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Précis Paper

Inconsistencies Between Construction Certificates and Development Consents

Peter Tomasetti SC and Scott Nash of counsel were on opposite sides of the record in this case of Burwood Council. Construction certificates may be valid even if inconsistent with development consents and in breach of environmental planning regulations.

Discussion Includes

- What is the legislative scheme involving development consent and construction certificates in NSW?
- *Burwood Council v Ralan Burwood Pty Ltd* [2013] NSWLEC 173 – background facts, why the Council said the construction certificates were invalid and the findings of the primary judge
- *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404 – what did the Court of Appeal find?
- Once the Court of Appeal had found that the primary judge's reasoning was in error, why did it not then resolve the disputed factual question?
- What reservation did the Court of Appeal have regarding possibly being asked to decide a hypothetical question and how did it resolve its reservation?
- Why does it not necessarily follow that construction certificates are invalid even if they are inconsistent with development consent and therefore in breach of the *Environmental Planning and Assessment Regulation 2000* (NSW)?

Précis Paper

Inconsistencies Between Construction Certificates and Development Consents

1. In this edition of BenchTV, Peter Tomasetti SC (Barrister) and Scott Nash (Barrister) present on the NSW Court of Appeal's (McColl & Barrett JJA; Sackville AJA) decision in *Burwood Council v Ralan Burwood Pty Ltd (No.3)* [2014] NSWCA 404 which involved a property developer being sued by the Council building inconsistently with the development approval. Mr Tomasetti SC acted for the successful respondents including the developer, Ralan Burwood Pty Ltd, in the Court of Appeal. Whilst Mr Nash was led by Mr Hale SC in acting for the appellant, Burwood Council.

Legislative Framework Regulating Property Developers

2. Since 1998, in NSW, land is regulated by environmental planning instruments under the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act"), with land being zoned pursuant to these instruments. Under the zoning, a developer will be allowed to carry out development either without consent of the relevant Council, with consent, or development may be entirely prohibited. Generally a consent is required and is ordinarily sought in a development approval process ("DA"). Once a DA has been successfully sought, a developer will then apply for a construction certificate ("CC") if building work is required on the site. CCs are sought from private, accredited certifiers who are employed by the developer but act independently, carrying out an administrative decision under the EPA Act. A certifier will check drawings and specifications provided by the architect of a project and ensure that they meet certain minimum requirements e.g. fire safety, structural integrity etc.

3. As part of the process of issuing a CC, a private certifier will also ensure that the detailed engineering drawings provided at this second stage of the process are sufficiently consistent with the plans that were initially granted a DA. Importantly, the plans submitted at the DA stage to the Council are not required to be as detailed as those submitted to the private certifier. The idea being to ensure that developers do not waste too much capital employing a team of architects and engineers of varying specialties at the early stage of the DA which may be rejected, preventing the project from commencing.

4. Under the EPA Act, a CC must be entered before any building work is begun. Where building work has begun prior to the CC being provided by the certifier, any subsequently approved CC is deemed void under s 109F(1A). It should also be noted that the DA may stipulate that it defers the decision to consent to specific matters to the CC stage of the process. Furthermore, there may be conditional DAs which include clauses such as a common condition requiring the developer to abide by the *Building Code of Australia*.

Burwood v Ralan – Material Facts

5. Ralan Burwood Pty Ltd was the owner/developer of a $250 million, three building development in the heart of the Burwood CBD, dominating the landscape near the railway line and taking 2.5 years to build. Notwithstanding the size of the project, the legal principles that applied in *Burwood* in relation to the two-stage process under the EPA Act are the same as are applied to any project where a DA is consented to by a Council and a CC is sought from certifier.

6. Ralan had actually bought the site with a DA having been sought by the prior owner, ultimately with the consent of Burwood Council in the Land and Environment Court ('LEC'). Accordingly, Ralan engaged a licensed builder to carry out the building of the over 260 residential apartments with the developer saying, 'design, build and deliver the project and we will fund it.' The builder then appointed an architect who was charged with filling in detail to the plans provided for the DA, with the assistance of a team of engineers. During this process of producing a package of documents for the private certifier, the architect formed the view that changes to the plans provided for the DA were necessary as they exhibited inconsistencies. These changes were made.

