council sought to argue that if there were other persons benefiting from the instrument their consent had to be obtained. I reject this submission as cl 27 is not so limited in its terms. Clause 27(2) preserves only the rights of the Council under the restriction as to user. The Council is therefore the only body or person whose consent is required to vary, modify or release the restriction as to user. For the reasons I have already given, the Court has that power of the Council in this appeal. While this may not be a completely satisfactory situation from the point of view of the beneficiaries of the restrictions as to user, by virtue of s 28 of the EP&A Act this is clearly allowed.

32 I note the Council will be able to bring forward evidence from the beneficiaries of the restriction as to user at the hearing before the Court as their evidence is very likely to be a relevant consideration on any merits appeal.

33 The answer to question 2 must be in the affirmative, namely that the Court exercising the functions of the Council pursuant to s 39(2) of the Court Act clearly has the Council's power, preserved by cl 27(2) of the LEP, such that the Court can release, vary or modify the restriction as to user.

34 **Question 3**

If the answer to question 2 is "yes", must the Court still have regard to the instrument, as an instrument created under the Conveyancing Act 1919, pursuant to s 39(4) of the Court Act?

Both parties submitted this question should be answered in the affirmative. I agree this should be answered in the affirmative given the clear wording of s 39(4).

35 **Question 4**

In the alternative, must the Court have regard to the instrument pursuant to s 79C of the EP&A Act, being a matter for consideration in the determination of a development application as it is a matter arising from a provision of an environmental planning instrument?

The parties both submitted that the answer to question 4 was yes. While I have held the restriction as to user is not incorporated into the LEP it is clearly a matter arising from a provision of an environmental planning instrument in the circumstances of this case. It is clearly therefore a matter which arises for consideration.

36 The fact there are two bases on which the restriction as to user is a relevant matter for consideration does not have particular significance as a matter of practice. Ultimately the question of consideration will be determined by the weight which should be attributed to the restriction as to user (see question 5).

37 **Question 5**

If the answer to question 3 or 4 is "yes" must the Court, in ascribing the weight to be attached to the instrument, give it "proper genuine and realistic consideration" or "significant weight"?

The Council argued that it was appropriate for a judge of the Court to make a ruling on the appropriate weight to be given to the instrument in this matter. It submitted the restriction as to user should be given significant weight. The Applicant submitted this was a question of evidence and not a question of law.

It is not appropriate that I make any findings as to the weight which should be accorded to the restriction as to user by the Court when this matter proceeds to its merit hearing. In *G H Wainwright v Canterbury Municipal Council* (Bignold J, NSWLEC, 30 October 1992, unreported) Bignold J was required to answer a number of questions of law in relation to a restrictive covenant, one of which was "*What, if any, weight should be accorded to the restrictive covenant in determining the development application, in accordance with s 90 of the EP&A Act?*" (now s 79C). His Honour held that this was not a question of law but a question of fact for the tribunal of fact to decide. I agree and decline to answer question 5 as it does not disclose a question of law.

38 I do note, however, that the weight which should be attributed to the restriction as to user will depend on matters such as how the restriction as to user has been enforced in the past. In other words, a Court is likely to give less weight to a restriction as to user that the Council has allowed to be modified, varied or revoked numerous times in the past, than one which has been strictly enforced by the Council.

Summary of findings

The answers to the questions of law set out above:

(i) Does cl 27(2) of the Drummoyne Local Environmental Plan (LEP) prevent the suspension of registered instruments where development permissible under an Environmental Planning Instrument is in conflict with the rights or interests of a public authority under a registered instrument? Or in other words does cl 27(2) of the LEP preserve the enforceability of the covenant?

Answer - Yes.

(ii) Does s 39(2) of the Land and Environment Court Act 1979 (the Court Act) permit the Court to release, vary or modify the instrument where the enforceability of the instrument is expressly preserved by an Environmental Planning Instrument?

Answer - Yes.

(iii) If the answer to question (ii) is "yes", whether the Court must still have regard to the instrument, as an instrument created under the Conveyancing Act 1919, pursuant to s 39(4) of the Court Act?

Answer - Yes.

(iv) In the alternative, whether the Court must have regard to the instrument pursuant to s 79C of the Environmental Planning and Assessment Act 1979 (the EP&A Act), being a matter for consideration in the determination of a development application as it is a matter arising from a provision of an Environmental Planning Instrument?

Answer - Yes.

(v) If the answer to question (iii) or (iv) is "yes", whether the Court must, in ascribing the weight to be attached to the instrument, give it "proper genuine and realistic consideration" or "significant weight"?

Answer - This is a question of fact, not law.

The Court orders that:

1. The exhibits may be returned.
2. The question of costs is reserved.