PIKES & VEREKERS
LAWYERS

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INTRODUCTION

This special edition of the Pikes & Verekers Legal Update has been produced for distribution at the Australian Institute of Building Surveyors (NSW and ACT) conference at Dockside Convention Centre, Sydney on 20 and 21 August 2012.

This Update includes Judgments which should be of particular interest to those attending the conference.

The Legal Update is produced bi-monthly. Should any conference delegates wish to be placed on the mailing list for the Legal Update, they should email dmaike@pvlaw.com.au.

WHEN IS A STOREY NOT A STOREY?

***The Owners of Strata Plan 75903 v Lyall Dix* [2011] NSWSC 245**

5 April 2011 – NSW Supreme Court – Hall J

The Owners of Strata Plan 75903 ("the Strata Plan") commenced action against the developer and the Principal Certifying Authority ("the PCA") in relation to the construction of a residential flat building. The developer alleged that the PCA provided negligent advice that the construction of the building was exempt from the *Home Building Regulation* 1997 ("the Regulation") on the basis that the building had a rise in storeys of more than three.

It was claimed that, as a result of the negligent advice, the developer did not have effective home warranty insurance. This meant that the Strata Plan could not claim for building defects against an insurer.

In a preliminary hearing, the Court was asked to determine the meaning of the term "storey" for the purposes of the Regulation.

It is noted that on this preliminary question the Court was not determining whether the PCA was negligent, but only the correctness of the advice given.

Key to the Court's decision (and the advice) was whether the lower ground level, which contained store rooms, six residential units and fourteen car spaces, was a "storey" within the meaning of the Regulation. If it was the advice was correct and if not it was incorrect and insurance was required.

The Home Building Act 1989 states that a person is prohibited from carrying out residential building work unless a contract for insurance in relation to that work is in force. Clause 57BC of the Regulation provides exemptions to this requirement in the case of multi-storey buildings, being buildings with a "rise in storeys of more than 3" and containing 2 or more dwellings. The Regulation defined "rise in storey" by reference to the BCA. Storey was also defined, by way of exclusion of space within a building "if the space includes accommodation only intended for vehicles". No explicit reference was made to the BCA in the definition of storey.

The Court was required to determine the extent to which, if any, the BCA definition of storey was to be deemed to be incorporated in the definition in the Regulation.

What was on its face a comparatively simple question (is the lower floor level a "storey"?) was in fact a complex issue that ultimately turned on semantic constructions of words and phrases such as "space within a building," "includes," and "contains only."

The Court held that it was apparent that the draftsman intended "storey" as included in clause 57BC to mean something different to "storey" as used in the Building Code of Australia as otherwise the draftsman would have simply adopted the Code meaning as occurred with the phrase "rise in storeys". The fact that clause 57BC(5) specifically stated that "storey" does not include a space within a building if that space includes accommodation only intended for vehicles meant that this specific definition overrode the definition of "storey" in the Building Code of Australia. The specific exclusion of a space which "included" space for the accommodation of vehicles meant that the space need not be solely used for the accommodation of vehicles in order for the space to fall outside of the definition of storey.

As the lower ground level in part provided accommodation for vehicles, it was not a storey. The building did not, therefore, contain a rise in storeys of more than 3 and so was not a multi-storey building. Insurance was therefore required.

Whilst the case does not allow any conclusions to be drawn on whether the certifier was or was not negligent, it serves to illustrate difficulties in providing advice on statutory interpretation.

The salutary lesson is if in doubt, seek legal advice.

For enquiries about this case please contact Joshua Palmer.

THE COMPLEXITIES OF A COMPLYING DEVELOPMENT CERTIFICATE

***Bankstown City Council v Bennett & Anor* [2012] NSWLEC 38**
13 March 2012 – Land and Environment Court of NSW – Pepper J

An experienced private certifier ("the certifier") issued a Complying Development Certificate ("CDC") to the Al Noori Muslim School Ltd ("the school") in Greenacre under State Environmental Planning Policy (Infrastructure) 2007 ("the SEPP").

Bankstown City Council brought proceedings in the Land and Environment Court seeking a declaration that the CDC was invalid and an order restraining the school from undertaking any development pursuant to the certificate.

The Court determined that the CDC was invalid but in the exercise of its discretion declined to make any orders.

The school had commenced in 1983 as a small primary school at 75 Greenacre Road, Greenacre. Over the years, the school acquired a number of adjoining properties. In 2008 it obtained development consent from the Council to use a residential dwelling on 93 Greenacre Road as a secondary school for 60 children.

