

Land and Environment Court
New South Wales

Case Name: Harris v Secretary, Department of Climate Change, Energy, the Environment and Water

Medium Neutral Citation: [2025] NSWLEC 116

Hearing Date(s): 11 September 2025

Date of Orders: 11 September 2025

Decision Date: 11 September 2025

Jurisdiction: Class 1

Before: Pain J

Decision: Refer to [30]

Catchwords: PRACTICE AND PROCEDURE – appeal of remediation order – objection to admissibility of aerial imagery evidence in Class 1 appeal – objection dismissed

Legislation Cited: Biodiversity Conservation Act 2016 (NSW), s 11.15
Evidence Act 1995 (NSW)
Land and Environment Court Act 1979 (NSW), s 38(2)

Cases Cited: Makita (Aust) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305
Secretary, Department of Planning and Environment v Namoi Valley Farms Pty Ltd (No 6) [2022] NSWLEC 62
Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd (No 2) [2020] NSWLEC 126

Category: Procedural rulings

Parties: Jane Maree Harris (Applicant)
Secretary, Department of Climate Change, Energy, the Environment and Water (Respondent)

Representation: Counsel:
C Ireland (Applicant)
M Fozzard (Respondent)

Solicitors:
Horton Rhodes (Applicant)
Department of Planning, Housing and Infrastructure
(Respondent)

File Number(s): 2024/326078

Publication Restriction: Nil

EX TEMPORE JUDGMENT

- 1 The Appellant Mrs Harris has commenced a Class 1 appeal of a remediation order issued under s 11.15 of the *Biodiversity Conservation Act 2016* (NSW).
- 2 I am ruling on the admissibility of part of an expert report of Mr Watts dated 15 July 2025 (the Watts report). The Appellant argues that it does not satisfy the *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 (*Makita*) requirement that an expert's opinion must link conclusions with expertise based on his or her specialist knowledge and identify the assumptions and reasoning based on that expertise. The Appellant provided a list of objections to numerous paragraphs and diagrams throughout the report as specified therein. The same essential objection was made in relation to all of these matters and I consider they can be dealt with globally without needing to refer to every paragraph and diagram specified.
- 3 Mr Watts is a surveyor specialising in aerial surveying and aerial imagery analysis with over 35 years' experience in the mapping and surveying industry. His expertise is not questioned by the Appellants. The report is lengthy, some 319 pages including numerous appendices.
- 4 The Appellant submitted that the rules of evidence should be applied, accepting s 38(2) of the *Land and Environment Court Act 1979* (NSW) (LEC Act) applies in this matter, as these can provide useful guidance. Such a course is available in Class 1 proceedings. The report criticism focussed on paragraphs in the Executive Summary as lacking in reasons and then referred to various paragraphs and diagrams which were considered to be conclusory

and lacked reasoning and therefore could not be tested. The operation of Global Mapper, the software program applied by Mr Watts in reaching his conclusions, was also said to be inadequately identified in the report and consequently his use of the software program was not able to be tested. The assumptions applied in the program were not identified. Mr Watts did not make clear in the report when the computer or he was preparing images.

Fundamentally Mr Watts did not articulate how he arrived at 138ha of trees being cleared as he concludes in his report. The reader was simply left with having to accept Mr Watts' opinion. While there is a veneer of detail in the report it largely contains assertions and the reasoning is not fully disclosed.

- 5 Reference was made to *Secretary, Department of Planning and Environment v Namoi Valley Farms Pty Ltd (No 6)* [2022] NSWLEC 62 (*Namoi*) and *Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd (No 2)* [2020] NSWLEC 126 (*Auen Grain*), cases which I understood to be considered by the Appellant as supportive of these submissions.

Consideration

- 6 The Respondent made eight points, several of which I adopt below in rejecting the Appellant's application to exclude large sections of the Watts report. I have reviewed the entirety of the report and the annexures in order to inform my ruling. It is essential to review the report as a whole in ruling on the matters raised, which the Appellant's case failed to do in my view (Respondent's point 4).
- 7 I consider that *Namoi* provides no assistance in this case dealing with an entirely new report (Respondent's point 2). I further observe that *Namoi* and *Auen Grain* were both considering evidence in the context of criminal prosecutions where *Evidence Act 1995* (NSW) (Evidence Act) considerations squarely arose.
- 8 No ruling on whether the Evidence Act ought to apply generally need be made in order to consider the Appellant's submissions on this particular report relying on the principles in *Makita*. I am mindful that while rules of evidence provide useful guidance in Class 1 appeals on occasion, their application must always be tempered by the importance of achieving the just, quick and cheap aims of

litigation in such matters, which is generally to have less formality in such processes. I am determining whether a remediation order ought to be made and if so on what terms and that is the point to which decisions on evidence and how it is presented must be directed (Respondent's point 3). Ultimately the decision is one for the Court to make assisted by evidence, in other words Mr Watts can inform the Court's decision, and no more (Respondent's point 5).