7. The private certifier was ultimately asked to provide six CCs for different stages of the development e.g. the first stage was excavation for the parking space, followed by actually constructing the parking space and so on. For each stage, the architect had provided designs which differed from those provided for the DA. Notwithstanding these inconsistencies, the private certifier provided the CC and the project was able to continue to proceed.

8. In late 2012, the building was essentially complete with all units having been pre-sold. Only at this stage was scaffolding removed to reveal the external glass, curtain-like cladding that surrounded all 3 buildings. On observing this cladding and receiving complaints from members of the public in relation to it, the Council commenced proceedings in the LEC against the developer in February 2013. The Council alleged that there was not sufficient variety in the external cladding and that several design details, including fenestration, louvres etc., did not appear as the Council had anticipated based on the materials provided for the DA.

Ralan Pty Limited v Burwood Council [2013] NSWLEC 173 – Council Institutes Proceedings

9. The Council relied on reg. 145 of the *Environmental Planning and Assessment Regulation 2000* (NSW) ('the EPA Regulation') which states:

REGULATION 145:

Compliance with development consent and Building Code of Australia

(1) 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…

10. Furthermore s 109F(1)(a) of the EPA Act states:

SECTION 109F:

Restriction on issue of construction certificates

(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…

In addition, s 81A(5) of the EPA Act states:

SECTION 81A:

Effects of development consents and commencement of development

…

(5) Regulations may provide for the issue of certificates. The regulations may make provision concerning the issue of certificates for the erection of buildings and the subdivision of land.

11. In arguing the developer had breached reg. 145 (and accordingly s 109F(1)(a)), the suit was classified as a class 4 proceedings involving the judicial review of the administrative decision of the private certifier to issue the CCs. The Council argued that the alleged breach of reg. 145 invalidated the CC, meaning any construction which had taken place was done without a certificate, as required under the EPA Act. If the LEC agreed, they would have the power to make remedial orders to address the consequences of the alleged breach, potentially ordering Ralan to rectify the inconsistency and construct the façade as described in the DA plans.

Ralan Pty Limited v Burwood Council [2013] NSWLEC 173 – Developer's Rebuttals

12. In responding to the Council's suit, the developer raised a number of defences. Firstly, the developer alleged that they had not actually been carrying out any 'development' as the

physical 'development' had been undertaken by the builder they had contracted to implement the project, who had not been joined to the proceedings. Therefore, they would not have breached provisions of the EPA Act requiring a valid CC for 'development'.

13. Ralan further argued that any inconsistencies between the plans provided for the DA and those provided for the CC were not inconsistent for the purpose of reg. 145 because the changes were practically necessary for the development to be comply with *Building Code of Australia* requirements.

14. In the alternative to the argument that there was no inconsistency, the developer also suggested that breaching reg. 145 of the EPA Regulation or s 109F(1)(a) of the EPA Act did not invalidate the CC, relying on principles from the majority judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355. As extracted from the Court of Appeal judgment (*Burwood Council v Ralan Burwood Pty Ltd (No.3)* [2014] NSWCA 404) at [154]-[155]:

[154] The test for determining whether an act done in breach of a statutory provision is (at [93] (of *Project Blue Sky*)):

> "to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid...In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'."

[155] The judgment in *Project Blue Sky* explains (at [91]) the principle:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."

Ralan Pty Limited v Burwood Council [2013] NSWLEC 173 – Judgment of Sheahan J

15. The primary judge made two key findings (noted at [126] of the Court of Appeal judgment), each of which was sufficient in itself to defeat the Council's claim for relief. First, his Honour found (at [289]) that Ralan could not be held responsible for carrying out the development otherwise than in accordance with the DA as it was the builder with the responsibility for design and delivery who had engaged the architect, the private certifier and numerous subcontractors. Secondly, his Honour found (at [336]) that, in any event, the CCs were not inconsistent with the DA. In his Honour's opinion, a certain amount of adjustment from the plans in the CC would always be expected, particularly given it was "a huge development on a confined site, in difficult circumstances" (at [325]), but the development was acceptable as it retained "all the fundamentals of the project" (at [329]). Thus, the CCs had been issued in compliance with the EPA Act and the EPA Regulation.

