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BURWOOD COUNCIL V RALAN BURWOOD PTY LTD

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to AIBS Conference
10 August 2015

Overview

The project at 1-3 Railway Parade in Burwood has been the subject of much public controversy and a long and complex history of litigation, including a special leave application to the High Court.

The PCA for the project issued a number of construction certificates ("CC plans") which were somewhat varied from the development approved in the original development consent ("the DC"). The main variations were the finishes used on the façade of the building and the general appearance of the building. The relevant argument was whether the variations were substantial enough for the courts to determine that the CC plans were inconsistent with the DC, and if so, whether the CC plans would be invalidated.

Ultimately, the Court has held that even if the CC plans were inconsistent with the DC, the inconsistency does not invalidate the CC plans, and therefore, those CC plans become part of the DC.

This case has some interesting implications on the role of the PCA and the issuance of CC plans as will be explained later in this paper.

The Facts

The case involves a class 4 civil enforcement challenge in the Land and Environment Court ("the LEC"), brought by Burwood Council, concerning a major development project at 1-3 Railway Parade, Burwood.

A DC was granted by Senior Commissioner Roseth of the LEC in 2008 for:

> *Mixed commercial/residential development consisting of a podium & 3 towers with commercial units & 233 residential units & 4-level basement car parking for 307 cars.*

A number of amendments were made to the original DA architectural design by a later engaged project architect.

Six CC plans were issued by the PCA between 2010 and 2012 with regard to the subject development.

There were a number of variations between the CC plans and the DA plans. Those variations resulted in fairly substantial savings in the costs of the project.

Burwood Council sought to challenge the validity of those CC plans on the grounds that the CC plans were inconsistent with the DC and therefore in breach of clause 145 of the *Environmental Planning and Assessment Regulation 2000* ("the Regulations"). The Council also sought orders for Ralan to complete extensive rectification works.

Although there were a number of variations, some particular external features received the most attention, namely:

1. the omission from the project of the initially approved louvres, described as being "a major and important design feature"; and
2. the as-built finishes, including windows and frames, and their colours.

These changes resulted in a building which presented as primarily "green" in colour, rather than the more "cyan" or "blue" colour which was expected from the DC plans.

Another question was raised as to whether the developer would be liable, vicariously or otherwise, for any breach, and therefore subject to remedial orders.

Further issues were raised with regard to interim occupation certificates issued by another PCA.

The Legislative Framework

Pursuant to s 80(12) of the *Environmental Planning and Assessment Act 1979* ("the Act"):

> ***Effect of issuing construction certificate***
>
> *If a consent authority or an accredited certifier issues a construction certificate, the construction certificate and any approved plans and specifications issued with respect to that construction certificate, together with any variations to the construction certificate or plans and specifications that are effected in accordance with this Act or the regulations, are taken to form part of the relevant development consent (other than for the purposes of section 96).*

A construction certificate may be issued under s109C of the Act:

> *(1) The following certificates (known collectively as Part 4A certificates) may be issued for the purposes of this Part:…*
>
> > *…(b) a construction certificate, being a certificate to the effect that work completed in accordance with specified plans and specifications will comply with the requirements of the regulations referred to in section 81A (5),*

Section 109F of the Act states that:

> *(1) A construction certificate must not be issued with respect to the plans and specifications for any building work or subdivision work unless:*
>
> > *(a) the requirements of the regulations referred to in section 81A (5) have been complied with…*
>
> *…(1A) A construction certificate has no effect if it is issued after the building work or subdivision work to which it relates is physically commenced on the land to which the relevant development consent applies.*

The relevant regulations are the Regulations referred to above.

Clause 145 of the Regulations provides that:

> *(1) A certifying authority must not issue a construction certificate for building work unless:*
>
> > *(a1) the plans and specifications for the building include such matters as each relevant BASIX certificate requires, and*
> >
> > *(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, and*
> >
> > *(b) the proposed building (not being a temporary building) will comply with the relevant requirements of the Building Code of Australia (as in force at the time the application for the construction certificate was made).*
>
> *(2) A certifying authority must not issue a construction certificate for subdivision work unless the design and construction of the work (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.*

The Land and Environment Court Decision

On the question of the inconsistency of the CC plans, Justice Sheahan held that "what matters to the court is that all the fundamentals of the project, as defined in the DC, remained in place after certification."

His Honour stated that a "certain amount of adjustment or reconfiguration was inevitable" and accepted that this is a normal part of the design and construction process.

Therefore, His Honour found that the CC plans were not inconsistent with the DC, and upheld the validity of the CC plans on that ground.

His Honour made little comment on the power of the Court to rule a CC invalid.

Further, His Honour referred to a long line of judicial authority (*Wilkie v Blacktown City Council* (2002) LGERA 444, *North Sydney Council v Moline (No 2)* [2008] NSWLEC 169) on the question of granting relief against persons who are not directly responsible for any breach.

His Honour held that in the circumstances, the actions of the developer did not fall within the very limited "take advantage" test, regardless of the fact that there were some costs savings. Therefore, the developer could not be held responsible for any failure to carry out development in accordance with the Act, or subject to any order for remedial relief.

The Court of Appeal Decision

The Council appealed the decision to the Court of Appeal.

The relevant questions for the Court of Appeal were:

1. Whether Sheahan J had properly considered whether the CC plans and DA plans were inconsistent; and
2. If the CC plans would be valid, on the assumption that the CC plans were inconsistent with the DA and thus were issued in contravention of s109F(1)(a) of the Act.

