



PIKES & VEREKERS
LAWYERS

RECENT ISSUES IN ENVIRONMENTAL AND DEVELOPMENT ENFORCEMENT

Paper given by James Fan

to the 14th Annual Conference of the Environmental Development and Allied
Professionals Western Group at Cowra
30 April – 2 May 2014

A. INCLUDING THE OWNER – ROSS v LANE COVE COUNCIL

1. Mr Ross made alterations and additions to a Northwood property contrary to a development consent granted by the Council. The Council obtained orders from the Land and Environment Court that Mr Ross demolish unauthorised works and reinstate the property in accordance with the consent.
2. During the proceedings in the Land and Environment Court, it became apparent that Mr Ross was no longer the registered proprietor of the property. There were suggestions that the transfer to the subsequent owner was a sham to divert responsibility, but the Court did not agree.
3. The Land and Environment Court then proceeded to make final orders against Mr Ross.
4. The Court of Appeal held that the orders gave a mandatory obligation on Mr Ross to demolish, rebuild and reinstate the property. He was rightly the person to be ordered to do so as he caused the unauthorised works. However, permission to access the land to carry out those works would be required.
5. Further, the new owner would be directly affected by the Court's orders, and they needed to be afforded the chance to make their views known in relation to the orders sought by the Council.

6. It is therefore essential that a property owner be joined to any civil enforcement proceedings where you are trying to get orders. If owners change, the proceedings need to reflect that.
7. This type of issue may also arise in situations of rubbish dumpers, hoarders, or any other unauthorised building works.

B. FINISHES AND MATERIALS - BURWOOD COUNCIL v RALAN BURWOOD PTY LTD

8. Clause 145 of the *Environmental Planning & Assessment Regulation 2000* provides that a certifying authority must not issue a construction certificate for building work unless:

...(a) the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent...

9. In this matter the Council brought proceedings concerning a major development regarding its external appearance against the developer and its principal certifying authority. It sought a series of declarations and mandatory orders to demolish or rectify the building because of changes made to some design features in breach of the consent granted.
10. In doing so, it challenged six construction certificates issued, and two interim occupation certificates.
11. Essentially, the Council tried to say the building didn't look like what was intended.
12. The project comprised three towers on a retail/commercial podium, and included 268 residential units, 62 retail and commercial suites, with associated underground parking. The total cost of the project was between \$120M and \$150M.
13. The Council argued that the buildings constructed were inconsistent with the development consent in a number of respects. The two major changes of concern to Council were:

- (a) the deletion of external louvres which Council alleged were a 'major and important design feature'; and
- (b) changes to the finishes of the building, including the windows and frames, and their colours.

14. An urban design expert gave evidence for Council that:

"as a final result the appearance of the building in no way even resembles the original intent of the approval as depicted in the accompanying elevation drawings...the entire character of the building appearance has been altered, compounded by the additional aid of a totally different range of colour choices and their application in detail."

15. Despite that, the Court found that the construction certificates were validly issued. It found that the fundamentals of this development remained after the issue of the construction certificates, and therefore the construction certificates were valid.



Above: The development as rendered in DA documents



Above: How the development is now presented

16. The matter is presently on appeal. However, if the Court's interpretation of the design changes in the construction certificate is correct, it means that Councils should be ever more proactive in detailing the types of finishes it wants in developments.
17. This type of issue would be particularly more sensitive for development of heritage buildings or conservation areas.

C. NOISE PREVENTION – ROGERS v CLARENCE VALLEY COUNCIL

18. Council issued a noise prevention notice under s 96 *Protection of the Environment Operations Act 1997* ("POEO Act") after it received complaints about noise generated from barking dogs housed and cared for on the property where the owner ran a non-profit animal shelter. The owner commenced proceedings to challenge the noise prevention notice.
19. The Court's judgment noted the background to the proceedings as being "*lengthy and somewhat of a dog's breakfast but, as will become apparent, requires setting out in detail.*" Essentially, the question the subject of the appeal was whether the noise was above acceptable limits under the POEO Act.
20. The Court heard from two acoustics experts that drafted 24 recommendations contained in a noise management plan. The Court admitted the 24 point noise management plan was onerous but nevertheless imposed those requirements, which included matters such as requiring Ms Rogers to limit the number of dogs in her care to eight and limiting her own personal pets to four.
21. The Court have six months for compliance with the 24 point noise management plan and noted that:

"It was not a matter of controversy that Ms Rogers was a person of modest means and that Happy Paws is a non-profit shelter relying on the goodwill of volunteers and donations from the community to operate...

In these circumstances it is appropriate to afford a degree of latitude to Ms Rogers in the time required by her to give effect to the recommendations contained in the ANMP and this is accordingly reflected in the orders made by the court."
22. Ms Rogers has six months to comply with most of the Court orders and nine months to supply written reports to the Court summarising how she has complied with the orders.

D. CHALLENGE TO COURT JURISDICTION – CAMDEN COUNCIL v RAFAILIDIS

23. Council granted development consent to the respondents for the erection of a new dwelling. That consent included a requirement that the respondents demolish and remove an existing dwelling on the land.
24. The respondents moved into the new dwelling without complying with these requirements and tenants remained in the old dwelling. Council issued notices and orders (under s 121B of the *Environmental Planning and Assessment Act 1979* and s 124 of the *Local Government Act 1993*) requiring compliance brought these proceedings in 2011. They came on for hearing and the Court made final orders in March 2012 requiring compliance with those orders and the consent.
25. Development applications were lodged seeking to retain that older dwelling, but when they were refused, the Council brought contempt proceedings against the owners for non-compliance with the Court's orders.
26. In defence of the charge of contempt, the owner stated that:
- (a) that she has "no lawful binding contract" with the Court;
 - (b) that she "was deceived by all people involved with this matter";
 - (c) that she did not give express and unequivocal consent to the matter being heard summarily, and enjoyed an inalienable right to trial by jury, the denial of which constitutes treason;
 - (d) that "any orders/judgments" were not properly made and documented, and that at least one document (a letter) was not admitted into evidence because "there was no wet ink signature" to give it "lawful standing" and "bind" her to it;
 - (e) that this Court lacks jurisdiction to proceed summarily, and that any determination it makes is the product of bias, deception, and/or fraud;
 - (f) that a Judge, in an unrelated valuation matter, did not demonstrate that he was properly appointed and sworn as a Judge, and that

Judges of this Court "allowed the proceedings to continue fraudulently"; and

- (g) that interference with property rights without consent is "terrorism".

27. In response, the Court found that it had the power to hear the matter and find the owner guilty of contempt. It referred to an earlier decision of the Court of Appeal which stated that:

- (a) The Land and Environment Court is a statutory Court of limited jurisdiction as opposed to having inherent jurisdiction. It means that it can only hear the matters where legislation states as such.
- (b) The Court is a superior Court of record, and this status carries with it broad powers to enforce its orders and to suppress any abuse of its processes, as well as other powers said to exist in superior courts.
- (c) However, such status as a superior Court is itself a direct consequence of the description of the Court in those terms with all of the jurisdiction conferred by and through the Court Act.
- (d) The Court's power to punish contempt of its own orders is stated expressly. That provision confers on the Court the powers vested in the Supreme Court in respect of the punishment of persons guilty of contempt, or of disobedience to any order made by the Court.