16. On the *Project Blue Sky* point, Sheahan J referred (at [293]-[302]) to the judgment of Hodgson JA in *Northern Residential Pty Ltd v Newcastle City Council* [2009] NSWCA 141; 75 NSWLR 192. In that case, Hodgson JA expressed the view (at [57]) that a subdivision certificate issued in circumstances where it was inconsistent with the DA or where the regulation had not been complied with, might be invalid. For this reason, the primary Judge thought (at [317]) that reg. 145 of the EPA Regulation played "a key role in determining the validity of the CCs". The suggestion being that if the CC was inconsistent with the DA pursuant to reg. 145, the CC should be held invalid. However, his Honour rejected the Council's submission that the plans and specifications submitted to the private certifier were inconsistent with the DA. Accordingly, the CCs had not been issued in breach of reg. 145 of the EPA Regulation. It followed that the CCs were valid.

Burwood Council v Ralan Burwood Pty Ltd (No.3) [2014] NSWCA 404 – Judgment of Sackville AJA (Barrett & McColl JJA agreeing)

17. The Council appealed to the Court of Appeal, with the two main issues before the Court being: (1) whether the trial judge's findings on consistency between the approved plans and the consent plans was correct and (2), whether the statutory framework surrounding the certification of a CC under s 109F(1)(a) of the EPA Act meant any inconsistency would result in a finding of invalidity.

18. At [127], Sackville AJA states that both findings of the primary judge ((1) that Ralan did not conduct any 'development' & (2) that the certificate was not inconsistent with the development consent) were affected by error and must be set aside. However, the Court of Appeal nevertheless reached the same ultimate conclusion as the primary judge in

upholding the validity of the CCs by accepting the developer's *Project Blue Sky* argument that breach of reg. 145 and s 109F(1)(a) did not invalidate the CCs.

19. His Honour concluded that although Ralan had signed a contract with the builder giving up possession of the site and assigning the obligation of design and construction to the builder, Ralan nevertheless retained the right to control the development in all fundamental respects. In fact, the developer conceded this point in the hearing before the Court of Appeal. On the other hand, it was noted that it was not the developer's breach but instead the private certifier's breach that the Council was relying on. However, if the certificates were invalid as a consequence of the certifier's breach, Sackville AJA did not accept that the developer was not carrying out development otherwise than in breach of the Act.

20. In relation to the issue of whether the plans submitted for the DA were consistent with those submitted for the CCs, Sackville AJA noted that the primary judge asked himself the wrong question. The primary judge erred in considering why the architect had made the changes (Sheahan J opined it was for the purpose of compliance with the *Building Code*) and instead should have simply ascertained whether there were any inconsistencies on the face of the documents. However, the Court did not have the relevant evidence before them to determine this latter question, with the answer proving unnecessary in light of the further findings on invalidity.

21. As noted above, although their Honours unanimously agreed that Ralan was indeed undertaking 'development' and that the DA plans and CC plans were inconsistent, they also decided that the resultant breach of reg. 145 and s 109F(1)(a) did not invalidate the CC. Therefore, the Council was bound to fail in their proceedings because the developer was still operating under a valid CC. Sackville AJA began his classical analysis of the application of *Project Blue Sky* principles by considering whether the words of the provision were expressed in mandatory terms. Regulation 145 is phrased as "a certifying authority must not issue…" as opposed to "may" or "might" which suggests the legislature's intention was for a breach of the provision to result in the invalidity of the CC. Notwithstanding this prima facie impression, his Honour relied on the following factors in making the determination that the legislature had not intended invalidity from a breach of the provisions:

    i. The parallel regulatory scheme under the *Building Professionals Act 2005* (NSW)

    The *Building Professionals Act* created and empowers the Building Professionals Board which appoints, regulates, receives complaints and disciplines private certifiers. In particular, the Board possesses the jurisdiction to investigate complaints that CCs are not consistent with a DA, and it is able to punish certifiers that have not complied with their duties under the Act and Regulation by

stripping them of their accreditation. The legislation provides rights of appeal for certifiers, maintains a register of complaints and was generally designed to ensure that CCs are validly provided. Therefore, it would seem that the legislature had not intended to invalidate CCs for breach of the relevant provisions in circumstances where there is an entire regulatory scheme designed to deal with this eventuality.

ii. Inconvenience

His Honour further noted that great inconvenience would attract if in every case a CC was found to be in breach, it was also deemed invalid (referring to McHugh JA in *Woods v Bate* (1986) 7 NSWLR 560 and Spiegelman CJ in *Smith v Wyong Shire Council* [2003] NSWCA 322; 132 LGERA 148). In *Burwood*, where the developer was completely oblivious to the potential invalidity of the development and was carrying out the development in good faith, to force it to replace the façade at a cost of approximately $15 million would be too great an inconvenience in circumstances where they played no relevant part in the breach.