Sackville AJA, with whom McColl JA and Barrett JA agreed, held that Sheahan J had erred in finding that the CC plans were not inconsistent as he had not made findings on the nature and extent of the variations to the DA plans.

After detailed consideration of the wording of s109F of the Act and cl 145 of the Regulation, His Honour stated that "Had parliament intended that a construction certificate issued in breach of s 109F(1)(a) should be invalid, it might have been expected to say so."

His Honour gave five reasons why a breach of s 109F(1)(a) or cl 145 would not invalidate a CC:

1. It would be the developer, not the PCA, who would suffer adverse consequences by relying on a CC which is held to be invalid for inconsistency;

2. The wording of s109F(1A) expressly refers to a breach which would lead to invalidity. Therefore, if Parliament intends that a CC issued in breach of statutory requirement is to be held invalid, it says so expressly;

3. If a breach of s109F(1)(a) were to cause invalidity, then any breach of the regulations regarding CC plans would lead to invalidity;

4. Clause 145 involves the exercise of an "inherently contestable" judgement, and it is not likely that the legislative scheme requires the validity of a CC to depend on matters on which there is room for differing opinions; and

5. If a breach of s109F(1)(a) or cl145 were to cause invalidity, this would result in public inconvenience. Further, the potential danger from impropriety or lack of competence arises because the statutory scheme has entrusted PCAs with the power and duty to issue CCs. Any risk arising is addressed in the *Building Professionals Act 2005* ("the BP Act").

His Honour also found that Sheahan J had erred in finding that the developer was not responsible for the breach. His Honour distinguished the circumstances of Ralan from those outlined in the authorities and held that Ralan could be held responsible for any failure to carry out development in accordance with the Act.

This judgement was the subject of a special leave application to the High Court. That application was dismissed as the decision turned on a complex statutory scheme unique to NSW, and the decision was not attended by sufficient doubt to warrant the grant of leave.

Implications of the Case for PCAs

As a result of the judgement of the Court of Appeal, regardless of whether CC plans are inconsistent with DA plans, and regardless of the extent of that inconsistency, those CC plans cannot be invalidated. Further, there is no way for public authorities to make remedial orders against a developer with regards to any inconsistencies once those CC plans are issued, pursuant to s80(12) of the Act.

On its face, there would appear to be further refinement needed, either by the Courts or the legislature. In our view there must be a line where the CC is so remote from the DA that it would be ruled invalid, or at least there would be some recourse against a developer seeking to rely on it. To give an extreme example, a DA could be approved for a 3 bedroom cottage, the PCA could then issue a CC for a 10 storey residential flat building. An interpretation of this judgement would lead to an understanding that the CC could not be ruled invalid and would become a part of the DA as approved. This is an unlikely scenario, however it illustrates that there must be a line drawn somewhere. We are yet to find out where.

On the law as it stands after this decision, however, there is a real chance that PCAs will be held to a higher level of responsibility than may have been formerly understood as there is no one else left to hold the bag. One can assume that this may cause the Building Professionals Board ("the BPB") to take a harder line on enforcing the professional standards required by the BP Act.

PCAs are bound by the requirements of the BP Act. If a PCA issues a CC in breach of the EPA act, then the PCA will be open to a finding of "unsatisfactory professional conduct" or "professional misconduct" as per the BP act. If the BPB makes a finding of "unsatisfactory professional conduct", or "professional misconduct", then the PCA may be fined or have his/her accreditation suspended or cancelled.

A PCA is also liable to prosecution under s125 of the Act for any breach of the Regulations.

If the BPB does crack down on inconsistent CCs, then it will be crucial for PCAs to understand precisely what is meant by the phrase "not inconsistent" under cl145(a). There is some detailed analysis of the phrase in paras [144]-[152] of the Court of Appeal judgement. The Court of Appeal has adopted the "ordinary meaning" of the word "inconsistent", as meaning "lacking in harmony between different parts or elements" or "self-contradictory" (Macquarie Dictionary). On that basis, PCAs should direct their attention to whether the CC is inconsistent with the DA, in the sense of lacking harmony between different elements or lacking congruity.

This is not a straightforward task and it should be remembered that some variation will be inevitable. The process of determining consistency should involve consideration of the nature and extent of the variations. The nature and extent of the variations between the CC plans and the DA plans should lead to a lack of harmony, or self-contradiction, and if they do, then a PCA should not certify those plans.

It is disappointing that the assessment of consistency between CC and DC plans has now largely been taken out of the hands of a specialist Court and primarily placed in the hands of the investigating/prosecuting body and an administrative tribunal (the BPB and the NSW Civil and Administrative Tribunal respectively). The Land and Environment Court is a specialist Court which was established to hear planning, building and environmental matters. One would think that any decision as to consistency between planning approvals and plans would be most suited to determination by the Land and Environment Court.

A regular practice of Councils is to impose conditions of consent requiring certain documentation to be provided "prior to the issue of a construction certificate." However, cl160(2) of the Regulations allows the PCA to be satisfied of those matters. Some have suggested that as a result of this judgement, Councils will now push for these conditions to be imposed by way of deferred commencement to ensure that Council has viewed all relevant information prior to the issue of the CC. However, any such condition may be interpreted as having the intention of defeating the statutory scheme and therefore could not be seen to be for a proper planning purpose. The condition could therefore be invalid and lead to the invalidation of the whole of the consent.

There has been some commentary that the statutory interpretation of the relevant clauses does not sit well from an administrative law perspective. Those principles include the fact that, if a purported decision is made without the requisite power, the Courts have the ability to declare that action to be invalid and of no effect. Therefore, PCAs should "watch this space" with regards to potential legislative amendment.