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Medium Neutral Citation:	**The Owners Strata Plan 432 v Seddon [2015] NSWLEC 69**
Hearing dates:	20, 21, 22, 23, and 27 May 2014; written submissions 4, 6, and 10 June, 2014
Date of orders:	01 May 2015
Decision date:	01 May 2015
Jurisdiction:	Class 4
Before:	Sheahan J
Decision:	(1) The Court declares (i) that the first and second respondents are carrying out or threatening to carry out works at 15 Crescent Street, Fairlight, being Lot 15 SP 432, in breach of the Environmental Planning and Assessment Act 1979; and (ii) that Complying Development Certificate No CD56/10 issued by Manly Council on the 27th October 2010 to the first and second respondents is null and void and of no effect. (2) The Court orders that the first and second respondents, by themselves, their employees, agents and contractors be restrained from carrying out any works in the northern part of Lot 15 Strata Plan 432 occupied by laundry and toilet facilities and/or in any common property associated with such facilities. (3) Costs are reserved. (4) All exhibits are returned.
Catchwords:	DEVELOPMENT CONSENT: deeming of a development consent from a building approval granted in 1962 – residential flat building with common laundry/toilet facilities – whether the owners of Lot 15 are entitled to a complying development certificate approving the removal of the common facilities and/or entitled to exclude other lot owners from using those facilities – whether the complying development certificate authorising those works is valid – failure to obtain "owner's consent" from owners' corporation – failure of Council to inspect before approval. REAL PROPERTY: common facilities not depicted on registered strata plan – space occupied by the common facilities is shown as part of "Lot 15" – rectification. RES JUDICATA: earlier proceedings brought by applicant in CTTT determined that the common facilities were located "wholly on Lot 15" – whether common property impacted by development – is applicant now estopped from asserting that "owner's consent" was required in

	respect of complying development certificate authorising the removal of the facilities – whether decision of "Adjudicator" under the Strata Scheme Management Act 1996 can give rise to estoppel.
Legislation Cited:	Building and Construction Industry (Security of Payment) Act 1999 Conveyancing (Strata Titles) Act 1961 County of Cumberland Planning Scheme Ordinance Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 Interpretation Act 1987 Local Government Act 1919 Local Government Act 1993 Local Government (Amendment) Act 1951 Manly Local Environmental Plan 1988 Miscellaneous Act (Planning) Repeal and Amendment Act 1979 Real Property Act 1900 Strata Act 1961 Strata Schemes (Freehold Development) Act 1973 Strata Schemes Management Act 1996 Uniform Civil Procedure Rules 2005
Cases Cited:	Auburn Council v Nehme [1999] NSWCA 383; 106 LGERA 19 Baiada v Waste Recycling and Processing Service of NSW [1999] NSWCA 139; 130 LGERA 52 Burgechard v Holroyd Municipal Council [1984] 2 NSWLR 164; 53 LGRA 346 Burwood Council v Ralan Burwood Pty Ltd [2013] NSWLEC 173 Burwood Council v Ralan Burwood Pty Ltd (No 3) [2014] NSWCA 404; 206 LGERA 40 Caltex Australia Petroleum Pty Ltd v Manly Council [2007] NSWLEC 105; 155 LGERA 255 City of Canada Bay Council v F&D Bonaccorso Pty Ltd [2007] NSWCA 351; 156 LGERA 294 Connor v Blacktown District Hospital [1971] 1 NSWLR 713 Drummoyne Municipal Council v Lebnan [1974] HCA Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69; 74 NSWLR 190 Ex parte Abraham Malouf; Re Gee (1943) 43 SR (NSW) 195 Fatsel Pty Ltd v ACR Trading Pty Ltd (1984) 54 LGRA 291 Gold and Copper Resources Pty Ltd v Newcrest Mining

Limited [2014] NSWLEC 148
Harris v Hawkesbury Shire Council (1989) 68 LGRA 183
Hill End Gold Ltd v First Tiffany Resource Corporation [2010] NSWSC 375
Hillpalm Pty Ltd v Heaven's Door Pty Ltd [2004] HCA 59; 220 CLR 472
Jones v Dunkel [1959] HCA 8; 101 CLR 298
Koompahtoo Local Aboriginal Land Council v KLALC Property and Investment Pty Ltd [2008] NSWCA 6
Kuligowski v Metrobus [2004] HCA 34; 220 CLR 363
Lawrom Nominees Pty Ltd v Kingsmede Pty Ltd [2000] NSWSC 1048
Le v Williams [2004] NSWSC 645
LDJ Investments Pty Ltd v Howard (1981) Strata Title Law and Practice, 30-035
Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Ltd [2003] NSWCA 5
Papua New Guinea v Daera Guba [1973] HCA 59; 130 CLR 353
Pascoe v Council of City of Wagga Wagga [1995] NSWCA 360
Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; 147 CLR 589
Quarry Products (Newcastle) Pty Ltd v Roads and Maritime Services (No 3) [2012] NSWLEC 57
Ramsay v Pigram [1968] HCA 35; 118 CLR 271
Rippon v Chilcotin Pty Ltd [2001] NSWCA 142; 53 NSWLR 198
Sahade v Owners Corporation SP 62022 [2013] NSWSC 1791
Sahab Holdings Pty Ltd v Registrar-General [2011] NSWCA 395
The Owners – Strata Plan No 37762 v Pham [2006] NSWSC 1287

Texts Cited:

J D Heydon, "Cross on Evidence" (7th ed, Butterworths, 2004)
Peter Butt, "Registrar's power to correct errors in the register – A new beginning" ((2014) 88 ALJ 452)
K R Handley, "Res Judicata: General Principles and Recent Developments" (18 Australian Bar Review 214)
AF Rath, PJ Grimes, and JE Moore, "Strata Titles: A handbook comprising annotations and practice notes on the Conveyancing (Strata Titles) Act 1961, with regulations and forms" (Law Book Co of Australia, 1962)
Murray Wilcox, "The Law of Land Development in NSW" (Law Book Co of Australia, 1967)

	Stephen Odgers, "Uniform Evidence Law" (10th ed, Thomson Reuters)
Category:	Principal judgment
Parties:	The Owners of Strata Plan 432 (Applicant) James Donald Seddon (1st Respondent) Vanessa Jane Larsen (2nd Respondent) Manly Council (3rd Respondent)
Representation:	Counsel: Ms L Byrne, barrister (Applicant) Mr S Docker, barrister (1st and 2nd Respondents) Mr M Seymour, barrister (3rd Respondent) Solicitors: Turnbull Bowles Lawyers (Applicant) Surry Partners (1st and 2nd Respondents) General Counsel, Manly Council (3rd Respondent)
File Number(s):	40963 of 2013

JUDGMENT

A: Introduction

In Brief

1 These Class 4 proceedings are brought by the Owners Corporation of Strata Plan ("**SP**") 432, which covers a residential flat building ("**RFB**"), known as "Pelican Court", and located at 15 Crescent Street, Fairlight, in Manly Council's area.

2 Pelican Court was developed during 1963, following the grant by Manly Council of (1) a "planning consent" ("**PC**"60/1954), early in June 1960, for 12 units, and (2) a "building approval" ("**BA**"524/62), on 20 November 1962, for 9.

3 The present proceedings concern the "proper and lawful use of Unit 15" (i.e. "**Lot 15**" in the SP registered on 6 August 1963, and ratified by the Owners Corporation on 22 August 1963), part of which space has apparently been used ever since the building was completed, in 1963, as a laundry, "as if it were common property".

4 On or about 9 April 2009, pursuant to contracts exchanged on 5 March 2009, the first and second respondents, Mr Seddon and Ms Larsen acquired two lots in SP 432 – one of nine upstairs residential units (Lot 7), and one of six ground floor garage units (Lot 15).

5 Lot 15 is frequently, but wrongly, referred to as **part of** Lot 7, but it is clearly a separate lot, associated with, and providing parking and storage space for, Unit 7. These proceedings concern the desire of the present owners of both units to have exclusive possession and use of the whole of Lot 15.

6

SP 432, as registered, does not show the laundry space at its northern end, but the plans marked by Council as “approved” predate the registration of SP 432, and show the facilities in that location.

7 There is no firm evidence before the Court as to how such an “error” occurred, only inferences. However, the Court now is asked to find a solution to the resulting dilemma, and counsel proved unable to take the Court to any authority clearly on-point.

8 The Owners Corporation argues that the only inference available is that, as the "common" laundry/toilet, shown in the plans for Lot 15, was in existence, and was inspected by the Council at the time of the issuing of the Council’s compliance certificate on 16 July 1963 ([143] below), it was simply overlooked.

9 It is claimed that, by mistake, Council failed to require/instruct the surveyor to redraw the boundary on the SP to follow the line on the Council-approved plans, as to where the laundry and toilet were located, and then approved the SP of subdivision, clearing the way for its registration.

10 Counsel suggested during the hearing (e.g. Tpp24 and 254) that the Corporation would need (a) a correction of the registered SP (see [46] and [454] – [455] below), or (b) approval of a subdivision, or (c) to reconfigure, or purchase part of all of, Lot 15, or (d) to construct a new laundry facility elsewhere on the subject land, none of which solutions can really be achieved by these proceedings. All three respondents appear to agree (e.g. Tp27) that this Court should not be used to obtain factual findings, simply to support a claim to relief enforceable elsewhere.

11 Seddon and Larsen were the original respondents to the Corporation’s Class 4 proceedings, but Council was joined as the third respondent, at a fairly early stage. For simplicity, I will refer to the third respondent throughout this judgment as “**the Council**”, and to the first and second respondents, who are life partners and jointly involved in all relevant events and these proceedings, as “**the respondents**”.

12 All parties were represented by counsel – the applicant Corporation by Ms Louise Byrne, the respondents by Mr Sean Docker, and the Council by Mr Mark Seymour.

13 The hearing was conducted over five days between and including 20 and 27 May 2014, during which the Corporation “shifted its ground” somewhat. As a result, leave was granted, on 27 May (Tpp312 – 313), to all parties, to make additional submissions in writing, and all three counsel did so.

14 Accordingly, there are before the Court ten submission documents, four from the Corporation (“opening” 14 May, on “ground 3”, 22 May, on “estoppel”, 27 May, and “in reply”, 4 June), three from the Council (“opening” 15 May, “speaking notes”, 23 May, and “final in reply”, 6 June), and three from the respondents (“opening” 19 May, “speaking notes”, 22 May, and “in reply”, 10 June).

Pelican Court

15 The owners of **six** of the nine residential units in Pelican Court, as developed, each **own** also one of the six garage units, and each of the other **three** residential owners has exclusive **use** of an allocated on-site parking space (by virtue of a By-law – in

Exhibit A1, tab A, fol 85). The distinction between garage lots and allocated parking spaces on surrounding land is canvassed in Rath's seminal textbook on the Strata Titles System (AF Rath, PJ Grimes, and JE Moore, "Strata Titles: A handbook comprising annotations and practice notes on the Conveyancing (Strata Titles) Act 1961, with regulations and forms", Law Book Co of Australia, 1962 – see pp15 – 16).

16 The respondents do not presently reside in Pelican Court – Lot 7 is leased out – but they use Lot 15 for general storage, not parking. A former owner ran a lawn-mowing business from that residual garage area, but "no owner of Lot 15 has ever had exclusive possession of the whole of what's shown on the plan as Lot 15" (Tp23, LL37 – 38), and the respondents argue that the space available for use as a garage is inadequate for that purpose.

17 For many years, the owners of other residential units in the nine-unit complex had/have used a shared/communal laundry and toilet which were incorporated in what became Lot 15, in the absence of such facilities being located somewhere outside the current configuration of the building, on the common property.

18 Those facilities were built in their present location in 1963 (see photographs in *Exhibit A4*) – and it is now common ground that they were completed by the time the SP was registered on 6 August 1963, and have been regarded as common facilities ever since.

19 Larsen deposed (25 February 2014, par 36) that Lot 15 is located "on [the] lowest level of the building at the back and end of the building".

Lot 15 and the Respondents

20 The respondents purchased Lots 7 and 15 under a **contract of sale** (*Exhibit **A6***), which included "Additional Special Condition 15" in the following terms:

> The Purchaser(s) acknowledge that the property comprises, of a common laundry and toilet which is used by the other unit holders and located in the vendors garage. The works were completed over 20 years ago by the previous owner. The vendors receive no payment or benefit from this arrangement. The Vendor(s) are unaware whether the same has been approved by the local Council. ...

21 The "title documents" in the contract (see *Exhibit A6*) note the existence of a covenant (no. J609505), and include:

(1) a copy of **SP 432** (registered 6 August 1963), on which Lot 15 is depicted as 233sq ft of garage space; and

(2) a copy of the **covenant** (dated 20 March 1964, and registered on the title on 1 April 1964), which "may be released varied or modified only with the consent of the council ...". The covenant binds the owner for the time being of Lot 15 to (1) permit the registered proprietors of Lots 1 to 9 to use or "enjoy" Lot 15, and (2) use Lot 15 only for "the storage or parking of a boat or motor vehicle".

22 Also included (in *Exhibit A6*) is a sketch plan which describes Lot 15 as the "Unit 7 garage", and depicts the internal spaces occupied by the laundry and toilet "cubicles" (1.83m x approx 2.4m, and 1.83m x 0.86m, respectively). Other evidence indicates that Lot 15's internal walls are comprised of 1.2m of brick, topped with painted fibro or similar sheeting, and that the slab floor of the laundry/toilet area is 5cm lower than the rest of the Unit 15 slab (Tp77).

23 The respondents concede that they purchased on notice of the laundry, but deny that they were on notice of any error in the SP.

24 They complain, however, that, with a substantial part of the area of Lot 15 being taken up with communal laundry/toilet facilities, the residual space available to them for parking is inadequate for other than a "small" vehicle. As currently configured internally, Unit 15 provides parking space only 13.5ft long, instead of the normally stipulated 18ft, and the respondents want the whole of Lot 15 to be returned to garage space, to be available for adequate private parking.

25 The respondents say (Tp27) that the Corporation's obligation to provide laundry etc facilities cannot be discharged by its committing a **trespass** on their private property in Lot 15, at the same time as it enforces a restrictive covenant requiring the respondents to use Lot 15 as a garage. (The Corporation (Reply sub 16) rejects the term "trespass", arguing that any "intrusion" on Lot 15 is at least "authorised".)

26 They also argue (Tpp27 and 234) that, by reason of earlier proceedings elsewhere, from which no appeal was brought, the Corporation is **estopped** from asserting an interest in Lot 15, enforceable against the respondents.

27 Among the contract documents (in *Exhibit A6*) are a letter, and a sketch plan, both dated 8 September 2006, from the respondents' predecessors in title (the Pauls) to John Jocumsen (the strata manager's representative), in the following terms:

> I refer to your letter dated 31 August 2006 requesting approval for refurbishment activities and continued use of the laundry at 15 Crescent Street Fairlight.
>
> As you are aware the laundry and toilet are currently part of the unit entitlement of Lot 7 and have been used by the other occupiers of the building on a casual arrangement.
>
> We can advise you that this arrangement can continue for the foreseeable future however should we require access to the full garage area we will endeavour to give the owners corporation at least 3 months notice, while we remain owners of the lot.
>
> It is appreciated that the Owners Corporation are willing to refurbish the laundry and toilet and we have no objection to this activity taking place.

28 The respondents have now incorporated into Lot 7 its own laundry facilities (see By-law in *Exhibit A9*), and they have also obtained from the Council a complying development certificate ("**CDC**" – no 56/10) in respect of their proposed removal of the internal, non-structural walls that partition the laundry and toilet spaces within Unit 15 (works described, erroneously, in CDC 56/10, applied for on 5 October 2010 and granted 27 October 2010, as the "non-structural wall within Unit 7").

29 They also notified the Owners Corporation that they intended to remove the tubs, disconnect the services in the laundry and toilet, seal up the floor wastes, and close the present external entrances to those facilities, which are clearly depicted in photographs (*Exhibit A4*). (The coin-operated washing machine is/was rented by the Owners Corporation from a business known as "Mini Mat Laundry Equipment".)

The structure of this judgment

30 Having now briefly introduced the basics of what has proven to be an extremely complex case, this judgment will deal with the following topics, before I set out my reasoning and orders (from [287]):

B: These and some earlier relevant proceedings ([32])

C: The "pleading" documents as they evolved ([48])

D: The evidence, both sworn and documentary ([60])

E: Various other statutory provisions raised in argument ([211])

(These are dealt with in groups: firstly, the Local Government and Planning legislation ([212]); secondly, the Evidence and Interpretation legislation ([254]); and thirdly, the Real Property and Strata Titles legislation ([263]).)

31 I will then set out my reasoning and orders:

F: The grounds of challenge, the issues which finally emerged, and my consideration of them ([287])

G: Other questions and conclusion ([435]).

B: Earlier and Present Proceedings

32 On 20 September **2010**, the Owners Corporation sought, from the Strata Title division of the then Consumer Trader Tenancy Tribunal ("**CTTT**" – in proceedings No. SCS 10/43413), orders against the respondents (Larsen 25 February 2014 par 27, and [26] above).

33 The catalyst for those CTTT proceedings was the attempted enforcement by the respondents of their asserted property rights over Lot 15, by closure of the rear access to it.

34 The Corporation's application was dismissed by the "Adjudicator" (see [167] below), on 17 January 2011, and negotiations between the disputing parties then continued during 2011 and 2012 (Larsen 25 February 2014 pars 31 and 32), and into 2013.

35 A March 2013 proposal to subdivide Lot 15, in consideration of an ex-gratia payment to the respondents, was not supported by Council (par 33, and Tp65 – 66), which would prefer the option involving the location of a new laundry/toilet elsewhere on site (Tp69). (Note here options in [10] above.)

36 The Owners Corporation, and unit owners other than the respondents, prefer the status quo, and do not want the facilities relocated (Tpp70 – 71), but relocation options were explored, and it was thought that, apart from questions of cost, the position of the sewerage line and stormwater drainage might impede such a project (Tpp87 – 89).

37 The Owners Corporation has continued to seek a resolution of the problem, outside the present litigation (Tp94, LL1 – 11).

38 However, on 3 December 2013, the respondents gave notice of their intention to commence the CDC works, and, in response to that notice, the Owners Corporation, on **10 December 2013**, commenced these present proceedings, but against only the respondents.

39 The Corporation obtained from Biscoe J an interlocutory injunction, which has subsequently been continued by consent, restraining the respondents from "hindering or interfering with or preventing the use of the common laundry and toilet facilities until further order".

40 On 11 December 2013, the respondents' proposed works were granted a construction

certificate ("**CC**").

41 On **18 December 2013**, the Council was joined as third respondent to these proceedings, when the Owners Corporation decided to seek, by way of further relief, a declaration as to the invalidity of the CDC.

42 An **amended summons** was filed on 20 December 2013, and the Council appears in the proceedings only to defend its grant of the CDC, and refute the argument that BA524/62 "became" a development consent ("**DC**").

43 The Owners Corporation argues that the respondents' proposed work involves common property, including "fixtures and fittings" (taps, tubs, toilet, lights etc), and/or personal property vested in the Owners Corporation, and points to the *Strata Schemes Management Act 1996* ("the **1996 Strata Act**").

44 The Corporation further argues that the subject site and the apartment building enjoy the benefit of a "deemed [DC] under the *Environmental Planning and Assessment Act 1979* [("**EPA Act**")]", in accordance with BA524/62, which included a condition (no 7) in the following terms (*Exhibit A1* tab A, fol 9/106):

> Laundry facilities being provided in accordance with the provisions of Ordinance 71, and the plans being amended accordingly; [i.e. as manually added to the plan at fol (iii)/106]

45 All three respondents deny that BA524/62 is a "deemed [DC]", and/or that it includes conditions which have continuing effect, and/or that the respondents' CDC can depend upon it. They say (Tp105, LL21 – 22) that BA524/62 "is and only is a building approval", under the *Local Government Act 1919* ("the **1919 LGA**").