The school continued to acquire more land in Greenacre Road and Mimosa Road. These properties were then consolidated with 93 Greenacre Road to create one large lot.

The 2008 development consent was the only consent for a school on the consolidated lot.

The school obtained funding under the Commonwealth Government's "Building Education Revolution" program to construct a new secondary school on the consolidated lot.

The CDC issued by the certifier was for the erection of a new secondary school on the consolidated lot.

Clause 31A of the SEPP provided that development for the purpose of construction of, or alterations or additions to, school buildings was complying development provided the development was carried out "within the boundaries of an existing school".

The Council contended that the CDC was invalid on a number of grounds, the two main grounds being:

1 There was no "existing school".

2 Even if there was, the CDC authorised development outside the "boundaries" of the existing school.

The Court found as a matter of fact that there was an existing school in operation on a part of the consolidated lot at the time the certifier inspected the land and issued the CDC. The Court had to consider the question whether the requirement that there be an "existing school" meant a school that had been lawfully using the land for that purpose, that is to say whether the term needed to be read down to include only an existing school for which development consent had been given to operate as a school on the land upon which it was located.

The Court held that to permit a CDC to be issued for development on land that had never been authorised to be used for a school, but for which consent to use the land for some other purpose had been given, would not meet the objects of the SEPP.

Further, leaving aside whatever consents may have been granted to use any of the parcels of land contained in the consolidated lot, the Court held that the mere act of registering a plan of consolidation cannot authorise the construction of a classroom on land for which no consent had ever been granted for the purpose of a school. In short, the CDC purported to authorise works outside the boundary of the

land, the subject of the existing 2008 development consent to use it as a school, namely 93 Greenacre Road.

The Court concluded that the proper construction of clause 31A of the SEPP was that there must be a lawfully established school with development consent to it operating on the land in order to engage the power to issue a CDC.

Discretion

Notwithstanding the finding of invalidity of the CDC, the Court in the exercise of its discretion declined to grant an injunction to restrain further work in erecting the buildings the subject of the CDC.

The Court noted that the discretion whether to make orders in injunction proceedings is wide (*Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 355).

The Court gave a number of reasons for declining to grant the injunction in the exercise of its discretion; however, the main reasons were delay on the part of Council in bringing the proceedings and the detrimental financial impact on the school should the injunction be granted. In this regard, evidence had been given that the school would be liable to pay $100,000 per calendar month to the builder for any delay in the completion of the project. Further, the secondary students proposed to attend the school would have to be relocated elsewhere.

For enquiries about this case please contact Ryan Bennett.

CHECK THE FINE PRINT – WHEN IS A CONDITION PRECEDENT TO THE ISSUE OF A CONSTRUCTION CERTIFICATE?

***Bennett v Building Professionals Board (No 2)* [2011] NSWADT 238**

12 October 2011 – NSW Administrative Appeals Tribunal – M Chesterman and P Friedmann

It is common practice in the certification industry to issue "partial" or "staged" construction certificates ("CCs"), such that only a specific part or parts of a work approved by development consent are authorised to be carried out by a particular CC. There is little or no case law as to whether such "partial" CCs are lawful under the Environmental Planning and Assessment Act 1979 ("the EP&A Act"), nor what the prerequisites to the issue of such certificates are.

This was an appeal against a finding of the Building Professionals Board that the issue of CCs for an approved development, in the absence of compliance with a particular condition of development consent, was unsatisfactory professional conduct under the Building Professionals Act 2005.

Condition 8(c) fell under the heading "Matters Relating to the Issue of a CC" and provided:

> *"To reduce the environmental and/or ecological impact of the development proposal, the following design changes shall be implemented:*
>
> *…*
>
> *(c) Reconstruct the retaining wall on the northern boundary of the development site. The wall shall be designed and constructed in accordance with the following:*
>
> *Of masonry materials with a rendered concrete finish.*
>
> *The top finished level be the same as the existing wall.*
>
> *Relevant Australian Standards.*
>
> *Details of these design changes shall accompany the construction certificate."*

The certifier had issued a number of CCs for various stages of the work to be carried out on the development, however the information required by condition 8(c) had never been provided. It was also of note, however, that the wall had not been constructed.

The ADT was required to answer two questions. Firstly, whether there was any restriction on the issue of more than one CC, either in the legislation or in the terms of the consent itself. Secondly, should the certifier have insisted on compliance with condition 8(c) before the first (or indeed any subsequent) CC was issued.

In answering the first question, the Tribunal considered the provisions of the EP&A Act and Regulation as they apply to CCs and found:

> *"The governing legislation does not contain any general prohibition of, or express restriction on, the issuing of more than one construction certificate relating to a single development."*

The Tribunal also relied on a Practice Note issued by the Department of Urban Affairs and Planning which expressly acknowledged the issue of separate CCs for various stages of a development.