- 9 The Respondent's point 6 dealt extensively with methodology and reasoning in the whole report and I adopt the submissions which provided a comprehensive review of the report including the appendices. In particular I note that Mr Watts clearly identified, through preparation of multiple smaller polygons on which he plots different vegetation types and cleared areas, how he formed his opinion about what has occurred across the proposed Remediation Area at different times. The methodology in the report is lengthy, thorough and detailed. That methodology is the reasoning that supports his opinions.
- 10 Paragraph 58 of Mr Watts' report at p 23, headed "Infrastructure and Vegetation Mapping and Analysis", states that he has used the following analytical skills gained from viewing and analysing aerial imaging to identify and interpret what he sees in an image. In a sentence he refers to "the core attributes within an aerial image form the essential criteria of the aerial imagery interpretations." Mr Watts lists the fundamental characteristics, and he refers to a document which lists all of the characteristics at p 288.
- 11 Paragraphs 59 to 61 disclose his experience and also the procedures he follows. At par 59, he says "all the dates of the imagery that I analysed" referring to the images that he has analysed by referring to his procedures and his reasoning within the images throughout the report. Where he stated "when I analyse medium to high resolution imagery, I can identify..." he is directly connecting to his experience. In these two paragraphs he goes on to say when he compares trees, that is how he identifies areas of ground cover. He clearly gives two bases for connecting his underlying reasoning to his opinion wholly or substantially based in par 59. In par 60 he says what he did and why he did these things. Mr Watt connects his opinions to his expertise at par 61.

- 12 In par 63 the use of this type of Global Mapper software is identified. He is not required to expose the workings behind the Global Mapper software.
- 13 Mr Watts discloses the commands he used. At par 64 he defines what polygons are and how they are created. The last two sentences of par 64 talk about sequencing and the digitising of the CAD polygons within that program. These statements can be tested.
- 14 Under the section "Assumptions", Mr Watts gives a very good, detailed description of what he is basing his opinions on. He makes observations constantly throughout his report that he's looking at images and counting trees, and then he puts them into classifications.
- 15 Under the heading "Scope of the Report – Method and Reasoning" par 82 is important. Mr Watts is noting how he uses the scaling of images, and he provides a useful table dealing with the size of the images created. Mr Watts discloses the scaling of images that he uses for the particular sensor (criteria) and how he uses it. At par 37 the methodology is not generic. Mr Watts is referring to how he creates things in the present tense, which are relevant to this property. It is not generic information, his opinion is tethered to his experience. These things are relevant to all of the imaging that is referred to throughout the report.
- 16 It is not desirable for an expert who has to present his evidence in such a way that it's digestible to the court and to any reader, that every time he looks at an image he has to give the methodology that he's conducted throughout the whole report. The whole report would not be 300 to 400 pages. It would be much longer than that. It would not be digestible.
- 17 The preparation of the data sets, particularly what he says at pars 86 to 89, is quite detailed. It is detailed to the extent that counsel can know what he could be asked questions about. It is frankly disclosed. Mr Watts is disclosing his underlying preparation of those data sets, and they are important.
- 18 At par 90 on p 38, Mr Watts refers to what he calls the validation checks, and then he refers to appendix 54 which are the checks that he did of all the data and dates of images.