46 The respondents complain that the Owners Corporation is really seeking from the Court a series of findings that may provide a basis for seeking a remedy elsewhere – for example, the correction of the apparent surveying error in SP 432, as registered – and they reject that course as "not an appropriate process" (Tp27, L35). They say that the relevant tribunal has already rejected the allegation of error, so creating an issue estoppel against the applicant (LL32 – 42), and they also deny that they purchased Lots 7 and 15, "on notice" of any such error (Tp29, LL43 – 47).

47 Much of the history of the relevant planning and development control regimes, of the Pelican Court development itself, and of the various approvals regarding it, predates the enactment of the EPA Act in 1979.

C: The Pleadings

48 The original pleading documents filed in the matter were soon overtaken, with the summons being first amended, on joinder of the Council, within ten days of filing (see [41] above).

49 At the beginning of the hearing, on **20 May 2014**, after some argument, the Court granted the Owners Corporation leave to make three main **further** amendments, and so to file a "**further amended summons**" ("**FAS**").

50

Firstly, it **deleted** from the summons its reliance upon PC 60/1594, continuing its reliance upon only BA524/62 to translate into a deemed DC. In her closing reply to the oral submissions of the three respondents, Ms Byrne, on behalf of the Owners Corporation, asserted that the 1960 consent had, in fact, **lapsed** in 1962, by virtue of cl 41(5) of the County of Cumberland Planning Scheme Ordinance ("**CCPSO**"), set out below at [192]. (Tp297, LL30 – 46).

51 All three respondents protested that the Court should not entertain that late assertion of lapsing. It should have been specifically pleaded, and the Owners Corporation should be confined to the case it had pleaded in its original summons: Uniform Civil Procedure Rules 2005 ("**UCPR**") 14.14 and 59.4(c).

52 **Secondly**, the Owners Corporation **added,** to prayer 1, a fourth particular of breach of the EPA Act, namely, a failure by Council to carry out an inspection of the site prior to issuing the CDC.

53 **Thirdly**, the amendments made some adjustments to the form of restraining **order** sought in prayer 3.

54 For completeness, I now set out, in full, the Owners Corporation's **FAS** (some emphasis added), filed pursuant to the Court's leave to amend, on **20 May 2014**:

> 1 A **declaration that the first and second respondents are** carrying out or threatening to carry out works at 15 Crescent Street, Fairlight, being Lot 15 and the common property to SP 432, **in breach of [the EPA Act] 1979**;
>
> **Particulars of breach**
>
> (i) s76A(1)(b) & 122(b)(iii) – the works are in breach of **deemed development consent comprised by planning consent and building approval No 524/62** granted by Manly Council in 1962;
>
> (ii) s84A(1)(b)(ii) & s122(b)(ii) – the works are in breach of Manly **LEP** 1988, clause 10A(2) and **Schedule 9(g)** (as in force at the relevant time);
>
> (iii) s84A(2)(b) & (3) and EPA Regulation 2000, Schedule 1, Pt 2, clause 3(e) – the Respondents failed to obtain **the written consent of the Applicant** [i.e. The Owners Corporation] to the application for approval for the works;
>
> (iv) s122(b)(i) & clause 129B EPA Regulation 2000 – the Third Respondent **failed to carry out an inspection** of the site of the development prior to issuing the CDC.
>
> 2 A **declaration that the Complying Development Certificate No** CD56/10("**CDC**") issued by Manly Council on the 27th October 2010 to the First and Second Respondents **is null and void and of no effect**;
>
> **Particulars**
>
> (i) The First and Second Respondents purported to carry out the works referred to in prayer 1 above under the authority of the CDC;
>
> (ii) by reason of the matters set out in particulars at prayer 1(i) to (iv) the CDC was invalidly issued.
>
> 3 An **order restraining** the first and second respondents, by themselves, their employees, agents and contractors, from: (i) **carrying out any works** in the northern part of Lot 15 Strata Plan 432 occupied by laundry and toilet facilities belonging to the Owners Corporation and in relation to any common property therein situated; and (ii) **preventing the use of the said laundry and toilet facilities by the lot owners**, their tenants, agents and contractors; without the consent in writing of the Owners Corporation for Strata Plan No 432 for the residential flat building at 15 Crescent St Fairlight in the State of New South Wales.

4 Such further or other orders as the Court sees fit;

5 Costs.

55 The hearing before me was conducted on the basis of (1) **Amended Points of Claim** ("APOC") filed on **21 May 2014**; and (2) separate responsive (Amended) **Points of Defence** ("POD"), filed by the respondents and by the Council, in reply to the APOC, on **22 May 2014**.

56 The applicant pleaded in its APOC (par 11):

> The construction of the CDC is an issue for the court. It is either void for uncertainty because the work does not involve removal of a non-structural wall within Unit 7 as that area of the RFB would ordinarily be understood in common parlance as being Unit 7 located on the third floor of the building. In fact the work sought to be undertaken is to Lot 15 which is located on the ground floor. If the CDC is read with the plans and SEE referenced on its face it is clear the works approved relate only to that part of the RFB known as Lot 15 and include more than just the removal of a non-structural wall. In fact the works depicted on the plans and described in the SEE involve demolition of the laundry and toilet facilities, the removal of the wall dividing these facilities from the rest of Lot 15 and the sealing up of the entrance to them from the outside of the building. This is the work that the First and Second Respondent attempted to commence that gave rise to the urgent proceedings. In addition a change of use of that part of the RFB was to be achieved by the works, not just building work.

57 In reply, the Council pleaded, in its POD (par 3):

> With respect to [11], the Third Respondent says that the CDC is certain on its face as to its effect , with any reference to Lot 7 being a typographical error causing no uncertainty, and further says that the CDC does not authorise a change in use by the removal of internal walls in a registered lot as the use remains residential.

58 The Council also pleaded delay (par 5):

> The Applicant has excessively delayed commencing proceedings to challenge the CDC which was issued in October 2010 and not challenged until December 2013

59 The respondents pleaded in their comprehensive "Points of Defence to Amended Points of Claim" (again "POD" – pars 20(c) and (d)), that the defendant was **estopped** "from denying that the laundry and toilet facilities are not wholly within Lot 15 by reason of the finding in the CTTT Judgment to the opposite effect", or "in the alternative…it is an **abuse of process** for the Applicant to contend that the laundry and toilet facilities are not wholly within Lot 15 by reason of the finding in the CTTT Judgment to the opposite effect and the Applicant's failure to appeal the CTTT judgement" (pars 13(d), (e) and 20(c), (d)).

D: The Evidence

60 A two volume Court Book (*Exhibits **A1*** and ***A2***) contains a large number of allegedly relevant documents.

61 A third volume of documents, containing some of the Owners Corporation's financial and other records (*Exhibit **A3***) was verified by one of the affidavits of the Corporation's Chairman, Roger **Grevatt**.

62 Council's historical file (comprising "folders within folders" – Tp106, L7) was also placed in evidence (at Tp108, L10 – *Exhibit **C1***).

63

Other affidavits relied upon in the substantive proceedings were provided by (1) the second respondent, Ms **Larsen**, (2) the Owners Corporation's solicitor, Richard **Phillipps**, and (3) a former Council officer, Ellise **Mangion**. (On the contested application to further amend the summons, a further affidavit was read from Mr Phillipps, as well as one from Council's in-house solicitor, Blake Dyer.)

64 Deponents Larsen, Grevatt, Phillipps and Mangion were all called for cross-examination during the hearing of the substantive proceedings.

65 As is to be expected, the documentary evidence before the Court overlapped somewhat, and involved a level of duplication, but it is also incomplete, as a lapse of more than 50 years – since Pelican Court was built, and the SP was registered – understandably has meant the loss of some older documents and records which would have assisted the Court. These facts have given rise to uncertainty and/or confusion regarding some dates.

66 I will come to the documents in due course ([102] below), but I turn, first, to summarize the affidavit and oral evidence.

The sworn evidence

67 **Grevatt** is a business analyst, and has been an occupier of the block since 1997. He became the owner of Lots 6 and 10 in March 2007, and was elected Chairman of the Owners Corporation at its annual general meeting ("**AGM**") in 2007 (Tp75).

68 Grevatt provided (Tpp63 – 64) some useful particulars of the subject site – including the slope of the land, the actual location of Lot 15, and the relevant relative location of the uncovered parking spaces provided on site.

69 He complains that the Corporation was not asked for its approval for the CDC works in 2010, and did not know of Council's grant of the CDC until after these proceedings were commenced. He compiled the various financial documents in *Exhibit A3*, to indicate the Corporation's responsibility over the years, for maintenance, repairs, upgrading and servicing of the "laundry and common property toilet" within Lot 15.

70 He deposed to the longstanding practice of unit occupants using the facilities in Lot 15, and to the various alterations made to them by the Owners Corporation over the years (at least since Mr Sait moved in, during 1992).

71 He also deposed to various dealings he had with Ms Larsen, both before and since completion of the respondents' purchase of Lots 7 and 15, and regarding the respondents' desire to restrict access to Lot 15, especially since they renovated Lot 7.

72 He also referred to some attempts to find a resolution to the dispute between the respondents and the Owners Corporation, sometimes involving also the Council. He is aware that former owners of Lot 15 used the garage component of it, for a time, to house a family lawn mowing business.

73 During his oral evidence, Grevatt conceded that, although fairly active in Owners Corporation affairs, he and it rely heavily on their strata manager (Tpp78 – 81). He could not recall precisely when he became aware of the CDC (Tpp81 – 87).

74

Much of solicitor **Phillipps's** evidence has informed the above summary of events, although he came into the matter only late in 2013 (Tpp96 – 97), and is not sure how long before the preparation of Points of Claim in January 2014 he became aware of the CDC (Tpp98 – 100).

75 He deposed to some 2013 settlement negotiations, including a proposition put to Council that Lot 15 be subdivided ([10] above). He was advised by Council that such a proposal "would not be recommended for approval", and has since turned his attention to trying to correct "an error in the Register", under s 12(1)(d) of the *Real Property Act 1900*: see [264] below, and *Sahade v Owners Corporation SP 62022* ("*Sahade*") [2013] NSWSC 1791.

76 He also estimated the Owners Corporation's costs, as at Day 1 of the hearing, at possibly $50,000. (See Tpp97 – 98).

77 The respondent **Larsen** is an interior designer by profession, part-owner of Units 7 and 15, and a sometime "property developer" (Tp125, LL20 – 21). She affirmed two affidavits, the first dated 25 February 2014, and the second dated 20 May 2014.

78 Larsen and Seddon are the registered proprietors, as joint tenants, of each of Lots 7 and 15, having settled their purchase of both on about 9 April 2009. The purchase price was $337,500 (Tp140, LL24 – 28).

79 She deposes (25 February, par 5):

> I was aware of the existence of the laundry and toilet facilities in Lot 15 and that they were used by other owners and tenants of Strata Plan 432 on a casual arrangement when we bought Lots 7 and 15 but I also knew that the whole of Lot 15 was being sold to us and was valued as such by our lender.

80 She was and is aware that their lots are subject also to the terms of the restrictive covenant.

81 She also deposes to a detailed knowledge of many of the letters and other documents in Council's files, and other documents obtained by the respondents' solicitors from Land and Property Information NSW.

82 She takes issue with several assertions made by Grevatt in his affidavit of 24 January 2014, and deposes (par 14) to a representative of the vendors of Lots 7 and 15 having, on 5 March 2009 emailed Grevatt and the Strata Manager that:

> as a courtesy I can advise today that we have reached unconditional exchange of contracts for sale of our property at 7/15 Crescent Street Fairlight with settlement open ending as we need to provide vacant possession could you please confirm that the washing machines will be removed from unit 7 garage laundry as soon as possible and before 5 April 2009.

83 On 11 March 2009, Larsen emailed to Grevatt (par 15) a request that the washing machine be removed, and (par 16) the strata manager instructed the lessor of the machine "to remove the laundry equipment before 5 April 2009". On 30 March 2009, a general meeting of the Owners Corporation resolved that the washing machine "be reinstated", and that no common laundry and toilet would be built on common property to replace the facilities in Lot 15 (par 21).

84

From early April 2009 until about the end of August 2010, the respondents engaged in negotiations about the facilities located in Lot 15, but, on 31 August 2010, the Corporation rejected "all claims of ownership" by the respondents "over the area occupied by the laundry and toilet" (pars 24 and 25).

85 The respondents then decided "to assert [their] property rights over Lot 15, "locked the laundry door, and organized for the lessor to remove its washing machine, but some other residents "removed the laundry door with a chainsaw or the like", in Larsen's presence. Police were called, and the washing machine was "put back against the respondents' wishes" (par 26).

86 Larsen opines that the proposed works to Lot 15 will have no impact on shared electricity, water supply, and drainage services to the rest of the block, and are confined to the internal space of Lot 15 (par 36).

87 The respondents' strata levies on Lot 15 are based on the same unit entitlement as the other garage lots (10 to 14 – par 40), but, if the laundry and toilet are not removed, the balance of Lot 15 is, in her opinion, too small for use as a garage (par 39).

88 Larsen's second affidavit is concerned mainly with the question of the Council's making a physical site inspection of Lot 15, prior to the grant of the CDC. She deposes to receiving a call – during the week prior to one on 19 October 2010 advising of that approval – from "somebody from" Council wanting access to Lot 15.

89 In her oral evidence, Larsen assisted the Court to better understand how the laundry/toilet facilities were accessed and operated before the present dispute arose. She also confirmed that the access ramp was "rebuilt" (or, perhaps, properly established) in 2009, not long after the sale of Units 7 and 15 to herself and her partner (Tp123, LL1 – 11). That work generated an email exchange (including photographs), between herself and Council officer Brett Maina (*Exhibit A8*), due to her concern about safety for "patrons going into our title" (LL30 – 42).

90 She objected to the Owners Corporation "spending the money when we were going to be removing the laundry and toilet", but she "wasn't getting anywhere" (Tp124, LL35 – 49).

91 She was also tested on:

(1) the feasibility of establishing a laundry elsewhere on the property (Tp126),

(2) making changes to the SEE she originally put forward regarding her works on/in Unit 15 (Tpp127 – 133), but not including in it any mention of the fact that the laundry and toilet were being used by "anyone else in the building" (Tpp137 – 140),

(3) the proposed permanent closure of the external access to the rear of Unit 15 (Tp129),

(4) the renovations done to Unit 7, involving a change in the by-laws which was initiated by the strata manager (Tpp133 – 137, *Exhibit A1*, tab B, fol 731, and *Exhibit A9*), and

(5) the alleged Council telephone call she "clearly" remembers, regarding access to inspect her units in regard to her CDC application (Tpp141 – 142).

92

Grevatt put on a lengthy (fifth) affidavit in response to Larsen's primary affidavit, but I have already summarized above ([67] – [73]) the principal points made in all five of his affidavits, and in his oral evidence.

93 Ellise **Mangion** was a town planner at Manly Council from October 2009 to March 2014.

94 She was assigned to assess the CDC application, and authored the "Delegated Authority Report" embodying its approval (*Exhibit A1*, tab E, fols 35 – 36).

95 She deposes to carrying out such assessments at a rate of 10 per month, but says (par 4) that "nothing ... stands out ... as being significant" about this particular project or its assessment.

96 She cannot recall carrying out a physical inspection of the subject site, or preparing a report on any such inspection, or taking and filing any photographs taken during any such inspection, but she told the Court (par 6) "that it is unlikely that [she] did not undertake a site inspection".

97 She cannot (par 8) see "any reason why [she] would have varied [her] practice or that of Manly Council" in this case. It "was and remains [her] standard practice" (par 6), ever since she entered her profession in September 2008. As Mr Docker put it (Tp255, L49), it was her "practice and habit".

98 In Mangion's experience, all town planners in her time at Manly Council adopted that "standard practice" (par 7), and understood and followed Council's records management policy (Tp150). (That policy, as it presently stands, is before the Court as *Exhibit A10*, and that which was in place as at October 2010 is *Exhibit A11*).

99 However, she deposes, "it appears to have been an administrative oversight that the record of inspection was not placed into the file ..." (par 8, and *Exhibit A7*).

100 Mangion was cross-examined, in particular, as to whether she merely relied on a "desk-top analysis" of Council documents, rather than making an actual physical inspection of the site. She explained (Tp153, LL12 – 25) that Council administrative staff always printed out a range of planning information, and put it on file, as soon as a DA or an application for a CDC was received and allocated for assessment (see *Exhibit A1*, tab E, fols 37 – 43).

101 The following exchange occurred in this regard, between Mangion and Ms Byrne (Tp153, L38 – p154, L15)

> Q. ... So it's entirely possible in a busy period for you to process a CDC, for example, without going to the site, isn't it?
>
> A. No.
>
> Q. Well, I suggest to you that, in this instance, you looked at this information and you processed this CDC based on the desktop review and the file review of the land and what was involved?
>
> A. That's not my standard practice.
>
> ...
>
> Q. But I'm suggesting to you that, in this instance, that's what you did--
>
> A. I don't remember.

Q. --because you were very busy?

A. I do not remember.

Q. You don't remember?

A. I do not have any recollection that I--

Q. That you didn't do it that way?

A. I, that I didn't, or did or did not do a site visit or I did in the way that you are stating.

The documentary evidence

102 I turn, now to the very extensive documentary evidence.

Court Book Volume 1

103 In **Volume 1 of the Court Book (*Exhibit A1*)**, documents are grouped by source.

104 Those included under **Tab A** are described as "historical Manly Council Documents – 1960s", and bear dates between 1962 and 15 April 1964.

105 Under **Tab B** are relevant Land Titles documents; under **Tab C**, correspondence and the CTTT judgment; under **Tab D**, photographs; under **Tab E**, further Manly Council documents, namely those bearing upon the CDC.

106 Included under **Tab F** are copies of the three primary Richard Phillipps affidavits, the four primary Roger Grevatt affidavits, and the first Larsen affidavit.

107 Volume 2 of the Court Book (*Exhibit A2*), to which I will return ([181] below), contains various relevant planning and building instruments.

Documents tendered, supplementing Volume 1

108 The Volume 1 materials were **supplemented** by other documentary evidence, which, for convenience, will be noted at this point.

109 At the beginning of the second hearing day, during the tendering by Ms Byrne of various documents, the Council (in circumstances described at Tpp106 – 108) elected to tender for the use of the Court the **original Council file(s)** from the 1960s (*Exhibit **C1***). That tender proved to be of great assistance to the Court in dealing with this matter.

110 Two other **1960 letters** from the town clerk to solicitor C J Berry, were separately tendered during the hearing – one dated 16 June 1960 (*Exhibit **R1***), and the other dated 21 December 1960 (*Exhibit **A5***). (Carbon copies of both of these letters are also to be found in *Exhibit **C1***.)

111 The original application for PC was made by letter dated **9 May 1960** from Berry to the Town Clerk, enclosing a sketch plan (both in *Exhibit **C1***).

112 On **12 May 1960** (?), the CCC wrote to Council (also in *Exhibit C1*) saying that it was "not desired to make any representations" about the proposal.

113

A letter from the Council to Berry dated **1 June 1960** (with "25 May" crossed out – also in *Exhibit **C1***) advised that location of the site within a "Foreshores Scenic Protection Area" required Council to consult with the Cumberland County Council ("**CCC**") before making its decision.

114 In a letter dated **8 June 1960** (*Exhibit **C1*** – blue tag 2), Council advised that, as the CCC had no objection to the proposal, Manly Council had approved the granting of consent for 12 single-bedroom flats (c.f. 9), over three storeys, to be built at 15 Crescent St, subject to the submission of satisfactory plans and specifications, which must conform to the requirements of the 1919 LGA and the ordinances made thereunder. Detailed plans and specifications were invited.

115 The letter of **16 June 1960** (*Exhibit **R1***) referred to earlier correspondence regarding **PC 60/1594**, in particular the above-described letter dated 8 June 1960, and set out the conditions attaching to that 8 June approval:

> • Condition 4 relevantly required that vehicle parking spaces outside of garages were to be not less that 18ft by 8ft, paved and drained, and specifically reserved for the parking.
>
> • Condition 7 required that a registered surveyor's certificate be submitted to Council immediately upon completion of the foundations for the building.
>
> • Condition 9 required the provision of 'an additional water closet ... in this building, ... to be accessible from the yard area', and
>
> • Condition 10 required that the dimensions for the allotment as indicated on the sketch plan submitted be confirmed by the applicant (for consent).