The Tribunal also found that the consent itself:

> *"Did not clearly indicate, expressly or by implication, that only one construction certificate might be issued, or for that matter that the issue of multiple certificates was permitted. It did not convey an unambiguous message, one way or the other, on this question."*

The Tribunal nevertheless found that the consent arguably contemplated the issue of multiple CCs. In so finding the Tribunal undertook a detailed analysis of the words used in the consent and the array of diverse matters which a CC was required to address in the context of the consent.

The second question also required a detailed analysis of the words of the consent and the objectives of requiring a CC. The Tribunal found that there was no stipulation in the consent, either expressed or implied, that the requirements of condition 8(c) had to be satisfied before the issue of any CC whatsoever. The interpretation that the Tribunal agreed upon was:

> *"Certain 'design changes', involving the reconstruction of the retaining wall and required by way of modification to the development proposal, must be 'submitted with' and must 'accompany' the construction certificate that* ***relates to this part of the works that are permitted by the consent****."* [our emphasis]

Only those conditions directly referable (either expressly or implicitly) to the work approved by the particular CC needed to be complied with prior to its issue.

The consent made clear that certain other conditions did have to be complied with prior to the issue of the first CC (i.e. prior to the issue of **any** CC). If it had been the Council's intention to require the provisions of condition 8(c) to be complied with prior to the issue of **any** CC, that could have been made readily apparent in the drafting of the consent. Council had elected not to do so.

Whilst there is no presumption or requirement in the legislation that a CC must relate to all works authorised by the development or that all conditions precedent to the issue of a CC be complied with prior to the issue of any CC, the ultimate finding on such questions will depend on the terms of the consent and practical considerations regarding the safety and efficiency of carrying out development work.

From a Council's perspective, the drafter of conditions should give careful consideration to what is intended to be achieved in imposing a condition and when that purpose is best met and should give careful attention to the wording of the conditions to ensure that those objectives are achieved.

For enquiries about this case please contact Joshua Palmer.

LAPSING OF DEVELOPMENT CONSENT

***Wollongong City Council v K & M Prodanovski Pty Ltd* [2012] NSWLEC 107**

11 May 2012 – NSW Land and Environment Court – Sheahan J

The Applicant, Wollongong City Council, sought a declaration that a development consent granted for a mixed use building had lapsed. The Respondent, the beneficiary of the consent, asserted that demolition and geotechnical works undertaken meant that the consent had not lapsed. The Council countered that argument on the basis that, the works undertaken were unlawful and therefore could not be relied upon as physical commencement for the purposes of section 95(4) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act").

Background

On 28 June 2005, the Council granted consent to the demolition of an existing service station and associated structures, and the construction of a mixed use development comprising 24 residential units and 3 commercial units, and basement car parking.

The consent was due to lapse on 28 June 2007, however the Council agreed to the extension of the lapsing period to 28 June 2008.

No works were undertaken until about April 2008, when the Respondent notified the Council that it intended to commence demolition works.

Soon after, the Respondent commenced demolition of the above ground structures and those works were completed by 14 May 2008. The Respondent also undertook removal of the underground storage tanks around that time. However, the Council issued a stop work order under section 121B of the EPA Act on 15 May 2008.

The Conditions of Consent

The Council at the outset acknowledged that the conditions of consent were poorly drafted, with overlap in various areas. However it contended that its intent was clear and that the relevant conditions of the consent required that the Respondent to:

- Appoint a Principal Certifying Authority prior to demolition works;
- Have prepared by a "competent person", as defined in the relevant Australian Standard, a Hazardous Materials Survey and forward this to Council;
- Notify NSW WorkCover prior to commencing demolition works;
- Forward an Asbestos Management Report, a Hazardous Substances Management Plan and a Remediation Action Plan to the appointed PCA and the Council;
- Undertake a phase 2 detailed report pursuant to SEPP 55 prior to the removal of the sub-surface service station tanks; and
- Obtain a construction certificate prior to construction work.

The Council asserted, and the Respondent did not contest, that the above steps were not followed. Rather, the Respondent contended that each of the conditions were to be construed narrowly. On the Respondent's interpretation of the conditions, demolition and geotechnical works did not require the appointment of a PCA and other conditions, such as those relating to NSW WorkCover, were of an advisory nature and not mandatory.

The Court's Consideration

Essentially, the issues were:

1 Whether the works undertaken on the land and relied upon by the Respondent were lawful under the consent granted; and

2 If the works were unlawful, whether such works constitute "physical commencement" for the purposes of section 95(4) of the EPA Act.