Similarly, s 109F(1)(b) of the EPA Act provides:

SECTION 109F:

Restriction on issue of construction certificates

(1) A construction certificate must not be issued with respect to the plans and specifications for any building work or subdivision work unless:

...

(b) any long service levy payable under section 34 of the Building and Construction Industry Long Service Payments Act 1986 (or, where such a levy is payable by instalments, the first instalment of the levy) has been paid.

The need to pay a long service leave levy seems trivial (at least with respect to the need to ensure consistency) so it could hardly be contended that a breach of that provision should result in such a draconian outcome (which would likely have been the law had the Court of Appeal decided differently on this question of invalidity).

iii. Examination of the statute as a whole

Other provisions of the EPA Act expressly render other types of administrative decisions invalid including ss 35 and 101 which contemplate challenges to the

validity of environmental planning instruments and DAs within certain time periods. No similar provision exists with respect to CCs, hence standard principles of statutory interpretation would suggest this silence evinces an intention against breaches of provisions involving CCs, grounding invalidity.

iv. A tendency in the courts to find invalidity only where it is absolutely necessary, with *Burwood* not being such an occasion

Burwood Council v Ralan Burwood Pty Ltd (No.3) [2014] NSWCA 404 - Implications

22. Prior to the decision of the Court of Appeal in *Burwood*, the LEC had assumed they possessed the authority to invalidate CCs where they were inconsistent with the DA to such an extent that the consent authority would not have approved such a development. *Burwood* effectively leaves prosecution (under s 125 EPA Act; *Moy v Warringah Council* [2004] NSWCCA 77) and potential disciplinary action as the only tools to ensure certifier compliance with the requirements. The Court of Appeal held that the scope and object of the EPA Act does not require a CC issued in breach of s 109F(1)(a) to be held invalid. This means that even where a CC is issued in breach of s 109F(1) of the EPA Act and reg. 145(1) of the EPA Regulation, the CC will still be valid.

23. A subsequent application by the Council for special leave to appeal to the High Court was rejected with the sitting justices considering the Court of Appeal's decision to be a straightforward application of *Project Blue Sky* principles. Furthermore, as this legislation was unique to NSW it was difficult to establish that such an appeal was necessary as a matter of public importance for the nation. The argument presumably being that if the NSW Parliament was unsatisfied with the law resulting from the decision, it was available to them to amend the legislation rather simply.

24. Mr Tomasetti SC did not consider that a legislative change reversing the decision and affecting the role of certifiers was likely, reflecting on the Building Professionals Board being largely successful in ensuring a high standard of certifiers ensuring consistency given their broad powers to punish.

25. What this decision has done is clarify the rights and obligations of developers in relying on CCs and re-emphasises the importance of a first principles approach to statutory interpretation. Additionally, the decision introduced clarity into the interpretation of s 80(12) of the EPA Act which states:

SECTION 80:

Determination

…

(12) 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).

In light of *Burwood*, it follows that where a DA is inconsistent with a CC, given the CC remains valid, the plans governing the CC necessarily prevail over the plans submitted in relation to the DA.

BIOGRAPHY

Peter Tomasetti SC

Peter Tomasetti SC was called to the NSW Bar in 1979 and appointed Senior Counsel in 2007. He specialized in environmental and planning law disputes and acts for the NSW Roads and Maritime Services, councils and applicants in relation to compulsory land acquisition and other issues related to environmental and planning law.

Scott Nash

Scott Nash was called to the NSW Bar in 2010. He completed a Master of Urban and Regional Planning, the Norman Waterhouse Prize in Planning Law and the Heritage Council Prize. He has twice been Mayor of Randwick City Council in 2011/2012 and 2013/2014.

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Focus Case

Burwood Council v Ralan Burwood Pty Ltd (No.3) [2014] NSWCA 404

Judgment Link

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Legislation

Building Professionals Act 2005 (NSW)
Environmental Planning and Assessment Act 1979 (NSW) ('the EPA Act')
Environmental Planning and Assessment Regulation 2000 (NSW) ('the EPA Regulation')