116 The last paragraph of the letter says:

> Your attention is also drawn to the need to obtain building approval for this proposal prior to any work being commenced and in this regard you are invited to submit to Council duplicate copies of detailed working drawings and specifications as a formal building application.

117 Sometime late in 1960, **after 8 June 1960**, and probably after 16 June 1960, Council adopted a code for "control of residential buildings in Foreshore areas", with which code "any departure" from any project as earlier approved must comply.

118 *Exhibit **C1*** includes (blue tag 1) the file copy of the minute of the Council's Health and Building Committee meeting/decision on **1 November 1960**. The proposal at that time was still for 12 single-bedroom flats, on 3 levels.

119 The Council's letter of **21 December 1960** (*Exhibit **A5***) replied to a handwritten letter from Mr Berry, dated 25 October (in *Exhibit **C1***), seeking Council's confirmation of the "draft permission already granted", and referred to some subsequent discussions regarding the development. The letter of 21 December commenced with the following paragraph (emphasis added):

> ... I have to advise that as the area of land indicated in your original planning application dated 9th May, **1960**, is not now available, the **planning consent granted previously by Council is now null and void**.

120 The letter went on to inform Mr Berry that it would be necessary for development on the site to conform with Council's development control code. Building was restricted to a maximum of 4 storeys and 16 units, and Schedule 7 to the 1919 LGA stipulated the

percentage of site which may be occupied. Attention was also directed to a then recent Council decision fixing minimum areas for various smaller units, and prohibiting external stairways and access balconies.

121 The letter concluded:

> In view of the foregoing, you are invited to submit for Council's consideration a completely new development application conforming with these requirements and other statutory regulations.

122 The first major piece of Strata Titles legislation – the *Conveyancing (Strata Titles) Act 1961* ("**the 1961 Strata Act**") – received assent on 27 March 1961, and apparently commenced on **8 January 1962**.

Other Tab A historical Council documents

123 The application for BA on **7 November 1962** is document 1 (fols 1 – 3/106) in *Exhibit A1* tab A, but, before it in that section of the bundle, is a collection of **plans** numbered "(i)" to "(v)".

124 Plan **(iii)** clearly indicates that, during the course of consideration of the building proposal, the intention to include a communal laundry and toilet in the car parking area provided **within** the unit block was altered by hand, so that those facilities would be included in what the Court now knows to be Unit 15, rather than Units 12 and/or 13. On plan (iii) each of the separate laundry and toilet is indicated to have its own doorway into the backyard, as well as a normal garage entry doorway from the driveway.

125 Plan **(iv)**, which is endorsed "amendment approved", and is dated **8 May 1963**, shows those facilities as located in what is now known as Unit 15.

126 Plan **(v)** is in fact a barely legible photocopy of endorsements stamped on, or taped to, the back of a plan subsequently identified to the Court, very clearly in *Exhibit C1*, as the original of plan (iii). The date of approval of BA524/62 is stamped as "**20 November 1962**", and the printed minutes taped to it are of the meeting stated to have been held by the Health and Building Committee on **13 November 1962**.

127 By the time of the 7 November 1962 application, the number of units proposed for the site had dropped from 12 to 9 three-room units. The applicant was REX Building Co, and the fees were paid (fol 3) by the owner, Pelican Court Pty Ltd.

128 The 1962 Council minute makes clear that the consideration of the BA had regard to the provisions of the then draft planning scheme ordinance ("PSO"), restricting it to 4 storeys and 16 units. The document noted that "the area occupied by carparking ... exceeds the permissible by 19sq feet". The Council minute refers to Council's decision of **8 November 1960** (*Exhibit C1* blue tag 1), "in respect to [PC]", and refers also to the advising of changes in Council requirements on **21 December 1960**, noting that "the building application now submitted indicates that this building is proposed having external open stairs and external access balconies".

129

The recommendation to the Council was that the site be inspected by the committee, for closer consideration of the matters in those notations, and of the proposal for open access stairs and balconies, and a front elevation of completely faced brickwork...". It then noted that, "apart from this, approval of the application is recommended subject to" 15 conditions, including **condition 7**, which provided:

> laundry facilities being provided in accordance with the provisions of Ordinance 71, and the plans being amended accordingly.
>
> (By contrast, the 1960 PC's condition 7 – see [115] above – concerned survey requirements)

130 I turn now to note some of the other documents included under **Tab A of *Exhibit A1***, following those plans, and the 1962 building application.

131 Folio 5 is some sort of checklist, on an assessment report dated 9 November 1962, which notes flats as permitted in the Residential B Zone, and proclaimed residential district 5. The draft ordinance required one off-street car space per unit. The precise areas of the project are noted at fol 6, and some "considerations on assessment" are noted at fol 7. The stamps and attachments noted above ([123] – [126]) are copied again, at fols 8 – 10(2).

132 At fols 11 and 12 is a copy of the formal advice, dated **22 November 1962**, of BA granted to REX Building on 20 November 1962 (fol 10/106), and including, specifically, the new condition 7, regarding amendment of the plans to accommodate the laundry facilities.

133 The detailed specification (at fols 13 – 35) suggests that each of the 9 flats would contain only one bedroom, and that a separate laundry, WC and a 14 foot rotary hoist will be "provided externally". External traffic areas were to be paved to provide parking for 9 cars, including 6 under the building. All pages of the specification are stamped "Municipality of Manly". The original (bound) copy of that specification is also to be found in *Exhibit C1*, and bears (on the back of its page 23) the traditional stamp signifying its approval by Council, dated **20 November 1962** (blue tag 3).

134 Folio 25 of the specification noted the external doors to the laundry and WC, fol 28 the nature of floor waste grating for the laundry floor, and fols 29 and 30 the provision of laundry tubs etc. Among the electrical specifications at fol 32 is the following: (b) all lighting including fixing of fittings selected under P.C. items, to all stairs halls, public corridors and common areas "including Laundries". In the lighting and power point section at fol 33 there is mention of "public area" outlets, including for the laundry. In the "P.C. items" at fol 35, the tubs and two coppers are noted.

135 On **12 February 1963** (fol 41), Council wrote to REX, following an inspection which indicated that the levels for the garage floors were not in accordance with the approved plan, and that the end walls of the garages were being bricked in. REX was asked to submit amended details to Council for those and other matters. REX was also reminded to provide the registered surveyor's certificate required. A survey certificate, dated 7 February 1963, appears at fol 44.

136 The screening of the stairs remained an issue as at a further inspection on **26 March**

1963 (fol 48), and amended plans were submitted, but did not satisfy Council (fol 52).

137 A strata subdivision plan was submitted to the town clerk on **1 May 1963** (fol 50), and Council responded to Hooker Finance on **14 May 1963** (fol 51), indicating that:

> where there are compelling reasons for so doing, Council will approve a Strata Subdivision Plan that provides for separate titles to garages etc. if the owner enters into a restrictive covenant to the effect that the garages will not be used or enjoyed otherwise than by a proprietor, tenant or other person entitled for the time being to occupy any of the living units.

138 Hooker Finance was also requested to "reconsider the matter and decide whether the garages could be attached to specified living units or alternatively left in common property".

139 Council is recorded (fol 59) as accepting, in the period from 21 to 28 May, 1963, a recommendation that the strata subdivision be approved subject to the applicants (for strata subdivision approval) entering into a suitable covenant.

140 On **28 May 1963**, Arthur T George & Co responded (fol 58) to Council's letter of 14 May 1963, indicating that Hooker Finance wished to proceed with the plan in its then form, but agreeing to the restrictive covenant being endorsed on title.

141 The town clerk advised George on **3 June 1963** (fol 61) that its solicitors (J.E.A. Florance and Florance) would be instructed to draft a suitable covenant, and, on **2 July 2013**, it forwarded to the developer's surveyor (fol 66) the original strata subdivision "plan duly endorsed with Council's Certificate of Approval".

142 A final inspection, on or about **12 July 1963**, is noted at fol 73.

143 Council's Certificate of Compliance, under **s 317A** of the 1919 LGA, was issued on **16 July 1963** (fol 75). (The original is to be found in *Exhibit **C1***.)

144 The SP was registered on **6 August 1963**, and ratified by the Owners Corporation, which also certified the plans annexed to it, on **22 August 1963** (fol 83).

145 At fol 85, there is a notification of a change of by-laws under the 1961 Strata Act, recording a unanimous resolution, passed on 21 August 1963, to add to the by-laws By-law 36, empowering the "Body Corporate" to "mark out" portions of the common property as three parking spots for owners of nominated residential lots in the project. Council's solicitors wrote to the Town Clerk on **2 September 1963** (fol 86), regarding the implementation of this parking policy.

146 Folios 94 to 106 indicate that caveats were used to ensure that transfers of lots were made subject to a covenant in the appropriate form, so that no separately titled garage units would be sold to anyone who did/does not own a living unit within the building. Self-evidently, not all residents purchase a garage space, but the original purchase of Lots & and 15 (by Madeline May Holdsworth) was registered, with the covenant on **23 March 1964**.

Title documents – Exhibit A1, tab B

147 The "**land title documents**" under **tab B of *Exhibit A1*** (31 folios in all) include the following:

148

At fol 7, a search of the common property notes changes of by-laws and the respective unit entitlements of the 15 lots – Each residential lot (1 to 9) is entitled to 38 units, and each garage lot (10 to 15) to 2 units.

149 Title searches indicate that Seddon and Larsen are joint tenants in both Lot 7 and Lot 15 (fols 10 and 11), and that Grevatt owns Lots 6 and 10 (fols 12 and 13). Scheduled in both instances is covenant J609505. Folios 17ff show the covenant being endorsed on memoranda of transfer, e.g. that from Pelican Court to Holdsworth.

Correspondence from 2006 – Exhibit A1, tab C

150 In **tab C of *Exhibit A1***, there are 73 folios of **correspondence**, commencing in **2006**, but especially in **2009**.

151 The exhibit includes (fol 1/73) another copy of Anthony Paul's letter and sketch drawing dated 8 September 2006, addressed to the strata manager (see [27] above).

152 Paul wrote again **2 February 2009** (fol 3/73), saying:

> As you are aware the laundry and toilet at 15 Crescent Street Fairlight are within part of the garage (Lot 15) with Unit 7 (Lot 7) and have been used by the other occupiers of the building on a casual arrangement for some time.
>
> This letter is provided to you as advice that this arrangement will be ceased today. As Unit 7 and the garage are for sale we have been requested to clarify the status of the garage for prospective purchasers.
>
> It is requested that the owners and tenants (apart from unit 7) of 15 Crescent Street Fairlight discontinue accessing the laundry as of today. It would be appreciated if the owners corporation could arrange to have the serviced washing machine removed promptly. A notice will also be installed in the laundry.
>
> We sincerely apologise for the inconvenience this may cause.

153 So "ended" in **2009** an arrangement apparently in place since **1963**.

154 At fols 4 – 5 is an email from Grevatt to Larsen, dated **23 February 2009**, advising her that she should be receiving from the Owners Corporation a letter basically stating that it "naturally objects to the demolition of the laundry", which has "been in-situ for decades", but conceding "that it can not do anything about it". Larsen was offered the use of the garage next to hers, then used by the current renters of Unit 8. He also raised with her the differential level of laundry floor, and asked her to park in Unit 8's garage while the disputants have "some breathing space" to explore a solution.

155 On **5 March 2009** (fol 6), Tony Paul sought from the strata agent and Grevatt an assurance that the washing machine would be removed from Lot 15, before 5 April, to enable him to provide vacant possession on settlement.

156 On **11 March 2009** (fols 7, 8, and 10), Larsen advised Grevatt that she had been informed that without public liability insurance the respondents were responsible for anyone who entered their "title in the laundry". She and Seddon were not willing to take out public liability cover, because of the expense involved, and, therefore, had been advised to have the doors closed on the laundry, and the washing machine removed. The taking of money for the use of the machine made the laundry a commercially

operated facility, again with insurance implications, she said, and she proposed some options for the body corporate, which she regarded as "the most appropriate and the least expensive". She concluded (fol 8):

> ... I am very sorry that everyone has not realised when they purchased their apartments that the laundry was not on strata title. Maybe they should all consider suing their solicitors and making them pay, rather than us.

157 Also on 11 March 2009 (fol 9), the strata manager instructed Mini Mat Laundry Equipment, the owner of the laundry equipment in Lot 15, to remove it before Sunday 5 April.

158 Grevatt responded to Larsen (fol 10) later on the 11th about the various options. He asked her to undertake the reclaiming of the whole space, at the respondents' own expense, but not to level the floor immediately, as under-floor services may need to accessed for re-routing.

159 On **12 March 2009** (fol 11), the strata manager (Jocumsen) notified all owners and residents of SP 432 that (1) "no records exist with respect to the laundry's original construction nor any agreements made at the time", (2) the common laundry/toilet was "built within [the] boundary of the privately owned garage (Lot 15) as indicated on the Strata plans", (3) vacant possession was required for sale of Unit 7, and, accordingly, (4) the washing machine was to be removed, and "the laundry and toilet doors will be sealed shut".

160 On **30 March 2009** (fols 13 and 14), the Owners Corporation resolved "not to add to the common property a common laundry and toilet to be built on the common property", to replace those facilities located within Lot 15. It further resolved to reinstate the washing machine to the Lot 15 laundry, and to remind owners that personal washing machines and/or dryers may not be installed within an allotted garage space without the approval of the Owners Corporation. (The Owners Corporation also declined to grant permission for Larsen and Seddon to keep a cat in Lot 7 and/or on the common property.)

161 On **31 March 2009** (fol 15), the then solicitor for the Owners Corporation, Graham Cochrane, advised Anthony Paul that it "was more likely than not that there had been an error by the surveyor in describing the boundaries" of Lot 15.

162 The Notice of the AGM of SP 432 on **31 August 2010** (fols 16 to 18) placed on the agenda a "special resolution", which would decide upon a course of action for the Owners Corporation regarding the "claim of ownership" of the "communal laundry/toilet" by the owners of Lot 15 (Unit 7). The respondents' intention to demolish was recorded in the notice, and the background to the resolution noted (1) that the architectural plans approved on "**8/5/63**" (see Plan (iv) in [125] above) show the facilities, which were built as part of the overall building project, (2) that they had remained in communal use for 47 years, and (3) that they were built as a specific requirement of Manly Council's decision.

163 Financial options resulting from a mediation session in April 2010 were canvassed (fol 17), and alternative resolutions were proposed.

164

The minutes of that 31 August 2010 AGM (fol 19) show that the Owners Corporation "specially resolved to reject all claims of ownership by the owners of Lot 15 (Unit 7) over the area occupied by the communal laundry and toilet". This represented a significant change in attitude over some 18 months from February 2009 from "can not do anything about it" ([154] above), to "reject all claims".

165 On **17 September 2010** (fol 20), one of the owners involved in the removal of the laundry door contended that it "was illegally locked by the owners of Unit 7".

166 The CTTT application dated "**20.9.10**" (fols 21 and 22) requested "an order by an adjudicator", and included written submissions in respect of the requested orders (fols 23 and 24). Those submissions noted that, "although the facilities appear on approved architectural drawings, ... they have in fact been constructed on Lot 15, ... not on common property", as a result of an error in the SP as registered on **30 July 1963** (?), and that the owners of Lot 15 had revoked further access by other owners, and changed the locks. The orders requested were (a) that the owners of Lot 15 remove the locks, (b) that no works be permitted to alter the structure until authorised by the Owners Corporation or further order, and (c) that the owners of Lot 15 were not to cause or permit construction or demolition of the laundry and toilet until such works are authorised by the Owners Corporation or further order.

167 Agreement was not reached at a mediation, and the application was dismissed by the CTTT adjudicator on **17 January 2011** (fol 25). Adjudicator O'Keeffe accurately recorded the relevant history (at fols 28 – 29), and then said (par 8 on fol 29):

> I accept the respondents' submission that the laundry and toilet area is 'erected on and entirely within a portion of Lot 15'. Indeed it appears common ground that such is the case. Nevertheless, the applicant submits that an error occurred at the time the strata plan was registered. However, there is no evidence to support this contention and the plans suggest otherwise. The similar sized area of the lot and the equal number of unit entitlements gives weight to their argument. Furthermore, there is no persuasive evidence that the respondents have done or intend to interfere with common property contrary to their duty as provide (sic) by section 116.

168 There are details of the likely costs of various options (fols 30 – 32).

169 The later documents in tab C of ***Exhibit A1*** reflect ongoing conversations about possible solutions. A letter from Phillipps on **10 December 2013** (fol 52) indicates no prior familiarity with the CDC upon which the respondents rely (see also email at fol 58). Folio 69 makes clear that a construction certificate ("CC") is not required, as the Council combines a "complying development approval" with a "complying development certificate", and considers that to have the same effect as a CC.

170 The respondents' Notice of Commencement of Building or Subdivision Work, lodged on **3 December 2013** (fol 70), relies upon CDC 56/10, dated 27 October 2010 (fol 71), and notification thereof (fol 72). It was this Notice which precipitated the urgent interlocutory proceedings before Biscoe J ([39] above).

The balance of Exhibit A1 – tabs D, E and F

171

Tab D of *Exhibit A1* contains various **photographs and sketch plans** etc of the facilities and building work within Lot 15, and of Lot 15's proximity to the uncovered carparking spaces provided for residents, and located on the common property.

172 **Tab E of *Exhibit A1*** contains principally, the 2010 **CDC documentation from the Council file**, regarding alterations to Lot 15 (CDC 56/10), and concludes with the inclusion (again) of Larsen's emailed notification to Council 3 December 2013, of commencement of the work the CDC purported to approve (fol 49/49, c.f. tab D fol 70/73 above).

173 The CDC application (lodged **5 October 2010**) is at fols 1 to 4. A computer record was added to tab E (at Tpp38 – 39, as fols 50 – 51). That record indicates that the proposal submitted on 5 October 2010 was not "notified".

174 The CDC application was supported by a Statement of Environmental Effects ("SEE"), of which there were apparently two versions prepared by Ms Larsen (Tpp129 – 130, and see fols 5 to 19 c.f. fols 20 – 33). The earlier draft of the SEE included a proposal for a hebel wall at the northern end of the garage.

175 The Council's undated assessment report, or "delegated authority report", about which evidence was given by Mangion, commences at fol 15.

176 Mangion acted upon the SEE as received by Council on 5 October 2010. As already noted above ([93] – [101]) there is some question about the procedure Mangion followed in this particular case, but she assessed the proposal, having regard to s 79C of the EPA Act, the then applicable Manly Local Environmental Plan 1988 ("**1988 Manly LEP**"), and the relevant development control plan, and recommended it to the Manager of Development Assessment for conditional approval.

177 The Notice of Determination is at fols 44 – 45/49, and the actual CDC at 46 – 47/49. Both are dated **27 October 2010**.

178 The complying development is wrongly described in the documents (see fol 46) as "removal of non-structural wall within **Unit 7** of an existing [RFB]" (my emphasis). None of the contents of tab E would appear to make clear that the "garage/laundry of Unit 7" had, in fact, a different lot number (15).

179 The Court takes the view that even a physical inspection would probably not have indicated that fact, but the SEE makes clear that the proposed alterations affect Lot 15.

180 **Tab F of *Exhibit A1*** contained affidavits read at the hearing, and noted earlier in this judgment ([67] to [101]).

Court Book Volume 2

181 **Volume 2 of the Court Book (*Exhibit A2*)** contains the following planning and building control **instruments**, etc:

> **Tab 1:** County of Cumberland Planning Scheme Ordinance ("**CCPSO**"), copy certified 12 May 1958
>
> **Tab 2:** An extract from what the index calls "Part IV **Ordinance 71**" dated 2 June 1960. (The extracts include elements of Parts I, II, II, and IV.)
>
> **Tab 3:** Manly Planning Scheme Ordinance ("**MPSO**") 20 December 1968

Tab 4: "**The 1988 Manly LEP**" (the historical version covering period 27 August 2010 to 24 February 2011).