On the first issue, the Court accepted the Council's contention that the works undertaken needed to be within the "four corners" of the consent to be lawful, particularly where the works had a "temporal or physical" connection to the subject matter of the consent. Those conditions were to be read strictly and therefore any breach of those conditions meant that those works were unlawful.

The Court found that some breaches, such as the requirement to notify WorkCover, were of a technical or minimal nature. However, the breaches relating to demolition and geotechnical issues were of a serious nature.

Having found that the works relied upon by the Respondent for "physical commencement" were unlawful, the Court found that the consent had lapsed and made orders restraining the Respondent from carrying out development in reliance upon that consent.

For enquiries about this case please contact James Fan.

COUNCIL ORDER RULED INVALID FOR UNCERTAINTY

***Bobolas v Waverley Council* [2012] NSWCA 126**

7 May 2012 – NSW Court of Appeal – McColl JA, Macfarlan JA and Tobias AJA

The appellants were each issued with an order under section 124 of the *Local Government Act 1993* ("the LG Act") by Waverley Council ("the Council"), which required them to remove rubbish accumulated on residential premises in Bondi.

Council claimed relief in the Land and Environment Court under section 678 of the LG Act to enable it to enforce the orders. That relief was granted (see *Waverley Council v Bobolas (No 2)* [2009] NSWLEC 211) which included an order allowing Council's officers to enter and remain on the premises to carry out the removal of rubbish.

The main issue addressed in the Court of Appeal was whether the order under section 124 was invalid on the basis that it was uncertain.

The Order

In January 2009, Council's officers attended the premises and formed the opinion that waste accumulated there was causing or likely to cause a threat to public health.

On 5 March 2009, the Council issued the Order which stated:

> *TERMS OF THE **PROPOSED** ORDER*
>
> *(a) Remove the accumulation of rubbish from all parts of subject premises...*
>
> *REASONS FOR THE ORDER*
>
> *The **order will be** given...*

> *PERIOD FOR COMPLIANCE WITH THE ORDER*
>
> *As the storage of waste and refuse constitutes a health risk **the order will** require that you comply with its terms within twenty-eight (28) days from the date of this order. (Emphasis added)*

When Council's officers attended the premises again in April 2009, they formed the opinion that the Order had not been complied with.

The Land and Environment Court

Justice Pain in the Land and Environment Court rejected much of the appellants' defence which raised issues such as the existence and constitution of the Council under the LG Act and the powers of the Council to carry out the orders under the LG Act.

Particularly, Her Honour referred to section 697 of the LG Act, under which proof of the incorporation of council is not required. Her Honour also referred to the powers afforded under Part 2 Chapter 8 of the LG Act which confer on councils' powers to enter land and buildings and to carry out inspections.

Her Honour also rejected evidence that went to the conduct of the functions of the Council in relation to the earlier orders.

As to the fact the order stated "proposed" and contained other wording to suggest it was framed in futurity, Her Honour stated that *"I think any of the recipients of this order would be under no illusion that they were to comply with the order, that there were potential offences that might arise if they failed to comply with the order."*

The Court of Appeal's Decision

McColl JA compared the strict requirement of Council orders to that of a search warrant in the sense that it would permit entry to premises whether or not the owner or occupier gave consent. Her Honour noted at [41] that such orders "*authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect*". There is, therefore, a need to "*insist on strict compliance with the statutory conditions*."

Referring to authorities on the issuing of search warrants, Her Honour noted that there is a balancing test of a person's private interest against the public interest.

Her Honour held that, because the order contained certain terms in the future tense, the order did not convey any requirement for immediate implementation or compliance. This was confirmed by use of words and phrases such as *"Terms of the proposed order"*, *"Reasons for the order"*, *"the order will be given..."* and *"...the order will require that you comply..."*

It was held that this deficiency went to the heart of the order and the recipient of the order could not "*be certain as to whether it required present compliance or, rather, whether it was some sort of warning notice in anticipation of an order requiring removal of rubbish being issued at a later date*."

Despite the fact that Council had carried out the subject matter of the order, the Court of Appeal set aside the orders made by Pain J and declared the order issued by the Council to be invalid.

Conclusions

The case again highlights the stringent requirement that orders under section 124 of the LG Act, but also those under section 121B of the *Environmental Planning and Assessment Act 1979*, need to be drafted with care and precision. It is a reminder that recipients of such orders must know what breaches have been committed, what acts are required to rectify the breach and the timeframe for compliance.

For enquiries about this case please contact Joshua Palmer.