- 19 Paragraphs 98 and 99 are very important for Mr Watts' procedures and how he forms his opinions because these show a double-check. He not only checks against the 27 March 2017 image. As he explains at par 99, he compares all those things that are in the table, and when they do not obviously correlate, then there is a problem. But it's a double-check because he knows that he has correlating to the 27 March 2017 document. That is what he is explaining at par 99.
- 20 At pars 101 and 102, he gives his opinion against the measurements that he carried out. He says, on the second line of par 102, "I am of the opinion that my area measurements for each observed area of clearing in this report are accurate". It is not just a sole, generic "here's my methodology". This is the methodology that he applies. The next heading on p 42 starts at par 103 and supports his submission. At 103 he says "I viewed the imagery at what was determined to be an appropriate viewing scale". Again at 104, referring to the elements of the aerial imagery interpretation document, he says halfway or a third way down "the use of a comparison technique is highly effective." And then the comparison technique is defined at p 309 within that document. There can be no mistake on how he analyses those documents. At par 104 he talks about the commands, a toggle function. Reading that as a layperson, he is flicking from one, and he says so. He is sliding from one image to the next. Mr Watts is telling the reader quite clearly what one of the toggle functions is and how he uses it within the package itself. In par 105, he refers to those core characteristics. Those core characteristics are referred to later on in the elements of aerial imagery interpretation in detail. All of what Mr Watts calls core characteristics he uses to identify those things on the ground, namely, whether the trees and ground cover had or had not changed over time.
- 21 At pars 107 and 108 Mr Watts talks about those images in 1988 and 1992. These are disclosing not only his methodology, but the methodology within the particular data sets or the particular images. It starts at par 109 and goes through to par 117. Pars 115, 116, and 117 are important. Mr Watts says that he undertook the determination of the changes in vegetation. This could only be his observations; "determination of the changes to the vegetation between subsequent dates of aerial imagery by visual inspection of each aerial image".

He provides them all in appendices at the end of the report. No one can be unclear as to what images he is talking about. And he says:

“This is a manual process where I made my own assessment of what changes had occurred at each date of the imagery. While I use the software package to record my observations, the assessment of such change was not directly determined by the software package or program.”

22 The next line, par 116, he says “each date of the imagery, the areas of observed vegetation changed since the previous aerial imagery was manually digitised by me”. Mr Ireland said yesterday that “we do not know if Mr Watts or the global software decided on what areas to paint”. The areas to paint, explained in par 116, were “manually digitised by me, used by the Global Mapper software as saved polygons”. There could be no mistake that he used a manual process and a computer to record it.

23 Mr Ireland on eight occasions said “we do not know if it is Mr Watts or the computer” and that is not correct because pars 115 and 116, when read together with par 117, can only be read as if it was a manual process and he used a computer to record them. The creation of the polygons are by his hand. He says at par 116:

“To create the CAD polygons, I used the digitised function within global mapper to draw a series of connected line segments of various lengths by clicking the computer mouse and manually digitise the CAD polygons along the boundaries of where I observed the vegetation to change.”

24 Mr Watts has clearly disclosed the extent of the detail regarding the process that he is going through to create the polygons that we see throughout the report.

25 Page 50 par 130 is where Mr Watts describes how he identifies and characterises the land cover types. He goes that little step further, identifying the particular way that Mr Watts does his work. He provides the reader with examples of how he identifies those things. He is giving the opportunity for a skilled cross-examiner to look at the examples and test, himself, whether or not those examples bear fruit. That is a matter of weight. That is not a matter of whether or not there is some reasoning or some fundamental problem with this report.

- 26 Mr Fozzard's submission that there was no sensible basis for submitting that Mr Watts had to explain how the Global Mapper software program worked by drawing the analogy that there would usually be no obligation to unpack how an Excel spreadsheet works is apt.
- 27 The Respondent's point 7 dealt with the identification of the 138 ha of trees removed which was a particular focus of Mr Ireland's criticisms in submissions in chief and in reply. I consider Mr Ireland's submissions that the report did not provide any basis for the calculation of the 138 ha were simply wrong. I adopt Mr Fozzard's specific references to the report made in submission. The report provides a clear articulation over many pages of how Mr Watts identified the trees which he aggregated as covering 138 ha across the Remediation Area of some 622 ha. The material he prepared was summarised in the diagram at p 18 in the Executive Summary which diagram is included later in the report together with the work he identified to explain how he arrived at it.
- 28 The comprehensive references in the Respondent's submissions are a complete response to the isolated matters identified in the Appellant's submissions. The report does identify Mr Watts' assumptions and reasoning including in relation to the area of 138 ha of trees cleared.
- 29 It is inappropriate to criticise the Executive Summary as this would not normally be expected to include reasoning (Respondent's point 8).
- 30 No basis to exclude the parts of the Watts report objected to has been established by the Appellant. The objections to parts of the Watts report are not accepted.
- 31 Further observations are warranted.
- 32 The Appellant chose not to obtain its own expert opinion on the application of aerial imagery, or at least none is before the Court, the more usual way in which expert evidence would be tested in Class 1 proceedings.
- 33 An overall comment on case management is that this objection to evidence should have been dealt with well in advance of the final hearing. I have had to determine it in the course of the final hearing. The matter was not identified at the pre-trial mention as an issue that would occupy a lot of court time. The

issue of admissibility has occupied one and a half of the two hearing days allocated for the matter in addition to the site visit and will mean that the matter will not be dealt with in the time allocated, an unsatisfactory outcome.