Tab 5: **BCA** National Construction Code section/clause "**F2.1**", dated 2011 (said to have replaced Ordinance 71).

182 I turn now to consider some aspects of those documents.

Exhibit A2, tab 1 – Cumberland PSO

183 The CCPSO (***Exhibit A2*, tab 1**) was first proclaimed on **27 June 1951**, and Amendment No 1 to it on 2 August 1957. (It was the subject of much commentary in Murray Wilcox's landmark text on "The Law of Land Development in NSW", published by the Law Book Co of Australia in 1967.)

184 Relevant provisions of the **CCPSO**, to which the Court was referred during argument, were as follows:

185 Clause 4 applied the Ordinance to "all land within the Cumberland County district", and cl 6 charged councils to be the "responsible authority" for carrying into effect, and enforcing, the provisions of the Ordinance. Clause 11 prohibited erection of a building, or the carrying out of work of a permanent character, without consent.

186 Part III dealt with "Building Restrictions and Use of Land".

187 **Clause 24**, being the first clause in Part III, included various definitions which applied, "unless the context or subject matter otherwise indicates or requires".

188 "Residential building" was defined to mean "a building, other than a dwelling-house, designed for use for human habitation, together with such outbuildings as are ordinarily used therewith, a [RFB], ..."; but it did "not include any building mentioned, whether by inclusion or exclusion, in the definitions of 'places of instruction' and 'institution'".

189 **Clause 26** of Part III introduced a zoning table, Part I of which table identified, in the following columns, (I) zone, (II) reference to the scheme map; (III) purposes for which buildings may be erected or used without consent of responsible authority: (IV) purposes for which buildings may be erected or used only with the consent of the responsible authority; and (V) purposes for which buildings may not be erected or used.

190 In respect of "Living Area" (the zoning of the subject site at all material times), only "dwelling houses" were mentioned in Column III. Column IV relevantly mentioned, inter alia, "residential buildings", and "any other purposes not referred to in Column III or Column V". Column V specified uses not relevant to the present matter, and Part II of the zoning table dealt with only "living area (restricted)", and also made no provisions relevant to the present case.

191 **Clause 27**, also in Part III, provided as follows:

> Where application is made to the responsible authority for its consent to the erection or use of a building in a zone in which a building of the type proposed may be erected and used only with its consent, the responsible authority shall decide whether to give or withhold consent, and in the former event what conditions, if any, shall be imposed:
>
> Provided that before determining any such application the responsible authority shall take into consideration –
>
> > (a) the provisions of any planning scheme (including this scheme) affecting the land;

(b) the character of the proposed development in relation to the character of the development on the adjoining land and in the locality;

(c) the size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon;

(d) any representations made by any statutory authority in relation to the application or to the development of the area, and the rights and powers of any such authority;

(e) the existing and likely future amenity of the neighbourhood including the question whether the proposed development is likely to cause injury to such amenity including injury due to the emission of nose, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, grit, oil, waste water, waste products or otherwise; and

(f) the circumstances of the case and the public interest.

192 Part VI of the CCPSO dealt with “Consents”, and **cl 41** provided as follows:

(1) Any application for the consent of the responsible authority under the provisions of this Ordinance shall be made in writing to the responsible authority by the owner or his representative appointed in writing and shall be accompanied by the following plans and particulars: –

(a) if the application is for consent to the use of a building or work or to the use of land, a plan in triplicate sufficient to identify the land to which the application relates and particulars in writing in triplicate of the purpose for which the building, work or land is used at the date of the application and the purpose for which consent is sought;

(b) if the application is for consent to the erection of a building or the carrying out of a work, a plan in triplicate sufficient to identify the land to which the application relates and particulars, illustrated by maps and drawings in triplicate, sufficient to describe the building or work, its location on the site and the purpose for which it is to be used:

Provided that if an application relates only to the alteration, enlargement, extension of or addition to a building it shall be sufficient to show on the plan the site of the building and the alteration, enlargement, extension or addition in relation to such building and to furnish particulars relating only to the alteration, enlargement, extension or addition.

(2) Where, in pursuance of the Act (except Part XIIA thereof) or of an Ordinance made under the Act (except the said Part), and application is made to the responsible authority for its approval to erect a building such application shall, if the matter to which it relates requires the consent of the responsible authority under this Ordinance, be deemed to be an application for such consent, unless the application does not contain the information and particulars required by subclause one of this clause and the responsible authority so informs the applicant on or before giving its decision under the Act (except Part XIIA thereof) or under an Ordinance made under the Act (except the said Part).

(3) (a) The responsible authority may grant the application unconditionally or subject to such conditions as it may think proper to impose or refuse to grant such application.

(b) The responsible authority shall cause notice to be given to the applicant of its decision and in the case of a consent given subject to conditions or of a refusal, the reasons therefor shall be indicated in the notice.

(4) An application shall be deemed to be refused if the responsible authority neglects or delays to give within forty days after service of the application a decision with respect thereto.

(5) Any consent given under this clause to the carrying out of development in a Living Area Zone shall be void if the development to which it refers is not substantially commenced within two years after the date of the consent: Provided that the responsible authority may, if good cause be shown, grant annual extensions or renewals of such consent beyond such period up to a further period of three years.

193 **Clause 43** required that, before determining any application, the responsible authority must consider whether the development fell within a Foreshore Scenic Protection Area, and, if so, consult with the Cumberland County Council, and take into consideration any representations made by that council.

Exhibit A2, tabs 2 and 5 – Ordinance 71 and the BCA

194 In early 1960s, Ordinance 71 (***Exhibit A2*, tab 2**), made under the 1919 LGA, relevantly provided, in cl 3, a definition of "RFB" to mean "a building containing two or more flats, but ... not ... a row of two or more dwellings attached to each other such as are commonly known as semi-detached or terrace buildings".

195 **Clause 4(a)** provided:

> Before the erection of a building is commenced, two copies of the plans and specifications thereof and of a plan and specification of any fences already erected or to be erected on or on the boundaries of the allotment on which the building is to be erected, together with an application in writing for approval thereof, shall be submitted to the Council and in the case of an application for approval to erect a dwelling-house not conforming to the requirements and specifications prescribed or approved by or under this Ordinance as to structural design, detail structural drawings shall also be submitted to the Council:
>
> Provided that the Council may, if it sees fit, dispense with the necessity for the submission of a plan and specification of the fences or of plans and specifications to make minor alterations in an existing building or to erect building to be used exclusively for the purpose of a green-house, conservatory, summer-house, private boat-house, fuel shed, tool-house, cycle shed, aviary, milking bail, hay shed, stable, fowl-house, pigsty, barn, verandah, or the like: Provided also that any building (other than a verandah or an aviary) used or intended to be used for the keeping of domestic animals shall be wholly detached from any dwelling-house: Provided also that where it is desired to make some minor alteration to a building not materially affecting its stability, lighting, ventilation, or size of rooms, the application may in the first place be made without submitting plans and specifications, which shall, however, be submitted if the Council so require.

196 Part IV of the Ordinance dealt (cl 52) with "RFB", and, in a specific provision (cl 56), with "kitchens, bathrooms, water closets etc" in "Domestic Offices".

197 **Clause 56** included the following relevant sub-clauses (which are not limited to "domestic offices"):

> (b1) Separate laundries shall be provided in a [RFB] at the rate of one for every four flats or part thereof with washtubs and copper or other means of washing clothes installed in each and the water laid thereto:
>
> Provided that one laundry only shall be required to be provided for each eight flats or part thereof if –
>
> (i) two sets of wash-tubs and coppers or other means of washing clothes are permitted by the council to be installed in each laundry and the water laid thereto; or,
>
> (ii) mechanical equipment for washing and completely drying clothes is installed in each laundry.
>
> ...

(f) Where a [RFB] contains not less than six and not more than twenty-three flats or where two or more [RFBs] are erected on land and such [RFBs] contain in the aggregate not less than six flats and not more than twenty-three flats and the land on which the [RFBs] are situated is not subdivided, a water-closet shall be provided in addition to the water-closet referred to in subclause (a) of this clause and the door of such water-closet shall be directly accessible from the outside of the building.

198 It is contended that the section/clause of the **BCA** numbered "**F2.1**" (***Exhibit A2* tab 5**), replaced Ordinance 71 in dealing with the "Facilities in Residential Buildings", and remains current.

199 **F2.1** contains a table, which requires that, "within each sole-occupancy unit", laundry facilities, where provided as a separate laundry for each four sole-occupancy units or part thereof, should comprise:

(i) clothes washing facilities comprising at least one washtub and one washing machine; and

(ii) clothes drying facilities comprising –

(A) clothes line or hoist with not less than 7.5m of line per *sole-occupancy unit*; or

(B) one heat-operated drying cabinet or appliance for each 4 *sole-occupancy units*.

Exhibit A2, tab 3 – MPSO

200 The MPSO, dated "20 December **1968**", and gazetted on that date (***Exhibit A2,* tab 3**), relevantly provided (cl 4), as a result of decisions taken in 1946, and then in 1969-70, and 1971, that the term "RFB" meant:

a building containing two or more flats, but does not include a row of two or more dwellings attached to each other such as are commonly know as semi-detached or terrace buildings and "flat" means a room or suite of rooms occupied or used or so constructed, designed or adapted as to be capable of being occupied or used as a separate domicile.

201 What remained of **cl 57** (see note on folio 33 regarding deletions) provided:

(2) A person shall not erect or use a building for the purpose of a [RFB] unless provision is made within the site of the building for –

(a) vehicle parking space of an area not less than 18 feet by 8 feet 6 inches for every flat within the building; and

(b) proper vehicular access to such parking space.

(3) For the purposes of subclause (2) of this clause "vehicular parking space" includes any garage or court available for use by vehicles.

202 In "Part VIII – General", specific provision was made for rights under the CCPSO, in the following terms (**cls 66 and 69**):

66. (1) Subject to subclause (2) of this clause the revocation, pursuant to paragraph (d) of subsection two of section 342L of the Act, of the County of Cumberland Planning Scheme to the extent to which it applies in respect of all land within the Municipality of Manly shall not affect –

(a) the previous operation of that Scheme in respect of the said land or anything duly suffered, done or commenced to be done under that Scheme or under the Act in relation to that Scheme;

(b) any right, privilege, obligation or liability acquired, accrued or incurred under that Scheme or under the Act in relation to that Scheme;

(c) any penalty, forfeiture or punishment incurred in respect of any offence

committed against that Scheme or under the Act in relation to that Scheme;

(d) any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed and enforced as if the said Scheme had not been revoked.

(2) Nothing contained in subclause (1) of this clause shall have the effect of reviving any claim for compensation or giving an additional claim for compensation in respect of the injurious affection of an estate or interest in land by reason of any provision contained in the County of Cumberland Planning Scheme but where a claim for compensation in respect of any such injurious affection had been made within the time prescribed and had not been determined before the appointed day, legal proceedings in respect of that claim may be continued and enforced as if the County of Cumberland Planning Scheme had not be revoked.

...

69. Where permission to erect any building or to carry out any work or to use any building, work or land or to do any other act or thing has been granted under Division 7 of Part XIIA of the Act or under any Ordinance made under that Part or where any consent for any such purpose has been granted under the County of Cumberland Planning Scheme and conditions have been imposed which are not inconsistent with any provisions of this Ordinance, the conditions shall have effect as if they were conditions imposed under this Ordinance and may be enforced accordingly.

Exhibit A2, tab 4 – The 1988 Manly LEP

203 The 1988 Manly LEP (***Exhibit A2*, tab 4**) gazetted 16 September 1988, made special provision for "exempt and complying development", in Part 2, headed "General restrictions on development of land". **Clause 10A** of Part 2 says:

(1) Development listed in Schedule 8 is exempt development if it complies with any relevant standards set for the development in Schedule 8.

(2) Development listed in Schedule 9 is complying development if:

(a) it is local development of a kind that can be carried out with consent on the land on which it is proposed, and

(b) it will achieve the outcomes listed in Schedule 9 for the development.

(3) Development is not complying development if it is carried out on land within an environmentally sensitive area.

(4) A [CDC] issued for any complying development is to be subject to the conditions for the development specified in Schedule 10.

(5) In addition, a [CDC] that relates to the erection of a temporary and portable building must:

(a) state that the building is a temporary building, and

(b) specify a removal date that is no later than one year after the date of issue of the [CDC].

(6) In this clause, ***environmentally sensitive area*** means an area within Manly local government area which, for reasons of environmental sensitivity, is identified as an environmentally sensitive area on the map marked "Manly Local Environmental Plan (Amendment No 34—Exempt and Complying Development)—Environmentally Sensitive Areas Map 4".

204

As the Court is here concerned with "**complying** development", I note that "additional standard" No 9 in that part of **Schedule 8** (headed "Additional standards for **specific** types of development", and called up by cl 10A(1) quoted above) dealt with "**demolition**" in the following terms (emphasis mine):

> ***generally***
>
> □ Only if ordered by the Council or if involves demolition of a structure the erection of which would be **exempt development**.

205 "Additional standard" No 13, dealing with **exempt** development involving "minor internal alterations and exterior maintenance and renovation", provided:

> ***generally***
>
> □ Non-structural;
>
> □ Relates to previously completed building;
>
> ...
>
> ***windows***
>
> ...
>
> □ To conform with any original development consent.
>
> ...

206 **Schedule 9** (headed "Complying development", and called up by cl 10A(2)) sets out "**general** standards", for complying development, including one, (**g**), that it not contravene any conditions of a DC applying to the land.

207 It also provided, in (**d**), that it must comply with "any deemed-to-satisfy provisions of the *Building Code of Australia*". It made the following provision by way of "additional standard" for (my emphasis):

> ...
>
> **Residential alterations; internal Nil**

208 Schedule 10 (cl 10A(4)) dealt with conditions imposed on CDCs, covering a range of matters.

209 As Mr Seymour submitted (Tp268f), these schedules to, and cl 10A of, the LEP, have their "statutory origin" in s 76A(5) of the EPA Act ([231] below), and they provide "desirable outcomes", not "essential characteristics" or "pre-conditions" or "essential criteria".

210 The 1988 Manly LEP was superseded in 2012 – 2013.

E: Other Relevant Statutory Provisions

211 Apart from the various instruments included in *Exhibit A*2, and quoted above, the Court was taken on a journey through various alterations made to other relevant legislation since the 1960s. I will deal with them chronologically.

The 1919 LGA

212 In 1962, the legislative scheme governing the erection of buildings was to be found in **Part XI** of the 1919 LGA, and the Ordinances made under that Part, pursuant to s **318**.

213 Section **306** provided that a building shall not be erected or used in contravention of the provisions made by or under the Act, and s 311 provided that prior approval of Council was required for the erection or alteration of a building. Section **310** required that:

> Subject to the provisions of this Act and of any ordinance every building hereafter erected in the area shall be erected to the satisfaction of the council –
>
> (a) in conformity with this Act and the ordinances; and
>
> (b) in conformity with the application, plans, and specifications in respect of which the council has given its approval for the erection of the building.

214 Section **314** provided:

> **314.** (1) The council shall consider each application and the plans and specifications accompanying it, and may subject to the provisions of this Act approve, or approve subject to conditions, or disapprove thereof: Provided that—
>
> (a) the application plans and specifications may at any time be modified in such manner or respects as t h e council may approve; and
>
> (b) the council shall not approve unless it is satisfied that a building erected in accordance with the application plans and specifications, or any modifications thereof which it approves, would be in accordance with the provisions of this Act and the ordinances; and
>
> (c) the council shall not approve an application for approval of the erection of a residential flat building which would not conform to one of the standards prescribed for [RBFs] in Schedule Seven.
>
> (1A) Paragraph (c) of subsection one of this section shall not preclude the council from approving an application for approval of the erection of a [RBF] which would not conform to one of the standards prescribed in schedule Seven to this Act where—
>
> (a) the building is to contain shops; and
>
> (b) such shops are to be erected on the ground floor of the building and facing the road to which the building has frontage; and
>
> (c) such shops either with or without a common entrance hall to the flats are to occupy the whole of the frontage of the allotment on which the building stands; and
>
> (d) the only departure from the standard prescribed in Schedule Seven and applicable in the particular case is that the external walls of the building for a prescribed distance (not exceeding forty feet) from the road to which the building has frontage are not to be set back from the side boundaries of the allotment or are not to be set back to the extent required under that standard; and
>
> (e) the council in its absolute discretion is satisfied that, having regard to the circumstances of the case and the public interest, the application should be approved.
>
> For the purpose of this subsection “shops” includes rooms which are to be used for which are to be so constructed or designed as to be capable of being used for the purpose of any trade, industry, manufacture, business, avocation or calling.
>
> (2) The council shall give notice to the applicant of its approval, or approval subject to conditions, or disapproval within forty days after service of the application.
>
> (3) In the case of an approval subject to conditions or of a disapproval the reasons therefor shall be indicated in the notice.

215 Section **314A** was a “special provision” relating to RFBs in certain parts of areas, and provided:

(1) The Governor may, on the application in writing of the council, by proclamation apply the provisions of this section to any land within the area of that council to which a prescribed town or country planning scheme or a scheme in course of preparation applies.

(2) A proclamation under subsection one of this section may prescribe, in relation to the erection of [RFBs] on any land referred to in the proclamation, requirements for or with respect to all or any of the following matters: –

(a) the provision of natural light and ventilation for rooms;

(b) the provision, maintenance and operation of mechanical means of ventilation;

(c) the proportion of a site to be covered by any such building, and the provision of open spaces and light areas;

(d) the total floor area of any such building in relation to the area of a site;

(e) the height of any such building;

(f) the position, in relation to other buildings or to the boundaries of a site, of any such building or of any outbuilding or offices to be erected on the site;

(g) the provision of suitable space for the parking and accommodation of vehicles likely to be used in connection with any such building;

(h) the means of access generally, and particularly the means of access for the purpose of removal of garbage and other refuse;

(i) the form and contents of the plans and specifications in respect of any such building;

(j) such other matters as the Governor considers appropriate.

(3) In respect of an application for the council's approval of the erection of a [RFB] on land within a part of the council's area to which this section applies –

(a) paragraph (c) of subsection one of section three hundred and fourteen of this Act; and

(b) any other provision of this Act or any provision of any other Act, or of the ordinances, or of any regulations or by-laws made under any Act, that is inconsistent with any of the requirements prescribed in the proclamation applicable to that part of the council's area,

shall not apply so as to preclude the council from approving of the application, but the council shall not approve of the application, either absolutely or subject to conditions, unless it is satisfied that a building, erected in accordance with the application and the plans and specifications in respect of the proposed building submitted to the council, or with any modifications of the application, plans or specifications of which the council approves, would be in accordance with the requirements prescribed in such proclamation.

(4) In this section, "scheme in course of preparation" means: –

(a) a town or country planning scheme submitted to the Minister before the commencement of the Local Government (Town and Country Planning) Amendment Act, 1962, where the Minister has decided to proceed with the scheme without alteration, or to proceed with the scheme with such alterations as he deems expedient; and

(b) a town or country planning scheme submitted to the Minister after such commencement, where the Minister has, pursuant to subsection tow of section 342F of this Act, certified that the scheme submitted to the State Planning Authority is adequate and sufficient and that the planning principles contained in the scheme appear to the Minister to be suitable.

216 **Ordinance 71** was the general building Ordinance, and cls 52 to 69 of it dealt specifically with RFBs. (See above at [196] – [197])

217

In 1945, **Part XIIA** (later renumbered "12A", but **not** "XXIIA", as wrongly submitted on several occasions by Ms Byrne) was added to the 1919 LGA, and concerned town and country planning schemes (Act No 21 of 1945).

218 The CCPSO was made as a schedule to the *Local Government (Amendment) Act 1951*, and took effect upon the date of assent to that Act. The CCPSO was deemed to be an Ordinance under Part XIIA, and applied until such time as local councils within the Cumberland County district made their own planning scheme ordinances (see above, at [183] – [199], and see again Wilcox's text, cited in [183] above).