IF IN DOUBT, STAY OUT

***Rumble v Liverpool Plains Shire Council* [2012] NSWDC 95**

5 July 2012 – District Court of NSW – Mahony SC DCJ

The Plaintiffs, Mr and Mrs Rumble, were the occupiers of residential premises at Quirindi together with their five children. Over the course of two days in August 2009, Liverpool Plains Shire Council ("the Council") by its employees and agents, entered the premises of Mr and Mrs Rumble, and removed a number of damaged and derelict cars and various car parts.

The Plaintiffs claimed damages for trespass to their property against the Council, officers of the Council, its sub-contractors and the State of New South Wales (together "the Defendants"). The Plaintiffs claimed aggravated and exemplary damages in respect of the trespass. In addition, the Plaintiffs sought damages for the seizure and removal of their property.

The Defendants conceded a trespass to the Plaintiffs' land. However, they submitted that only nominal damages should be awarded as there was no damage sustained by the Plaintiffs. The Defendants also resisted any order for aggravated or exemplary damages.

The individual defendants relied on the indemnity provided under the Local Government Act 1993 ("the LG Act") as they were carrying out duties on behalf of the Council and those duties were carried out in good faith.

The unauthorised entry to the premises was purported to be in reliance of an order under section 121B of the Environmental Planning and Assessment Act 1979 ("the EP&A Act").

The Purported Order

During the course of 2009, Council's officers had been attending the Plaintiffs' premises and investigating the unauthorised use of residential premises as a caryard or junkyard. This included the storage and keeping of numerous vehicles and parts in varying states of repair. In July and August 2009, Council's officers issued various Notices of Intention to Issue an Order under section 121B of the EP&A Act.

On 12 August 2009, Council's officers issued an order that required the removal of all unregistered vehicles within 12 hours of the order. The order stated that the period for any appeal of the order must be made within 48 hours of the order.

The Plaintiffs submitted that the order was invalid as the statement of reasons was deficient and the period for compliance was inadequate. Further, it was submitted that the person who signed the order on behalf of the Council did not have delegated authority.

The Defendants did not challenge the asserted invalidity of the order.

The Trespass

On the morning of 13 August 2009, two Council officers attended the Plaintiffs' premises together with two police officers. When the Council officers were refused entry to the premises, one of the Council officers used a bolt cutter to cut the chain locking the front driveway gate.

Attached to the front driveway gate and other gates to the property, was a sign that stated "… ADMITTANCE BY INVITATION ONLY OR TRESSPASS APPLIES".

It was not in issue that the Council officers were asked to leave the property on no less than three occasions.

Over the course of two days, Council's officers, aided by sub-contractors with tow trucks and trailers removed a total of 56 vehicles as well as various car parts.

Damages

The Court found that the trespass was not of a trifling nature such as to warrant nominal damages as it involved entry to land against the express wishes of an occupier who had a right to exclusive possession and quiet enjoyment. The Court held that the trespass was extensive and involved numerous Council officers, sub-contractors and police officers entering the property to remove the vehicles.

The Court ordered damages to each of the Plaintiffs in the amount of $10,000.00.

In relation to the claim for aggravated damages, the Court noted that the Council's officers acted in a high-handed manner towards the Plaintiffs. The Court found that the Council was reckless as senior staff were prepared to issue orders that led to the unauthorised entry without legal advice of their position or entitlements.

However, the Court noted that the Plaintiffs were continuing a non-compliance with planning laws and that the Plaintiffs did not suffer indignity, embarrassment or outrage to an extent that would warrant an award of aggravated damages.

In relation to exemplary damages, the Court noted that the Council acted in direct contravention of the EP&A Act in trespassing on residential property, which would normally require a Court order or a search warrant. Again, the Court noted the recklessness of Council's senior staff and that the conduct in carrying out the trespass was egregious.

The Court held that it was necessary to mark its disapproval of the conduct and deter the Council (and others) from repeating such conduct by awarding exemplary damages. Exemplary damages in the amount of $10,000.00 were awarded to each of the Plaintiffs.

Finally, the Court awarded damages of $12,500.00 to each of the Plaintiffs for removal and disposal of the vehicles and parts.

Immunity for Council's Officers

The individual Defendants, being the Council's officers as well as its sub-contractors, relied on the immunity from personal liability pursuant to section 731 of the LG Act.

The Court noted that the test of whether a person acted in good faith was a subjective one. The Court held that the individual Defendants' acts of trespass were done in good faith and under the direction of senior staff. This immunity extended to senior staff notwithstanding the Court's comments regarding the high-handed and reckless nature of the trespass.

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