219 In 1962, Manly Council, at the time of its assessment of BA524/62 had a draft planning scheme under consideration, but no Interim Development Orders ("IDO") in place, and the relevant PSO remained the CCPSO. (IDO No 1 was not gazetted until 24 December 1964).

220 The 1919 LGA provided that, once a building was erected, the Council could issue, on an application by any person, a **certificate of its compliance, under s 317A**. Such a certificate was for all purposes deemed to be conclusive evidence that, as at its date, the building complied with the requirements of the Act and the Ordinances. It is also relevant to note that a strata scheme of subdivision could not be registered without being accompanied by a 317A certificate of compliance signed by the Council. (See s 4 (3)(c) of the Strata Act 1961, and *Pascoe v Council of City of Wagga Wagga* [1995] NSWCA 360, per Sheller JA).

221 On 20 December **1968**, the MPSO was made under Part XIIA of the amended 1919 LGA, and repealed the CCPSO insofar as it applied to land within the municipality of Manly (above at [200]ff).

222 Clause 66 of the MPSO (above at [202]) preserved rights and obligations acquired under the CCPSO, and cl 69 ([202]) provided for the continued operation of any conditions imposed on a consent granted under the CCPSO, that were not inconsistent with the provisions of the MPSO – the conditions were deemed to be conditions made under the MPSO.

223 The MPSO, however, included no specific provisions for laundries in RFBs.

224 Accordingly, the Owners Corporation contends that the **1962 condition 7** (regarding the laundry facilities – see [129] above) continues to have effect, and could be enforced as if it were granted under the MPSO.

The EPA Act 1979

225 The EPA Act and its package of cognate 1979 Acts came into force on **1 September 1980**.

226 **Schedule 3** to the *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* ("the **1979 Planning Repeal Act**") included **cl 2**, which provided that PSOs made under Part XIIA of the 1919 LGA were designated "former planning instruments", and **deemed** to be "environmental planning instruments" ("**EPI**"), under the EPA Act.

227 Under **cl 7** of that Schedule, any consent granted under a former planning instrument

became a consent within the meaning of the EPA Act.

228 **Clause 14** of Schedule 3 provided (some emphasis added):

> 14 Construction of references to Part 12A, schemes, etc
>
> (1) On and from the appointed day, a reference in any other Act or in any regulation, by-law or other statutory instrument, or in any other document, whether of the same or of a different kind:
>
> (a) to Part 12A shall be read and construed as a reference to the [EPA Act],
>
> (b) to any provision of that Part shall be read and construed as a reference to the corresponding provision, if any, of the [EPA Act],
>
> (c) to a specified prescribed scheme or an interim development order made under that Part shall be read and construed as a reference to the deemed [EPI] that that prescribed scheme or interim development order is deemed by this Schedule to be,
>
> (d) to a prescribed scheme or an interim development order made under that Part, that is not identified by the reference, shall be read and construed as a reference to an [EPI],
>
> (e) except as provided in paragraph (d), to a planning scheme prepared under that Part shall be read and construed as a reference to a draft local environmental plan in respect of which a certificate has been issued under section 65 of the [EPA Act] , and
>
> (f) to prescribed qualifications with respect to town or country planning shall be read and construed as a reference to qualifications in environmental planning prescribed under the [EPA Act] ,
>
> **subject to the regulations and except in so far as the context or subject-matter otherwise indicates or requires.**
>
> ...

229 Section **4(1)** of the EPA Act includes the following relevant definitions:

> **development application** means an application for consent under Part 4 to carry out development but does not include an application for a [CDC].
>
> **development consent** means consent under Part 4 to carry out development and includes, unless expressly excluded, a [CDC].
>
> **land includes**: ... (d) a building erected on the land.
>
> **owner** has the same meaning as in the *Local Government Act 1993* and includes, in Division 2A of Part 6, in relation to a building, the owner of the building or the owner of the land on which the building is erected.

230 Section **79C** provides the criteria and procedure for the evaluation, assessment and determination of a development application, and **s 80A** deals with imposition of conditions. Section **81** deals with post-determination notification.

231 The definitions of “complying development” and “CDC” in **s 4(1)** take you, respectively, to ss 76A and 85, which provide as follows:

> **76A Development that needs consent**
>
> (1) **General**
>
> If an [EPI] provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:
>
> (a) such a consent has been obtained and is in force, and
>
> (b) the development is carried out in accordance with the consent and the instrument.
>
> (2) For the purposes of subsection (1), development consent may be obtained:

(a) by the making of a determination by a consent authority to grant development consent, or

(b) in the case of complying development, by the issue of a [CDC].

...

(5) **Complying development**

An [EPI] may provide that development, or a class of development, that can be addressed by specified predetermined development standards is complying development.

...

85 What is a "complying development certificate"?

(1) **Terms of [CDC]**

A [CDC] is a certificate:

(a) that states that particular proposed development is complying development and (if carried out as specified in the certificate) will comply with all development standards applicable to the development and with other requirements prescribed by the regulations concerning the issue of a [CDC], and

(b) in the case of development involving the erection of a building, that identifies the classification of the building in accordance with the *Building Code of Australia.*

(2) A [CDC] may indicate different classifications for different parts of the same building.

Note. To the extent to which it deals with the classification of a proposed building, a [CDC] under this Division replaces the statement of classification formerly issued under the regulations under the *Local Government Act 1993*.

(3) **Erection of buildings**

A [CDC] that enables the erection of a building is sufficient to authorise the use of the building when erected for the purpose for which it was erected if that purpose is specified in the application for the [CDC], subject to section 109M.

Note. Section 109M prohibits the occupation or use of a new building unless an occupation certificate has been issued for the building.

(4) **Subdivision of land**

A [CDC] that enables the subdivision of land may authorise the carrying out of any physical activity in, on, under or over land in connection with the subdivision, including the construction of roads and stormwater drainage systems.

Note. A plan of subdivision cannot be registered under the *Conveyancing Act 191*9 unless a subdivision certificate has been issued for the subdivision.

(5) **Other requirements for [CDCs]**

The regulations:

(a) may impose other requirements concerning the issue of [CDCs], and

(b) may provide for the form in which a [CDC] is to be issued.

(5A) A [CDC] has no effect to the extent that it requires a compliance certificate to be obtained in respect of any development.

(6) For the purposes of this section, ***development standard*** includes a provision of a development control plan that would be a development standard, within the meaning of section 4, if the provision were in an [EPI].

232 Section 85, just quoted, sits in Div 3 of Part 4 of the Act (ss 84 to 87), which is entitled "Special Procedure for Complying Development".

233 Section **84A** of Div 3 of Part 4 provides (emphasis added):

84A Carrying out of complying development

(1) A person may carry out complying development on land if:

(a) the person has been issued with a [CDC] for the development, and

(b) the development is carried out in accordance with:

(i) the [CDC], and

(ii) any provisions of an [EPI], development control plan or the regulations that applied to the carrying out of the complying development on that land at the time the [CDC] was issued.

(2) An application for a [CDC] may be made:

(a) by the owner of the land on which the development is proposed to be carried out, or

(b) by any other person, **with the consent of the owner** of that land.

(3) The regulations may provide for the procedures for making an application, the fees payable in connection with an application and the procedures for dealing with an application.

(4) (Repealed)

(5) Nothing in this Division prevents a consent authority from considering and determining a development application for the carrying out of complying development.

234 Section **85A** provides:

85A Process for obtaining [CDCs]

(1) **Application**

An applicant may, in accordance with the regulations, apply to:

(a) the council, or

(b) an accredited certifier,

for a [CDC].

...

(3) **Evaluation**

The council or accredited certifier must consider the application and determine:

(a) whether or not the proposed development is complying development, and

(b) whether or not the proposed development complies with the relevant development standards, and

(c) if the proposed development is complying development because of the provisions of a local environmental plan, or a local environmental plan in relation to which the council has made a development control plan, that specifies standards and conditions for the complying development, whether or not the proposed development complies with those standards and conditions.

...

(6) **Determination**

The council or an accredited certifier may determine an application:

(a) by issuing a [CDC], unconditionally or (to the extent required by the regulations, an [EPI] or a development control plan) subject to conditions, or

(b) by refusing to issue a [CDC].

...

(8) The determination of an application by the council or accredited certifier must be completed within the period prescribed by the regulations (or such longer period as may be agreed to by the applicant) after lodgment of the application.

[Note, in respect of (8), that cl 130AA of the Regulation prescribes a period of 10 days – see [249] below]

(9) In determining the application, the council or the accredited certifier must impose a condition that is required to be imposed under Division 6 in relation to the complying development.

(10) There is no right of appeal against the determination of, or a failure or refusal to determine, an application for a [CDC] by a council or an accredited certifier.

...

(11) **Post-determination notification**

On the determination of an application for the issue of a [CDC]:

(a) the council or accredited certifier must notify the applicant of the determination, and

(b) the accredited certifier must notify the council of the determination, and

(c) if the determination is to issue a [CDC], the council or accredited certifier must notify any other person, if required to do so by the regulations, in accordance with the regulations.

...

235 Section **81A(1)** provides:

(1) **Erection of buildings**

A development consent that enables the erection of a building is sufficient to authorise the use of the building when erected for the purpose for which it was erected if that purpose is specified in the development application, subject to section 109M.

236 The note to s 81A(1) explains that s 109M prohibits the occupation or use of a new building unless an **occupation certificate** has been issued for it.

237 Division 3 of Part 6 deals with Orders of the Court, and commences with **s 122**, which provides the following definitions, relevant to the Division:

(a) a reference to a breach of this Act is a reference to:

(i) a contravention of or failure to comply with this Act, and

(ii) a threatened or an apprehended contravention of or a threatened or apprehended failure to comply with this Act, and

(b) a reference to this Act includes a reference to the following:

(i) the regulations,

(ii) an [EPI],

(iii) a consent granted under this Act, including a condition subject to which a consent is granted,

(iv) a [CDC], including a condition subject to which a [CDC] is granted,

(v) an order under Division 2A,

(vi) a planning agreement referred to in section 93F.

The 1993 LGA

238 On 1 July 1993, the *Local Government Act 1993* ("**the 1993 LGA**") commenced, and the relevant provisions of the 1919 LGA were repealed.

239 Any approval granted under the 1919 LGA, or under an Ordinance made under that Act, continued in force as an approval under the 1993 LGA.

240 **Schedule 7** of the 1993 LGA provides (in **cls 3 and 14**):

> **3. General saving**
>
> (1) If anything done or commenced under a provision of an instrument repealed by the Local Government (Consequential Provisions) Act 1993 has effect or is not completed immediately before the repeal of the provision and could have been done or commenced under a provision of an Act specified in clause 2 (1) if the provisions of the Act had been in force when the thing was done or commenced:
>
> (a) the thing done continues to have effect, or
>
> (b) the thing commenced may be completed.
>
> (2) This clause is subject to any express provision of this Act or the regulations on the matter.
>
> ...
>
> **14. Existing approvals**
>
> An approval given, or deemed to have been given, under the old Act or an ordinance under the old Act, and in force immediately before the commencement of Division 1 of Part 1 of Chapter 7, if it is an approval, or an approval of a kind, that may be given under this Act, continues in force and is taken to have been given, and may be revoked, modified, extended or renewed under this Act.

The 1997/8 changes to the EPA Act and to the 1993 LGA

241 Effective **1 July 1998**, the building approval provisions, which had been carried forward from the 1919 LGA into the 1993 LGA, were **transferred** into the EPA Act.

242 A building approval under the 1993 LGA was deemed to be a development consent under the so-amended EPA Act, provided certain criteria were satisfied, namely that the approval would not have required development consent under the unamended EPA Act.

243 In this respect, **cl 45** of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 ("**the 1998 Transitional Regulation**") provided as follows:

> **Approvals**
>
> (1) Subject to Division 1, an approval for a prescribed activity [defined in cl 3 of the 1998 regulation to embrace most building works] granted and in force under the unamended LG Act 1993 (including an approval arising under Division 1 but not including an approval for an activity specified in item 6 of Part A of the Table to section 68 of that Act) is taken to be a development consent granted under the amended EP&A Act 1979.
>
> ...
>
> (3) However, an approval for a prescribed activity granted under the unamended LG Act 1993 is not taken to be a development consent if:
>
> (a) the activity comprises development that, immediately before the appointed day, required development consent under the unamended EP&A Act 1979, and
>
> (b) the development consent referred to in paragraph (a) has not been obtained.

(4) A development consent arising under subclause (1) (being a development consent for building work or demolition work) is taken to be subject to the conditions prescribed by Part 7 of the amended EP&A Regulation 1994 as if the development consent had been granted under the amended EP&A Act 1979.

244 **Clause 46** of that 1998 Transitional Regulation provided:

> **Certain approvals taken to be construction certificates**
>
> (1) An approval granted and in force under the unamended LG Act 1993 for a prescribed activity involving building work is taken to be a construction certificate issued under the amended EP&A Act 1979.
>
> (2) Subclause (1) does not affect the requirements of any condition imposed on the approval including, in particular, any requirements that must be complied with before work is carried out under the authority of the approval.

The EPA Regulation 2000

245 Clause 49 of the Environmental Planning and Assessment Regulation 2000 ("**the 2000 Regulation**") requires a DA to be either made by the owner of the land to which it relates, or with the written consent of that owner. (c.f. s 84A(2) in [233] above).

246 Part 7, Division 1, of the 2000 Regulation (Regs 125 to 129C) deals with applications for CDCs.

247 Regulation **129B** provides that a certifying authority "**must not issue** a [CDC] for development unless a council or an accredited certifier has carried out an **inspection** of the site" (emphasis mine).

248 Regulation **129C** requires that the council or accredited certifier must make a **record** of each inspection carried out for the purposes of cl 129B. Clause 129C(3) provides what such a record **must** include:

> **129C Record of site inspections**
>
> (1) A council or accredited certifier must make a record of each inspection carried out by the council or accredited certifier for the purposes of clause 129B.
>
> (2) Any council or accredited certifier who is required to make such a record but is not the certifying authority in relation to the issue of the [CDC] concerned must, within 2 days after the carrying out of the inspection, provide a copy of the record to the certifying authority.
>
> (3) The record must include the following:
>
> (a) the date of the application for the [CDC],
>
> (b) the address of the property at which the inspection was carried out,
>
> (c) the type of inspection,
>
> (d) the date on which the inspection was carried out,
>
> (e) if the inspection was carried out by a council, the name of the council and the identity and signature of the individual who carried out the inspection on behalf of the council,
>
> (f) if the inspection was carried out by an accredited certifier, the identity of the accredited certifier, including, in a case where the accredited certifier is an accredited body corporate, the identity of the individual who carried out the inspection on behalf of the body corporate,
>
> (g) if the inspection was carried out by an accredited certifier, the accreditation number of the accredited certifier, including, in a case where the accredited certifier is an accredited body corporate, the accreditation number of the individual who carried out the inspection on behalf of the body corporate,

(h) details of the current fire safety measures in the existing buildings on the site that will be affected by the proposed development concerned,

(i) details as to whether or not the plans and specifications accompanying the application for the [CDC] adequately and accurately depict the existing site conditions,

(j) details of any features of the site, or of any building on the site, that would result in the proposed development the subject of the application for the [CDC]:

(i) not being complying development, or

(ii) not complying with the *Building Code of Australia*.

249 Regulation **130AA** in Division 2 of Part 7 provides that, for the purposes of s 85A(8) (see [234] above), the period prescribed by regulations is either 20 days (for development covered by cl 130AB), or 10 days. Division 2 goes on to make other provisions in respect of the determination of an application for a CDC, notification etc. and cl 134 prescribes the form for a CDC.

250 Regulation cl **137(1)** provides:

(1) The determination of an application for a [CDC] is publicly notified for the purposes of section 101 of the Act:

(a) if public notice in a local newspaper is given by the council or an accredited certifier, and

(b) if the notice describes the land and the development the subject of the [CDC], and

(c) if the notice contains a statement that the determination of the application for a [CDC] is available for public inspection, free of charge, during ordinary office hours at the council's offices.

251 The 2000 Regulation includes (in **Part 2 Sch 1** at cl 3) the information which is to be included in any application for a CDC.

252 **Clause 3(e)** specifies that if the applicant for the CDC is not the owner, it must provide a written statement of owner's consent.

253 **Clause 4** lists the documents which must accompany such an application, and Part 3 of the Schedule deals with the information and documents required for an application for a construction certificate.

The Evidence Act

254 Various statutory provisions dealing with evidentiary matters were relied upon during the hearing of this matter.

255 Section **59** (per Stephen Odgers' *Uniform Evidence Law* (10th ed, 2012)) sets out the "**Hearsay Rule**", and ss 60ff deal with exceptions to it. Section **60** provides:

Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).

256 Section **64** provides (notes omitted):

(1) This section apples in a civil proceedings if a person who made a previous representation is available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

...

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is give by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made.

(4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

...

257 Section **135** provides:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

258 Section **136** provides:

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.

The Interpretation Act 1987

259 Section **3(1)** of the *Interpretation Act 1987* defines the word "**instrument**" to mean "an instrument (including a statutory rule or an [EPI]) made under an Act, and includes an instrument made under any such instrument". (Reference was also made in argument to ss 68, 69 and 69A in this regard).

260 Section **5** makes clear that the Act applies to "instruments", and it provides as follows:

5 Application of Act

(1) This Act applies to all Acts and instruments (including this Act) whether enacted or made before or after the commencement of this Act.

(2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.

(3) Wherever appropriate, this Act applies to a portion of an Act or instrument in the same way as it applies to the whole of an Act or instrument.

(4) Nothing in this Act excludes the application to an Act or instrument of a rule of construction applicable to it and not inconsistent with this Act.

(5) This section does not authorise a statutory rule to exclude or modify the operation of Part 6 (statutory rules and certain other instruments).

(6) The provisions of sections 24, 28, 29, 30, 30B, 33, 42, 43, 69A, 75 and 80 that apply to a statutory rule also apply to an [EPI].

261 Section **30** provides:

(1) The amendment or repeal of an Act or statutory rule does not:

(a) revive anything not in force or existing at the time at which the amendment or repeal takes effect, or

(b) affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule, or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule, or

(d) affect any penalty incurred in respect of any offence arising under the Act or statutory rule, or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability or penalty,

and any such penalty may be imposed and enforced, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, as if the Act or statutory rule had not been amended or repealed.

(2) Without limiting the effect of subsection (1), the amendment or repeal of an Act or statutory rule does not affect:

(a) the proof of any past act or thing, or

(b) any right, privilege, obligation or liability saved by the operation of the Act or statutory rule, or

(c) any amendment or validation made by the Act or statutory rule, or

(d) the operation of any savings or transitional provision contained in the Act or statutory rule.

(3) This section applies to the amendment or repeal of an Act or statutory rule in addition to, and without limiting the effect of, any provision of the Act or statutory rule by which the amendment or repeal is effected.

(4) In this section, a reference to the amendment or repeal of an Act or statutory rule includes:

(a) a reference to the expiration of the Act or statutory rule,

(b) a reference to an amendment or repeal of the Act or statutory rule effected by implication,

(c) a reference to the abrogation, limitation or extension of the effect of the Act or statutory rule, and

(d) a reference to:

(i) the exclusion from the application of the Act or statutory rule, or

(ii) the inclusion within the application of the Act or statutory rule,

of any person, subject-matter or circumstance.

262 Section **60** (in Part 10) provides:

60 Laws with specific application not to apply

(1) Nothing in this Part renders a provision of the laws of the State applicable in a particular place:

(a) in so far as the provision is incapable of applying in or in relation to that place,

(b) if those laws expressly provide that the provision does not extend or apply in or in relation to that place, or

(c) if those laws expressly provide that the provision applies only in a specified locality in the State that does not include that place.

(2) A provision of the laws of the State shall not be taken to be a provision to which subsection (1) applies merely because it is limited in its application to acts, matters and things within the territorial or adjacent waters (however described) of the State.

The Real Property and Strata Titles Legislation

The Real Property Act 1900

263 During argument, reference was made to the following provisions of the ***Real Property Act 1900***, in the context of my possibly finding that a crucial error was made in the relevant SP, as registered.

264 Under s **12(1)(d)**, the Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General sufficient, **correct errors and omissions** in the Register. Section 121 requires the Registrar-General to give reasons for any such decision, and s 122 provides for a "dissatisfied" person to bring an appeal in the Supreme Court.

265 Section **40(2)** of the *Real Property Act 1900* provides (emphasis mine):

> No folio of the Register shall be impeached or defeasible on the ground of want of notice or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or **on account of any error**, omission, or informality in such application, or in the proceedings pursuant thereto, by the Registrar-General.

266 Section **42(1)(c)** provides:

> (1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:
>
> ...
>
> (c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value.

The 1961 Strata Act

267 I have earlier referred to the **1961 Strata Act** ([122] above), the key sections of which for present purposes were ss 3, 4, and 18:

268 Section **3** provided:

> (1) Land may be subdivided into lots by registering a strata plan in the manner provided by or under this Act.
>
> (2) When a plan has been so registered the lots comprised therein, or any one or more thereof, may devolve or be transferred, leased, mortgaged, or otherwise dealt with in the same manner and form as any land held under the provisions of the Real Property Act, 1900, as amended by subsequent Acts.

(3) (a) Subject to the provisions of this section, any transfer, lease, mortgage or other dealing affecting a lot shall have the same effect as a similar dealing affecting a lot in a plan of subdivision registered pursuant to section one hundred and ninety-six of the Conveyancing Act, 1919, as amended by subsequent Acts.

(b) A strata plan shall, for the purposes of the Real Property Act, 1900, as amended by subsequent Acts, be deemed upon registration to be embodied in the register book; and notwithstanding the provisions of that Act, as so amended, a proprietor subject to any interests affecting the same for the time being notified on the registered strata plan and subject to any amendments to lots or common property shown on that plan.

(4) Section eighty-eight of the Conveyancing Act, 1919, as amended by subsequent Acts, shall not apply to easements or restrictions as to user implied or created by this Act and such easements and restrictions shall take effect and be enforceable without any memorial or notification on folia of the register book constituting titles to the dominant or servient tenements and without any express indication of those tenements.

269 Section **4** provided (and see Rath, *op cit* [15] above, at pp15ff):

(1) A strata plan shall –

(a) delineate the external surface boundaries of the parcel and the location of the building in relation thereto;

(b) bear a statement containing such particulars as may be necessary to identify the title to such parcel;

(c) include a drawing illustrating the lots and distinguishing such lots by numbers or other symbols;

(d) define the boundaries of each lot in the building by reference to floors, walls, and ceilings, provided that it shall not be necessary to show any bearing or dimensions of a lot;

(e) show the approximate floor area of each lot;

(f) have endorsed upon it a schedule complying with the provisions of section eighteen of this Act;

(g) have endorsed upon it the address at which documents may be served on the body corporate in accordance with section twenty-seven of this Act;

(h) contain such other features as may be prescribed by regulations under this Act.

(2) Unless otherwise stipulated in the strata plan, the common boundary of any lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be.

(3) Every strata plan lodged for registration shall be endorsed with or accompanied by a certificate –

(a) of a surveyor registered under the Surveyors Act, 1929, as amended by subsequent Acts, that the building shown on the strata plan is within the external surface boundaries of the parcel the subject of the strata plan and where eaves or guttering project beyond such external boundaries. that an appropriate easement has been granted as an appurtenance of the parcel;

(b) of the town or shire clerk of the local council that the proposed subdivision of the parcel, as illustrated in the strata plan, has been approved by the local council; and

(c) pursuant to section 317A of the Local Government Act, 1919, as amended by subsequent Acts, in respect of the building.

270 Section **18** provided:

Every plan lodged for registration as a strata plan shall have endorsed upon it a schedule specifying in whole numbers the unit entitlement of each lot and a number equal to the aggregate unit entitlement of all lots, and such unit entitlement shall determine –

(a) the voting rights of proprietors;

(b) the quantum of the undivided share of each proprietor in the common property;

(c) the proportion payable by each proprietor of contributions levied pursuant to subsection two of section fifteen of this Act.

The 1973 Strata Act

271 The *Strata Schemes (Freehold Development) Act 1973* ("the **1973 Strata Act**") **repealed the 1961 Strata Act**, and made more comprehensive provision for "the subdivision of land into cubic spaces and the disposition of titles thereto".

272 In s **5**, "**common property**" is defined to mean so much of a parcel of land comprised in a SP as "is **not comprised in any lot**" (emphasis mine).

273 That section also defines "**lot**" and "**structural cubic space**", in these terms (some emphasis added):

"**lot**" is defined as:

> one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being **designated** as one lot or part of one lot on the floor plan forming part of the strata plan, a strata plan of subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but **does not include any structural cubic space** unless that structural cubic space has boundaries described as prescribed and is described in that floor plan as part of a lot.

"**structural cubic space**" is defined as:

> (a) cubic space occupied by a vertical structural member, **not being a wall**, of a building,
>
> (b) any **pipes, wires, cables or ducts** that are not for the exclusive enjoyment of one lot and:
>
> > (i) are in a building in relation to which a plan for registration as a strata plan was lodged with the Registrar-General before the day appointed and notified under section 2 (3) of the *Strata Titles (Development Schemes) Amendment Act 1985* , or
> >
> > (ii) in any other case-are in a building or in a part of a parcel that is not a building,
>
> (c) any cubic space enclosed by a structure enclosing any such pipes, wires, cables or ducts.

274 Under s **6**, the 1973 Strata Act is to be read and construed as if part of the *Real Property Act 1900*. Subsection (2) of s 6 provides:

> The *Real Property Act 1900* applies to lots and common property in the same way as it applies to other land except in so far as any provision of that Act is inconsistent with this Act or is incapable of applying to lots or common property.

275 Section **8** deals, in detail, with the registration of SPs. It comes within Div 1 of Part 2, entitled "Creation of lots and common property". Division 2 deals with specifically "Common property", and s 18 provides:

(1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

(2) The Registrar-General shall, upon registration of a strata plan, create a folio of the Register for the estate or interest of the body corporate in any common property in that strata plan.

...

276 **Schedule 4** contains transitional and savings provisions, relevantly including **cl 3**, which provides:

Former lots and former common property to be derived lots and derived common property

(1) Where immediately before the appointed day [*the date of commencement of the Act, under s 2*]:

(a) a former lot had any boundary that under section 4 (2) of the former Act was the centre of a floor, wall or ceiling, that former lot, on the appointed day, becomes for the purposes of this Schedule a derived lot corresponding to that former lot and having, subject to subclause (2), as its boundaries:

(i) instead of any boundary that was the centre of a floor, wall or ceiling, the upper surface of that floor, the inner surface of that wall or the under surface of that ceiling, as the case may be, and

(ii) except as provided by subparagraph (i), the same boundaries as that former lot, and

(b) a former lot had no boundary that under section 4 (2) of the former Act was the centre of a floor, wall or ceiling, that former lot, on the appointed day, becomes for the purposes of this Schedule a derived lot corresponding to that former lot and having as its boundaries the same boundaries as that former lot.

(2) A derived lot does not include any structural cubic space unless that structural cubic space was stipulated, in the relevant strata plan or strata plan of resubdivision, as forming part of the former lot to which that derived lot corresponds.

(3) On the appointed day, former common property becomes, for the purposes of this Schedule, derived common property corresponding to that former common property but has as its boundaries:

(a) where any derived lot has any of its boundaries ascertained in accordance with subclause (1) (a) (i) or (b), boundaries adjusted reciprocally, and

(b) except as provided by paragraph (a), the same boundaries as that former common property.

(4) A reference to a former lot made in any instrument executed before the appointed day (being an instrument relating to the sale or other disposition of an estate or interest in that former lot) shall, on and after that day, be construed as a reference to the derived lot which corresponds to that former lot.

The 1996 Strata Act

277 Early in this judgment ([43]), I also referred to the **1996 Strata Act**, the objects of which were stated (in s **3**) to be:

(a) to provide for the management of strata schemes created under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, and

(b) to provide for the resolution of disputes arising in connection with the management of strata schemes.

278 Sections **62** provides:

> **62 What are the duties of an owners corporation to maintain and repair property?**
>
> (1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

279 Part 1 of Chapter 4 includes s **116**, which provides:

> **Owners, occupiers and other persons not to interfere with structure of lot or services to lot**
>
> (1) An owner, mortgagee or covenant chargee in possession (whether in person or not), lessee or occupier of a lot must not do anything or permit anything to be done on or in relation to that lot so that:
>
> > (a) any support or shelter provided by that lot for another lot or common property is interfered with, or
> >
> > (b) the passage or provision of water, sewage, drainage, gas, electricity, garbage, artificially heated or cooled air, heating oil and other services (including telephone, radio and television services) through or by means of any pipes, wires, cables or ducts for the time being in the lot is interfered with.
>
> (2) The owner of a lot must not alter the structure of the lot without giving to the owners corporation, not later than 14 days before commencement of the alteration, a written notice describing the proposed alteration.
>
> (3) In this section, lessee of a lot in a strata leasehold scheme means a sublessee of the lot.

280 **Chapter 5** contains, in seven Parts, ss 123 to 211.

281 It deals with "Disputes, and Orders of Adjudicators and [the CTTT]". (The former CTTT is now part of the NSW Civil and Administrative Tribunal, or "NCAT".)

282 The disputes covered are of a wide variety, and Chapter 5 commences with a comprehensive table of the types of orders which may be made, the persons who may apply for them, and the relevant section of the Act.

283 Parts 1 to 3 of Chapter 5 deal with the application and mediation processes.

284 **Part 4** deals with the Adjudication process (including s 171, which provides for variation or revocation of an order made by an Adjudicator, and ss 177ff which provide for appeals to the Tribunal against an order made by an Adjudicator).

285 **Part 5** deals with the jurisdiction of the Tribunal to make orders. **Part 6** deals with enforcement of orders made by Adjudicators and the Tribunal, and s 202(1) provides that the Tribunal may impose a pecuniary penalty of up to 50 penalty units for contravention of an order under that chapter.

286 When this Court comes to consider certain questions of **costs** in respect of the present proceedings, ss 229 to 230A, to which Mr Docker drew attention, may be very relevant. They provide:

> **229 Costs in proceedings by owners against owners corporation**
>
> > (1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).

(2) The court may order in proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to such lots and in such proportions as are specified in the order.

(3) If a court makes such an order the owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.

(4) Division 2 of Part 3 of Chapter 3 (section 78 (2) excepted) applies to and in respect of contributions levied under this section in the same way as it applies to contributions levied under that Division.

230 Restrictions on owners corporation levying contributions for expenses

(1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it under Chapter 5, levy a contribution on another party who is successful in the proceedings.

(2) An owners corporation that is unsuccessful in proceedings brought by or against it under Chapter 5 cannot pay any part of its costs and expenses in the proceedings from its administrative fund or sinking fund, but may make a levy for the purpose.

(3) In this section, a reference to proceedings under Chapter 5 includes a reference to proceedings on appeal.

230A Disclosure of matters relating to legal costs

If a disclosure under Division 3 of Part 3.2 of the *Legal Profession Act 2004* is made to an owners corporation in respect of the costs of legal services to be provided to the owners corporation, the owners corporation must give a copy of the disclosure to each owner and executive committee member within 7 days of the disclosure being made.

F: The Applicant's Grounds of Challenge

287 Having set out such a detailed factual history, extensive quotes from the evidence, and many statutory provisions which could prove relevant to the determination of this dispute, I now address the various claims made by the applicant Owners Corporation, which, it says, warrant the making of the orders it seeks, namely two declarations and one injunction ([54] above).

288 The Corporation's case for the two declarations (as a basis for injunctive relief) involves **four** distinct grounds, each an alleged breach of the EPA Act, in respect of the proposed works. These grounds were helpfully summarised in the respondents' "speaking notes" filed on 22 May (at par 2), generally in these terms (emphasis mine):

> **(1)** the CDC is invalid because it was issued in **breach of a deemed development consent**, being building approval No. 524/62 ... granted by the Council in 1962 [contrary to s 76A of the EPA Act – see [231] above];
>
> **(2)** the CDC is invalid because the development it approves is **not complying development** as the CDC is in breach of an existing deemed development consent [cl 10A(2) and Schedule 9(g)) of the 1988 LEP [[206] above], and s 84A(1)(b)(ii) of the EPA Act [[233] above] refer];
>
> **(3)** the CDC is invalid because **the works** it approves **involve common property** and Seddon and Larsen **failed to obtain the consent** of the Owners Corporation to the application for the CDC. ... ; and
>
> **(4)** the **Council carried out no inspection** before issuing the CDC, and, therefore, the CDC is invalid.

289

I will now address these grounds in turn.

Grounds (1) and (2) – Deemed Development Consent?

290 It is convenient to deal with these two grounds together as they both rest on the alleged existence of a DC, which is "deemed", but, on the Corporation's case, deemed from **only** BA524/62.

291 Condition 7 of that deemed DC, if the Court finds it is one, requires the maintenance of the common facilities in their current position, i.e. within Lot 15 (see [129] above).

The Applicant's Submissions on Grounds (1) and (2)

292 In closing the oral submissions she made at the conclusion of the evidence, on 22 May 2014, Ms Byrne summarized her case thus (Tp216, LL24 – 49):

> These are our points. We say there's an error in the strata plan, and for the purposes of the EPA Act that part of lot 15 can be construed for the purposes of the EPA Act common property, and therefore requiring owners' consent. Secondly, we say that the works involved the removal of pipes and interference with pipes and wires that are excluded from the lot, lot 15. Thirdly, we say on a true construction of what the CDC, the works that the CDC is intending to give approval to, would involve excluding the lot owners from the use of the laundry and toilet, and for that reason owners' consent was required. And, this is the first ground, the CDC then didn't comply with the condition of a development consent, the application for the CDC didn't comply with the condition of a development consent which was the provision I took you to in the Manly LEP 1988.
>
> So that's fitting all the facts together that we say mean that the CDC is invalid. If you took the narrow view and said the CDC just says remove non-structural wall, we say that the first and second respondent were intending and have admitted in their points of defence that they were removing the laundry, and that's in breach of the development consent and therefore they should be injuncted for that reason. That was prayer 1(i). So even if we lose the validity of the CDC on all of the three grounds we say that there is an apprehended breach in this matter and that the first and second respondent should be injuncted in accordance with section 124 unless and until some point in time which they get owners' consent. I've varied the owners' consent to the removing of the fittings and fixtures. That's the way I've varied the injunction in the further amended summons, so that it's not back to the court then, it would be up to the owners' consent.

293 The Corporation's claims are based on the operation of cl 41(2) of the CCPSO (set out above at [192]), such that BA524/62 operated not only as a BA, but also as a PC or DC, provided that Council was satisfied that the original application contained enough information relevant for approval of both construction of, and use of the land for, a RFB.

294 The operation of the relevant transitional provisions over time since 1962, the Corporation argues, preserve the BA as a consent, and condition 7 (see [129] above), in conjunction with the "approved plans", which depicted the common facilities in their current location (see [125] above), would remain enforceable to mandate the continued presence of the common facilities in Lot 15.

295 Ms Byrne said (at Tp177, LL5 – 25):

> Clause 41(2) of the CCPSO was in terms that it's--
>
> "…to be treated as an approval for consent if consent is required under this instrument "unless the application does not contain the information and particulars required by subclause (1) of this clause and the responsible authority so informs the applicant on or before giving its decision under the Act or under the ordinance made under the Act."

> So the fact that it's been approved and they haven't written back requiring - and subclause (1) of 41 was in relation to plans and particulars, they've been prepared to approve it subject to plans being amended and, therefore, we say it is both a planning approval and a building approval, your Honour…

296 All three respondents deny these claims.

297 They argue that the earlier (1960) consent (see [114] above) obviated the need for any further PC at the time BA524/62 was lodged. Accordingly, PC was not "required", again, when BA524/62 was granted, and cl 41(2) was not engaged.

298 In her final oral submission in reply, Ms Byrne submitted that the 1960 PC did not obviate the need for the building, as approved, to be given fresh PC/DC in 1962, for the following reasons:

299 Firstly, the consent given in 1960 gave consent for 12 Units (see [114] above), whereas the 1962 application gave approval/consent to build only 9 units. Accordingly, she argued, the 1960 consent could not possibly have been relied upon in respect of the smaller development.

300 Secondly, a Council officer advised Berry, by letter dated **21 December 1960** (*Exhibit A5*), that the 1960 consent was "null and void" (see [119] above).

301 Thirdly, as Ms Byrne submitted – for the **first** time in her (final) oral reply, late on the fifth and final day of the hearing – the 1960 PC had **lapsed**, pursuant to cl 41(5) of the CCPSO (see [192] above), by the time BA524/62 was approved. It, therefore, could not act as a separate consent for the use of the land (Tp297, LL30 – 46).

302 Both Mr Docker and Mr Seymour objected to this lapsing submission, complaining about its sudden arrival at the very end of argument in the case (Tp297, L48 – Tp298, L7).

303 They claimed that it caused all three respondents significant prejudice, as they had prepared their defences to the Corporation's summons, as it stood prior to its "further amendment" on the first day of hearing, and had seen no need, based on the pleadings, to bring any evidence on "substantial commencement" and the like, to negative any suggestions of lapsing (see Tp298, L43 – p299, L5, and Tp302, LL19 – 36).

304 In respect of any prejudice allegedly suffered by the Council, Ms Byrne submitted (Tp301, LL41 – 48):

> It's in their (sic – [council's]) history. The County of Cumberland Planning Scheme Ordinance has been in this case since I first listed it on 24 January 2014 in the points of claim that were then filed. Now any lawyer acting for a council would, in my submission, look at the whole of that scheme. The whole of that instrument to see if there's anything that either helped him, hindered him, whatever. It's not acceptable for the council, particularly, to submit that they're prejudiced because I've referred to subclause (5) of clause 41 in reply, your Honour. I see no prejudice that rests with the council.

305 Ms Byrne submitted that, if I found that BA524/62 was both a PC and a BA, there are two separate and distinct avenues through which that consent would be preserved.

306 The **first** avenue involves savings provisions in the various planning "instruments" consecutively described above:

307

In 1968 the MPSO was made, and the CCPSO was repealed. Clause 66 of the MPSO preserved any rights or obligations acquired under the CCPSO, and cl 69 preserved any conditions of a consent granted under the CCPSO, that were not inconsistent with any provisions of the MPSO (see [202] above). These conditions were to be treated as if they had been granted under the MPSO. Subsequently, the EPA Act came into force on 1 September 1980. By virtue of the 1979 Planning Repeal Act (Sch 3, cl 2), the MPSO became a deemed EPI (see [226] above). Clause 7 of that Schedule provided that any consent, approval or permission granted under a former planning instrument became a DC within the meaning of the EPA Act (see [227] above – and applicant's written subs 30 – 31). As such, BA524/62 became a "deemed DC" under the EPA Act.

308 The **second** avenue is through the LGA 1993:

309 At the commencement of the 1993 Act, the 1919 Act was repealed. Any approvals granted under the 1919 Act, including approvals granted under an ordinance made under that act continued in force (LGA 1993 Sch 7, cl 14 – see [240] above). On 1 July 1997 the building approval provisions under the LGA were transferred to the EPA Act. An approval granted under the LGA was deemed to be a DC granted under the EPA Act, provided that the approval did not require DC under the unamended 1979 EPA Act (applicant's written subs 32 – 33 – and see [243] above).

310 Having established that BA524/62 was a PC that had been preserved and remains in force, the Corporation argues that condition 7 of it is enforceable, and that the removal of the common facilities would be contrary to it, and so breach s 76A of the EPA Act (ground (1)). Any CDC (or other approval) authorising works in contravention of it would be invalid (ground (2)), because it would not be "complying development" (see [206] above). Ms Byrne submitted (par 35):

> If the approval is a deemed development consent under the EPA Act condition 7 of the approval forms part of the development consent and can be enforced accordingly. The deemed development consent runs with the land and binds successors in titles. It approved the common laundry and toilet in the present location as shown on plans lodged pursuant to condition 7. The consent cannot be varied or removed without approval from Manly Council by way of a modification to the consent. Such a modification application would require the written consent of the Body Corporate. It can be relied on as an 'existing consent' preventing council on insisting that any parking spaces (ie the residual of Lot 15) meet current building and planning standards and requirements.

The Respondents' Submissions on Grounds (1) and (2)

311 In relation to grounds (1) and (2), Mr Docker adopted (par 8) the written submissions of the Council, but made some additional/supplementary submissions in respect of them on his clients' behalf.

312 Mr Docker submitted that BA524/62 did not operate as both a building approval and a PC for the following reasons (par 9 – "CB" being "Court Book", now *Exhibits A1* and *A2*):

> (a) The Building Approval was issued following an application for approval to build, not for planning consent: CB A1-2/106;

(b) Although the Building Approval itself is not in evidence, there is no reference to the Building Approval being a planning consent in the papers for the meeting of the Health and Building Committee of the Council on 13 November 1962 or in the letter to the applicant advising of approval on 22 November 1962: CB A8-9 & 11-12/106.

(c) There is a planning consent in respect of the Site, being number 60/1594, which suggests the Building Approval is not a planning or development consent. The papers for the meeting of the Health and Building Committee of the Council on 13 November 1962 also refer to the application in respect to planning consent on this allotment being considered by the Council on 8 November 1960: CB A8/106.

313 Mr Docker submitted that, even if I found that BA 524/62 was also a PC/DC, condition 7 was **not** preserved upon the gazettal of the MPSO, because condition 7 was inconsistent with a provision of the MPSO (cl 69– see [202] above). This inconsistency arose because the provision of the common facilities on Lot 15, pursuant to condition 7, resulted in a garage space smaller than that mandated by the MPSO (cl 57(2)(a)). Mr Docker said (Tp251, L40 – p252, L2):

> DOCKER: So the internal is 3,600 millimetres which is 11 foot 10. If it's being measured right to the end of the lot it's 13 and a half feet. As a result of this condition this lot or this parcel of land has on it nine parking spaces, because your Honour knows there's six parking spaces in the building and three outside, and one of them is either 11 foot 10 or 13 and a half feet long. That is inconsistent with clause 57(2)(a) which is on page 33 of the Manly Planning Scheme Ordinance, which requires that for the purposes of a residential flat building, which is this, provision must be made for a vehicular parking space for every flat within the building, that is there has to be nine of them which are not less than 18 feet by 8 foot 6. So if the condition existed as a condition of a planning consent prior to the Manly Planning Scheme Ordinance coming in, it died on that coming in because it's inconsistent with that condition and therefore it doesn't get revived by clause 69.

314 Regarding Ms Byrne's "second avenue", through which condition 7 of BA524/62 is allegedly preserved, Mr Docker submitted that the provisions upon which she relied do **not** preserve condition 7, because BA524/62 is simply **not a PC**. He said (Tp252, L50 – p253, L8):

> Insofar as it is alleged by the applicant that the second path to a deemed planning consent, that is the one through the Local Government Act and the EP&A Amendment Act in 1987, is of itself a separate path. It's just not available because it's not a planning consent through that path, it's only a building approval, and as I submitted earlier it needs to be a planning consent to assist the applicant's case, because if it's only a building approval it applies to the whole of the building and the first and second respondents are not doing building, nor do they have control of the whole site, and so they can't be in breach of it.

315 Mr Docker submitted that, even if condition 7 remains enforceable, it refers only to the provision of a common laundry, and there is no mention of the intended removal of laundry facilities in the CDC, and condition 7 does not require the laundry facilities to be provided on Lot 15. Hence, the respondents do not breach condition 7 by removing the laundry facilities from that lot. They have no obligation to provide those shared facilities on their land, and nothing precludes such shared facilities from being placed elsewhere (par 11). Mr Docker submitted, in closing (Tp253, LL21 – 31, and p254, LL29 – 40):

> The first thing I'd say about such an argument is that because it's not the respondents' obligation, and because it doesn't apply to lot 15 specifically, then the works don't breach any such condition and also the respondents don't breach it. Even if your Honour was against me on that, it's my submission that it can't be said that the taking away of these laundry facilities necessarily results in a breach of that condition. The reason for that is because it's open for The Owners Corporation to provide these facilities elsewhere on the block, and there was actually evidence before your Honour

> which showed that that was a proposal which the council favoured, and in fact Mr Grevatt said in cross examination he was told in the pre-lodgement meeting by the council officer that the council would approve it. Your Honour might recall that answer.
>
> …
>
> The point for this purpose of the argument is that your Honour should find that it's not necessary that they be in lot 15, or it hasn't been established that it's necessary that they be in lot 15. It's The Owners Corporation's obligation, if anyone has one, to provide these facilities. So the removal of them from lot 15 doesn't mean there's a breach of this condition if it persists. The second reason why it's not a breach, your Honour, is that The Owners Corporation is already in breach of the condition because your Honour might recall the condition itself which comes out of Ordinance 71, clause 56(b), requires there to be a laundry for every eight lots or part thereof, and there's nine lots, so they're already in breach. So it's not a question of being more in breach. There's no such thing. If there's already a breach then taking it away can't constitute a breach of the condition if it exists.

316 Ms Byrne argued, in response, that the approved plans showed the common facilities on what became Lot 15. As those plans form part of the approval/consent, the common facilities are, absent a modification of the consent, to remain in that location, independent of the operation of condition 7, and their removal from their approved position would be a breach of the DC, irrespective of the application of condition 7 (par 8 of reply). She said (Tp184, LL32 – 37):

> We know that once a consent is granted, conditions form part of it and the plans form part of the consent your Honour. So the authority really is more in the territory of *House of Peace v Bankstown City Council* (2000) 48 NSWLR 498, and the words of President Mason that have been applied repeatedly about what is the nature of the development consent? It operates in REM, it endures and binds successors in title and the world at large.

The Council's Submissions on Grounds (1) and (2)

317 Ms Byrne relies upon Council's documents, but Mr Seymour made the point, during her oral submissions (see Tp174, LL45 – 46), that "the Court can't use these documents to construe the approval", and Ms Byrne conceded that (at L58).

318 Mr Seymour submits (par 19) that BA524/62 is not a DC under the EPA Act, because it is not a "consent, approval or permission", granted under a "former planning instrument" (See cl 7 Sch 3 of the 1979 Planning Repeal Act – see [227] above). Rather, it remains simply a BA, granted under the now repealed LGA 1919.

319 Mr Seymour said (Tp279, LL18 – 45):

> So what clause 7 is picking up, "consent approval or permissions granted in respect of an application made under a former planning instrument". The County of Cumberland Planning Scheme Ordinance is a former planning instrument and the council has no difficulty with the 1960 planning consent being something that might have been caught by this section and turned into a development consent. But that's not part of my friend's case. My friend says, the 1962 building application is a consent approval or permission granted in respect of an application made under a former planning instrument and this is why it's important, your Honour, that my friend be able to establish that it was two things in one because if it was only a building application for the purposes of the 1919 Act which is what we say, then it doesn't get picked up by clause 7 because that wasn't something made under a former planning instrument, it was something made under the 1919 Act.

> So it's only by mashing them together that my friend gets her historical continuation, but if they weren't - if they were two separate things then that clause simply isn't engaged and so that's what I've said at paragraph 22 at the last sentence, "As the building approval 524/62 was something granted under the 1919 Act that clause of that repeal Act just isn't engaged".
>
> Now, I can make good the proposition that they're different things and it may depend on your Honour's view about whether this involves the construction of an approval in the sense that the authorities say is a limited form of inquiry or whether your Honour permits it looking at the assessment material. It won't matter either way, but the council has to submit to your Honour as part of the planning system. This does involve the construction of approvals and traditionally that just means one goes to the approval itself and then looks at what's been brought into it. ...

320 Mr Seymour pointed to a number of facts which, he says, indicate that BA524/62 was **not** a PC/DC.

321 Firstly, the minutes of the Council meeting approving BA524/62, held on 13 November 1962, never refer to the application before it as an application for PC (*Exhibit A1*, tab A, fol 6/109, and Tp282, LL21 – 24). On the contrary, they expressly refer to an earlier PC application considered at a meeting on 8 November 1960 (see [128] above, subs par 20, and Tp280, LL31 – 49). As the minutes record (tab A, fol 8/109), "Council at its meeting held on the 8th of November, 1960, dealt with an application in respect of [PC] on this allotment".

322 Additionally, the approved plans (*Exhibit A1*, tab A, fol 10 – see [125] above), and a subsequent notification letter sent by the Council, informing REX Building Co of the approval (*Exhibit A1*, tab A, fol 11 – see [132] above), also do not refer to the application as being for PC – "no mention of a [PC] whatsoever" (Tp282, LL21 – 24).

323 Mr Seymour also submitted (par 24) that the "assessment considerations" the then Council identified as being relevant to BA524/62 (see *Exhibit A1*, Tab1, of fol 5/106), indicate that it was a BA granted under the 1919 LGA, as opposed to a PC issued under the CCPSO. He submitted that the matters considered were consistent with those required in the assessment of a BA under the LGA, as opposed to the process of assessment for a PC under the CCPSO. Mr Seymour said (Tp283, L2 – p284, L7):

> So, what is being assessed there, apparently, is the character of the proposed area and in the vicinity as a requirement, so it states on its face, of clause 25(a) of a draft Ordinance.
>
> Now, the County of Cumberland Planning Scheme Ordinance had a similar requirement and it was in - if your Honour then has exhibit A2 and I'll be asking your Honour to compare a few clauses of the Planning Scheme Ordinance to what was done, but relevantly, clause 27 which is on page 23, so this is the forerunner to a sort of section 79C when you're coming to address a planning consent what are the matters that you should take into account and your Honour will see from paragraph (b),
>
> > "The character of the proposed development in relation to the character of the development on the adjoining land and in the locality".
>
> Okay. They're similar things, but why on earth, if this was a planning consent assessment would that be addressed as something in a draft Ordinance requirement when it's an explicit requirement of clause 27(b) of the County of Cumberland Planning Scheme Ordinance. It just doesn't make sense. That's not my best point. But it is obvious that the person assessing this hasn't dealt with that as a legal requirement of the County of Cumberland Planning Scheme Ordnance. They've put consideration of amenity in terms of draft Ordinance requirements.

> Now, if your Honour then can see on page 6 what this material is showing, the area of the allotment calculated, the percentage of the area of the site calculated, the area of the building within that is calculated, the area available for carparking is calculated and the area to be occupied by the carparking is calculated. There is nothing in clause 27 that requires that to occur, but if your Honour then has the extract of the Local Government Act, that is at the time--
>
> …
>
> If your Honour goes back a page you can see that your Honour is in section 314A, "Special provisions relating to residential flat buildings in certain parts of areas" and then in terms of paragraph 2, the considerations that the Local Government Act is requiring in terms of building approval applications under itself. Paragraph (a), provision of natural light and ventilation of rooms. Paragraph (c), the proposition of a site to be covered by the building. Paragraph (d), the total floor area in proportion to the area of the site. Paragraph (g), the provision of suitable space for parking and accommodation of vehicles, etcetera. So these figures are entirely consistent with an assessment under this section. Nothing in the County of Cumberland Planning Scheme Ordinance required that level of detail.

324 He further submitted (see Tp284, LL10 – 44) that BA524/62 also could not be a PC, as the Council did **not** consult with the CCC (the regional authority) during its assessment, as required by cl 43 of the CCPSO, because the development was within a foreshore scenic protection area. It was argued that this was not done at that stage, because such consultation had already occurred (see [112] above) when Council was assessing the 1960 PC application, thus illustrating that the 1962 BA was granted in reliance on that 1960 PC.

325 Mr Seymour said (Tp284, LL38 – 44):

> So again, what we have when we look at the totality of the materials is a clear two step and the applicant's case will entirely fall over if your Honour makes that finding which we say is entirely consistent with the materials and the only thing that my friend can point to to suggest that it's both things is that clause of the County of Cumberland Planning Scheme Ordinance saying if you want it to be it can be both. If it needs to be it can be both. But we say there wasn't any need for it because it had occurred in two stages.

326 As BA524/62 was not a PC, the transitional provisions relied upon by the applicant do not preserve it as such.

327 In respect of the applicant's "second avenue", Mr Seymour submitted that, as the BA permitted the applicant only to "erect a building", as opposed to Council's consenting to the use of that building in its present form, BA524/62 is not preserved by cl 45(1) of the 1998 Transitional Regulation. He submitted (speaking notes pars 26 – 28):

> 26. The Corporation also relies on the transition of "approvals" from the 1919 Act to the Local Government Act 1993 and then into the Environmental Planning and Assessment Act 1979 by the Environmental Planning and Assessment Amendment (Savings and Transitional) Regulation 1998 ("the Building Approval Transition Regulation").
>
> 27. It is important that these transitional provisions saved approvals that were "for a prescribed activity" (being, in context, "To erect a building"). As at the time of these transitional provisions (ie 1 July 1998) there was no need for Building Application 524/62 to permit of the activity of "erect a building" as the Building had been erected. The ongoing *use* of the Building did not depend on Building Application 524/62 but on the earlier grant of Planning Consent in 1960 (which the Council accepts is the appropriate instrument that has an on-going life as a development consent due to the operation of transitional provisions and this is consistent with the analysis conducted by Pain J in *Caltex Aust* [sic] *v Manly Council* (2006) 155 LGERA 255).

> 28. Building Approval 524/62 is not a "development consent" for the purposes of clause 45(1) of the Building Approval Transition Regulation. It might be a *construction certificate* for the purposes of cl 46(1) of that Regulation.

328 Even if the BA is considered a PC, and its conditions are preserved by the transitional provisions, Mr Seymour submitted that condition 7, properly construed, created no ongoing obligation to provide the common facilities. He said (sub 25):

> In any event, the relevant condition was expressed, in terms, to apply to the plans the subject of the building approval. This condition was satisfied once those notations on the plans were made. The condition then expired in practical effect on registration of the strata plan: *Hillpalm v Heaven's Door Pty Ltd* (2004) 200 CLR 472. Following registration of the Strata Plan, the rights and liabilities of the residents of the Building concerning the use of individual lots and common property, inter se, would be determined by the registered plan and any subsequently issued certificate of title and, in those terms, the register is paramount: *City of Canada Bay Council v F&D Bonaccorso Pty Ltd* [2007] NSWCA 351 [("*Canada Bay"*)]; *Koompahtoo Local Aboriginal Land Council v KLALC Property Investment Pty Ltd* [("*Koompahtoo*")] [2008] NSWCA 6.

329 Council further submitted (par 27) that, even if Condition 7 did create an ongoing obligation to provide laundry facilities, that obligation rested on the applicant, not on the respondents, and relates to its ability to provide those facilities on the common property. It does not require the placement of the common facilities on Lot 15, nor apply to Lot 15 at all.

330 Mr Seymour submitted that the works authorised by the CDC would not contravene BA524/62, even if it be considered a DC. The CDC is clear as to what works it certifies – removal of an internal non-structural wall. The removal of any fixtures, and the capping of pipes servicing Lot 15 do not require approval, such work being "exempt development". He said (Tp264, LL24 – 42):

> If, as my friend has said, you go to the plans it puts it beyond all doubt that the certification is in respect of work within lot 15. If I then take your Honour to those drawings, because at the moment I'm just construing the instrument. That starts at page 32. What I'd ask your Honour to do is just to compare the certified development on page 46 to the drawing shown on page 32, and the development is the removal of a non-structural wall of an existing residential flat building, or within an existing residential flat building. If one asks what is the wall that's being removed, then that's what's depicted on the drawing on page 32 and that's confirmed on page 33 by the hatching. So that's the development that we say has been certified.
>
> There may well be an argument about whether the removal of the sinks and the toilet has been certified. For my part I would say that it wasn't certified, but that's a question of whether the plans incorporated that beyond the description of the complying development. It doesn't matter because what I'll take your Honour to eventually is the exempt development part of the LEP and minor operations to residential buildings are exempt development. So on any view, whether the removal of the sinks and the toilets were certified by this instrument or not doesn't really matter because they're exempt development.

Consideration of Grounds (1) and (2)

331 In light of the competing submissions of the parties on these two grounds, there are four questions which fall for consideration:

(1) Is BA524/62 a PC by virtue of cl 41(2) of the CCPSO, and, therefore, a "deemed" consent under the EPA Act?;

(2) If it is a PC, is BA524/62, including condition 7 (see [129] above), preserved by the relevant transitional provisions?;

(3) If so preserved, does BA524/62 create a continuing obligation on the owners of Lot 15 to maintain the common facilities on their property?; and

(4) If it does, are the proposed works in contravention of BA524/62?

Q. (1) Is BA524/62 a planning consent by virtue of cl 41(2) of the CCPSO?

332 There is much to commend Mr Seymour's analysis that Council followed the then usual two or three stage process (development approval, building approval, SP), and no basis was advanced for a Town Clerk to simply write a letter declaring a PC "null and void", and inviting a fresh application. However, **no case** has been properly made to the Court by the applicant that the 1960 PC actually lapsed, as envisaged by cl 41(5) (see [192] above).

333 On the other hand, there is High Court authority that would dictate a finding that BA524/62 is indeed a PC, by virtue of cl 41(2) of the CCPSO.

334 In 1967, Wilcox wrote (*op cit* [183] above, p338):

> In many cases an applicant for development consent to erect a building or work or open a new road would have to seek the consent of the same authority under a different Part of the Act (e.g. Pt. XI or Pt. XII). This is the case whenever the local council is the responsible authority for the purposes of development consent. In such a case no separate development application is necessary; the building or road opening application is deemed to be also a development application except where the application omits particulars required by the ordinance and the council so informs the applicant on or before its decision on the building application. This provision, which appears not only in the County of Cumberland Planning Scheme ordinance but also in the various local schemes, is of great benefit in minimizing formalities. It is not, of course, incumbent on an applicant to use this concession. In may cases he may prefer to defer preparation of a formal building application or subdivision application, with the necessary plans, until development consent is granted.

335 He added (at p438) a comment suggesting that cl 41(2) of the CCPSO enabled Council approvals to be "simultaneously both building and development approvals".

336 In 1974, the High Court decided *Drummoyne Municipal Council v Lebnan* ("*Lebnan*") [1974] HCA 34; 131 CLR 350. Mr Wilcox appeared for the successful respondents. The principal judgment (of the 4-1 majority) was delivered by Gibbs J. Menzies J dissented, but Barwick CJ agreed "entirely" with Gibbs J, Stephen J expressed "complete agreement" with him, and Mason J also agreed, without added comment.

337 The case turned on cl 31(3) of the Drummoyne PSO which provided:

> Where, in pursuance of the Act (except Part XIIA thereof) or of an Ordinance made under the Act (except the said Part), an application is made to the Council for its approval to erect a building or work or to open a new road, such application shall, if the matter to which it relates requires the consent of the responsible authority under this Ordinance, be deemed to be an application for such consent, unless the application does not contain the information and particulars required by sub-clause (1) of this clause and the responsible authority so informs the applicant on or before giving its decision in respect of such application.

338 It is to be noted that the terms of cl 31(3) are in all material respects identical to those of cl 41(2) of the CCPSO ([192] above).

339 Gibbs J said (at 358 – 9):

> The material words of the Ordinance – "if the matter to which it relates requires the consent of the responsible authority under this Ordinance" – raise the question whether the consent of the responsible authority is required and not whether the consent has in

> fact been given. The fact that there is a subsisting consent does not mean that the proposed building does not require a consent – it merely means that the requirement, if it exists, is satisfied. Clause 31 (3) was apparently intended to deal with those cases where, to speak only of buildings, the erection of a building requires the consent of the responsible authority under the Ordinance as well as the grant of a building approval under Pt XI of the Act. It no doubt appears convenient that it should be possible in such cases to obtain the two requisite consents upon one application only. In some such cases the landowner concerned may consider it prudent to obtain a development consent before proceeding to prepare the building plans necessary to support an application under Pt XI, but having regard to the time necessary to prepare building plans it is by no means unlikely that, as happened in the present case, the existing development consent will be due to expire soon after the building approval takes effect. In such a situation it would again appear convenient, speaking generally, that a development consent and a building approval should be in force for the same period of time. Whether or not considerations of this kind provided the reason for the enactment of the clause, its meaning seems to me to be clear; it applies when the erection of the building to which the building application relates requires, as a matter of law, the consent of the responsible authority under the Ordinance, whether or not, as a matter of fact, a consent of that kind has actually been given. In the present case, therefore, by virtue of the operation of cl. 31 (3) the building application made on 23rd September 1971 was deemed to be an application for a development consent.
>
> ...
>
> The effect of cl 31 (3) was that the building application had a twofold operation – it was deemed to be an application for a development consent as well as an application for approval. In my opinion It follows that an unqualified approval to the building application would amount to an approval to everything it was deemed to embrace and in other words amount to a development consent as well as to a building approval. No doubt a responsible authority has the power (subject to any right of appeal) to limit the effect of its approval, and to refuse a development consent while granting a building approval. However, in the present case the appellant approved of the application without any relevant qualification. Since the application was deemed to be, inter alia, an application for the consent of the responsible authority under the Ordinance, the approval took effect in part as an approval of that deemed application. On the proper construction of cl. 31 (3) and in the circumstances of the case the appel1ant as the responsible authority under the Ordinance gave its consent for the purposes of the Ordinance when it approved of the erection of the building under Pt XI of the Act.

340 Nothing either in cl 31(3) of the Drummoyne PSO, or in cl 41(2) of the CCPSO, required the consent authority to spell out specifically the fact that it was treating the BA application (here BA524/62) as an application for PC. It simply provides the consent authority with the ability to treat a BA application as if it were a PC application in certain prescribed circumstances.

341 References, in the Council's assessment material for BA524/62, to the 1960 PC having been "considered" by the Council do not alter this view. The fact that it had previously been "considered" simply indicates that the Council had previously considered an application for consent to a development on the land.

342 I, therefore, answer the first question "yes", and so turn now to the second.

Q. (2) Is BA524/62 preserved by the relevant transitional provisions so as to be a deemed development consent?

343 The applicant has argued that there are two avenues which would lead to the preservation or survival of the consent so deemed.

344 Avenue 1 (see [307] above), relies on the operation of transitional provisions, which were considered by Pain J in *Caltex Australia Petroleum Pty Ltd v Manly Council* [2007] NSWLEC 105; 155 LGERA 255.

345 In that case, Manly Council granted a building application pursuant to Pt 11 of the LGA 1919, for the construction of a service station on certain land. Pursuant to cl 41(2) of the CCPSO that application was also considered to be a development application. In 1988, upon the gazettal of the 1988 Manly LEP, use of the subject land for a service station became prohibited. The Council argued that there were no existing use rights attached to the land, because of the existence of a 1953 development consent, which remained in force, which rights, by virtue of s 109B of the EPA Act, authorised development for the purpose in that consent. It was submitted that, if s 109B applied, there could be no existing use rights, as defined under s 106(a), because the use of the land was not "prohibited".

346 Pain J concluded (at [59]) that, if there are appropriate transitional provisions in force under a PSO replacing the CCPSO, a deemed consent under the CCPSO continues in force.

347 Her Honour followed Court of Appeal decisions in *Auburn Council v Nehme*; [1999] NSWCA 139; 106 LGERA 19, and *Harris v Hawkesbury Shire Council* (1989) 68 LGRA 183, and I respectfully adopt her detailed analysis of the case law, and of the transitional provisions of direct relevance here.

348 For Condition 7 to survive beyond the repeal of the CCPSO, it must not be "inconsistent" with any provisions of the MPSO (cl 69 MPSO – set out above at [202]).

349 Clause 57(2)(a) of the MPSO has also already been set out ([201] above. It provided:

> (2) A person shall not erect or use a building for the purpose of a [RFB] unless provision is made within the site of the building for –
>
> > (a) vehicle parking space of an area not less than 18 feet by 8 feet 6 inches for every flat within the building.

350 Condition 7 required "laundry facilities being provided in accordance with the provisions of ordinance 71, and the plans being amended accordingly".

351 The plans were subsequently so amended, and plan (iii) (*Exhibit A1*, tab A) shows a hand-drawn alteration placing the common facilities within what became Lot 15. Plan (iv), which is stamped "amendment approved", also shows the common facilities in that location (see [125] above).

352 As a consequence of the amendment, the garage area within what became Lot 15 was reduced to length of 13.5 ft, well below the 18 ft mandated by cl 57(2)(a) of the MPSO (Tp251, L40 – p252, L2).

353 It cannot be disputed that this reduced area is inconsistent with the area mandated by cl 57(2)(a), but the question for the Court is whether Condition 7 itself is "inconsistent" with that clause, and I believe it is not.

354 Condition 7, on its terms, did not necessarily require the reduction of the garage space in Lot 15. It was the manner in which condition 7 was given effect which caused the area of Lot 15 to be reduced. This does not give rise to an "inconsistency" of the type envisaged in cl 69 of the MPSO.

355 Accordingly, I find that BA524/62, including, in particular, condition 7, is preserved by the relevant transitional provisions.

356 Even if I am wrong in this conclusion, the approved plans form part of the BA/DC, because their incorporation is necessary to understand the consent. Those plans depict the common facilities in their present location, and removal of them from that location would be inconsistent with the consent (see my examination of the relevant principles in *Quarry Products (Newcastle) Pty Ltd v Roads and Maritime Services (No 3)* ("*Quarry Products*") [2012] NSWLEC 57).

357 Having found that BA524/62 is preserved through avenue 1, it is unnecessary for me to consider avenue 2 ([308] – [309] above).

Q. (3) Does BA524/62 create a continuing obligation on the owners of Lot 15 to maintain the common facilities on their property?;

358 It was submitted that, even if I found that BA524/62 was a DC and remained in force, condition 7 itself placed no ongoing obligation on the respondents to maintain the common facilities on their lot.

359 The respondents cited *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* ("*Hillpalm"*) [2004] HCA 59; 220 CLR 472, in support of the proposition that no ongoing obligation can rest on them, as the owners of Lot 15, to maintain the common facilities on their lot, because to do so would "require an implied easement or right of access over lot 15", which is contrary to the High Court's finding (at [53]) that conditions attached to PCs do not give rise to rights *in rem*, and it would be contrary to the long-standing principle that rights in land do not exist outside those which are depicted in the register, because the Torrens system is one of "title by registration not registration of title" (see also *Canada Bay*; and *Koompahtoo*.

360 Hillpalm Pty Ltd was the registered proprietor of land adjacent to land owned by Heaven's Door Pty Ltd. Both parcels had formerly been parts of one lot. In 1977, the land was subdivided, and a condition of that subdivision required that a right of way be granted and constructed over the Hillpalm lot for the benefit of the Heaven's Door lot. However, the easement was never granted, nor the right of way constructed, and Heaven's Door brought proceedings in this Court, seeking to compel Hillpalm to grant the easement. Hillpalm argued before me, at first instance, that, as the failure to grant the easement was in breach of the original subdivision consent, and so contrary to s 76A of the EPA Act, it was entitled to relief pursuant to s 123 of that Act.

361 My decision went on appeal, and eventually the case was determined by the High Court, which held, by majority (McHugh, Hayne and Heydon JJ) that Heavens Door could not rely on the condition of consent to compel Hillpalm to grant it an easement. Their Honours reasoned (at [42]) that, by merely occupying the land, Hillpalm was not "carrying out development in breach of a [DC]", and, accordingly, there was no breach of s 76A, and no action arose against Hillpalm under the EPA Act. Heaven's Door had sought to overcome this difficulty by arguing that the consent created a right *in rem* (see [51]), but their Honours rejected this position, stating that "the existence of such a right would be inconsistent with s 42(1) of the Real Property Act" (quoted at [266] above). The majority continued (at [53]):

> "If the consent to the subdivision did create a right in rem, that would be a right or interest in the land not shown on the computer folio certificate. There would then be a real and lively question about how the two statutory schemes (the scheme under the EPAA and the Torrens system for which the Real Property Act provides) were to be reconciled, and questions of implied repeal or amendment might arise.

362 The joint judgment did, however, state that "the availability of rights *in personam* is entirely consistent with the Torrens system of title". They said (at [54] – [55]):

> 54 The immediate indefeasibility of a title to land under the Torrens system does not deny "the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant" [(33)] and those proceedings "may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration" [(34)] . If the respondent has a right against the appellant, it is a personal right, not a right in rem, and that personal right must be found, if at all, in the relevant statutory provisions.
>
> 55 For the reasons given earlier, however, the respondent has no such right. Section 123 of the EPAA does not provide that right to the respondent in this case, the appellant not being in actual or threatened breach of that Act. No other provision of that Act was identified as founding the right asserted. That being so, the respondent's claim to orders obliging the appellant to create an easement and construct a right of way must fail.

363 Unlike the *Hillpalm* situation, the respondents in the present case propose to carry out a positive act that is contrary to a previous DC. There can be no doubt that what they propose is "carrying out development", and that, therefore, a right *in personam* arises under s 123 of the EPA Act. The applicant does not rely on the consent providing a "right *in rem*", but seeks to restrain a positive breach of a DC which, it says, remains in force.

364 Ms Byrne sought to distinguish the present case from *Hillpalm*, stating (at Tp18, L44 – p19, L11):

> This case is not about resolving conflicting interests in land. Hillpalm v Heaven's Door, a case that your Honour would be aware of and I'm aware of –
>
> …
>
> – is not engaged. We're not seeking to enforce an unfulfilled condition of a development consent against a subsequent owner of t the fee simple, which was what the Heaven's Door party had applied to do before your Honour. The relevance of any condition of a development consent in this case is because of the complying development certificate application and the fact that the Manly LEP 1988, as at the relevant time, specified, as one of the criteria for a comply development, that it could not be in breach of a condition of a development consent.
>
> It's a very different inquiry, and what we have to show is that the building approval granted by Manly Council in 1962 is a deemed development consent for the purposes of the Environmental Planning and Assessment Act and, therefore, that reference in the Manly LEP is engaged and that the complying development certificate could not - sorry, I withdraw that. The nature of the work that the first and second respondent applied to do under the complying development application would be in breach of a condition of that development consent. So that's the main point in regard to the relationship between the development consent and the complying development certificate.

365 I accept this submission. Unlike *Hillpalm*, the applicant is not asserting a right to have a new proprietary right created over land in its favour, in purported compliance with a condition of consent. Rather, it seeks the maintenance of the "status quo", or the current form of the building, in which those common facilities were approved, and have remained for many years in that position. It says that the removal of those facilities would be a breach of the consent, unlike the situation in *Hillpalm*, where it was asserted

that Hillpalm had a positive obligation to create a right so as to comply with the consent. *Hillpalm*, therefore, does not prevent the applicant in this matter from succeeding.

366 It was asserted by all respondents that condition 7, on its terms, was "spent" when the plans were amended, because it required only that the plans be amended to show the common facilities, and, when that was done, it was satisfied, and had no further operation. Additionally, it was submitted that Condition 7 placed no obligation on the owners of Lot 15 to provide the common facilities on their property, but, rather, it placed an obligation on the Owners Corporation to provide the facilities on Common Property.

367 I consider that the obligation to provide the common facilities in their present location arises from the approved plans themselves, as part of the consent, independently of Condition 7 (see again *Quarry Products*). Whether those facilities become common property is a separate issue from precisely where they are located.

368 The respondents are, therefore, not at liberty to remove them.

Q. (4) Are the proposed works in contravention of BA524/62?

369 Finally, it was submitted, that, even if condition 7 remained in force, and created an obligation to maintain the common facilities in their present location, the works actually authorised by the CDC do not contravene that condition (Council's speaking notes, par 32).

370 The CDC certifies the removal of an internal non-structural wall, which is complying development pursuant to the LEP. The removal of the sinks and toilets at the end of Lot 15 did not need development consent because such work is considered "minor internal alterations", and so is "exempt development", not needing certification.

371 I consider that the works the subject of the CDC clearly involve the removal of common facilities, and the transformation of that area into a garage space for the exclusive use of the owners of Lot 15. The CDC expressly states that "This approval relates to drawings/plans Nos. DA01 – DA04 dated 27 September 2010 and received by Council on the 5 October 2010" (*Exhibit A1*, Tab E, fol 46/49). Drawings DA03 and DA04 clearly show that the works relate to the proposed demolition of internal walls partitioning the garage space from the common facilities. An annotation on DA03 reads: "Remove existing sinks & toilet suite and make good".

372 In my opinion, the CDC clearly authorises the removal of the common facilities, and I am satisfied that those proposed works are contrary to BA524/62, which operates as a deemed DC.

Conclusion on Grounds (1) and (2)

373 The applicant must succeed on grounds (1) and (2).

Grounds (3) and (4)

374 Having come to the conclusion that the applicant succeeds on grounds (1) and (2), it is entitled to the grant of relief.

375 It may, therefore, not be strictly necessary for me to determine the remaining grounds, but, as they were fully argued before me, and have relevance to relief, I will now deal, hopefully more briefly, with each of grounds (3) and (4) in turn.

Ground (3) – owner's consent

376 The applicant claimed that the CDC is invalid, as the respondents did not obtain its consent as owner of the common property in fee simple: see ss 84A(2)(b) and (3) of the EPA Act, Schedule 1, Pt 2, cl 3(e) of the EPA Regulation, and s 18 of the 1996 Strata Act.

377 There were two alternate arguments advanced by the applicant as to why the works were on common property:

378 First, it was argued that the registered SP showing the common facilities wholly within Lot 15 is erroneous, and that, as a matter of fact, the applicant is the owner of that part of Lot 15 containing the common facilities.

379 Second, even if the SP is considered correct, the works involve the common property, as they extend beyond the inner surface of the walls, the upper surface of the floor, and the under surface of the ceiling, in the cubic space occupied by Lot 15. The works involve interfering with pipes and wires which are not for the exclusive use of Lot 15, and are, therefore, common property: see ss 5(1) and 5(2) of the 1973 Strata Act and applicant's subs 41 – 49.

380 The respondents submitted that the applicant should be held **estopped** from asserting these grounds, as the issue was the subject of earlier proceedings in the CTTT (see [32] above), the outcome of which was unfavourable to the applicant.

381 It is convenient to address that threshold issue first.

Issue Estoppel/Res Judicata?

382 It was submitted by Mr Docker, on the respondents' behalf (par 26):

> Moreover, the Owners Corporation is seeking to collaterally attack the decision of the Tribunal in the CTTT Application, which rejected an application for injunctions restraining Seddon and Larsen from carrying out works or demolishing the laundry and toilet facilities on the basis that the laundry and toilet facilities are erected on and entirely within Lot 15. The decision of the Tribunal created a res judicata against a claim for injunctive relief: see *Hill End Gold Ltd v First Tiffany Resource Corporation* [2010] NSWSC 375 at [31] – [40] per Brereton J. Alternatively, an issue estoppel arose against the Owners Corporation from the Tribunal's decision preventing it from arguing that Lot 15 is owned by Seddon and Larsen and that the work will be on common property because that fact was indispensable to the decision, the same questions were decided by the Tribunal as are posed here, the Tribunal's decision was final and the same parties are involved: see *Port of Melbourne Authority v Anshun Pty Ltd* [("*Anshun*")] (1981) 147 CLR 589 at 597 and *Kuligowski v Metrobus* [("*Kuligowski*")] (2004) 220 CLR 363 at [21] – [22]. Such a collateral attack on the Tribunal's decision also amounts to an abuse of process: *Rippon v Chilcotin Pty Ltd* [("*Rippon*")] [2001] NSWCA 142; 53 NSWLR 198.

383 However, in his oral submissions, Mr Docker qualified the estoppel point, stating (at Tp236, LL23 – 29):

> I should pause there and say when I take your Honour to the decision your Honour will find that there was no finding of an error, but what it said was that there wasn't evidence before me to conclude there was an error. That's not sufficient for an issue estoppel. So

> I'm not relying on the issue estoppel to say there was no error, but what I am relying on is to say that there's an issue estoppel as to the ownership of lot 15, and the lack of rights of The Owners Corporation over it.

384 The acknowledged expert on *res judicata*, in all its forms, is retired NSW Court of Appeal judge, the Hon K R Handley, who conveniently updates the contents of his 1996 text book by occasional lectures. In particular, I have been referred to his 1999 lecture "Res Judicata: General Principles and Recent Developments", published in 18 Australian Bar Review 214.

385 The learned author distinguishes carefully four types of *res judicata* – "cause of action estoppel", "issue estoppel", "merger in judgment", and so-called "*Anshun* estoppel", which draws, from *Anshun*, the principle that re-litigating an issue can amount to an "abuse of process". It will be recalled that the respondents distinguished between "estoppel" and "abuse of process", and pleaded both in their POD (see [59] above).

386 Mr Handley deals with many leading cases in detail, and I will not repeat that analysis here, but I have applied it to the competing submissions made in the present case.

387 The cause of action brought before the CTTT in 2010 arose from the applicant's asserted right to apply for a statutory order under s 138 of the 1996 Strata Act – as to which see *Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Ltd* [2003] NSWCA 5, per Giles JA at [42] – [46], and *The Owners – Strata Plan No 37762 v Pham* [2006] NSWSC 1287 (Rothman J) – whereas a different cause of action is relied upon in these proceedings, one based on an alleged breach of provisions of the EPA Act. I do not believe that a "cause of action" estoppel arises in this case, but I now move on to consider other types of estoppel.

388 The applicant submitted that a decision of an Adjudicator under the Strata legislation is not capable of giving rise to estoppel/*res judicata*, because it is administrative in character, not judicial: *Papua New Guinea v Daera Guba* [1973] HCA 59; 130 CLR 353 at p 453. It was submitted that many of the aspects of a judicial process are missing – there is no "joinder of issue", the Adjudicator is not required to provide reasons for a decision, and an order of an adjudicator ceases to have any effect after two years from the making of the order. An Adjudicator also has the power to make a decision on a matter which was not agitated by the parties, making an order under a different section of the Act than that nominated in the application, and a strata manager may be appointed without an application having been made.

389 The applicant also relied upon the decision of Macfarlan JA in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; 74 NSWLR 190, where His Honour held (at [42]) that a decision of an adjudicator under the *Building and Construction Industry (Security of Payment) Act 1999* would create an estoppel only if there could be discerned a "legislative intention ... to confer upon adjudicator's determinations a sufficient degree of finality to attract the principles ...". The applicant submitted that there are several features of the decision-making process under the 1996 Strata Act that illustrate a lack of finality – the range of possible orders, beyond the adjudication of pre-existing rights between parties, or the review of a pre-existing decision; and a

decision of an Adjudicator cannot be “final”, because it can be corrected, or clarified, or a time limit may be extended, on the application of people who are not necessarily parties.

390 In response to this, Mr Docker relied heavily on *Kuligowski*, which I am bound to follow. Applying the principles the High Court espoused, I conclude that a decision of a Strata Adjudicator **can** create an issue estoppel. However, the parties to the CTTT proceedings were not entirely the same as those to these proceedings, and the applicant submitted that estoppel does not arise here because of those differences (namely the Council was not a party to the earlier proceedings): *Ramsay v Pigram* [1968] HCA 34; 118 CLR 271, at 282 – 283.

391 However, Biscoe J in *Gold and Copper Resources Pty Ltd v Newcrest Mining Limited* [2014] NSWLEC 148, said at [20]:

> If an issue estoppel exists between two parties, then it is not defeated by the fact that another person was also a party to the earlier proceeding (and is not a party to the later proceeding), nor by the fact that another person is also a party to the later proceedings (but was not a party to the earlier proceedings): ...

392 Therefore, the fact the Council was not a party to the 2010 proceedings does not preclude the existence of an issue estoppel.

393 The applicant next submitted that, although the factual issue of ownership of the toilet/laundry facilities was involved in both proceedings, the factual matrix is not exactly the same, and, therefore, issue estoppel does not arise. In the proceedings before the adjudicator the issue to be determined was whether the common facilities were located entirely within Lot 15, whereas here the issue is whether the works the subject of the CDC involve works which require owners consent because they interfere with common property.

394 I agree with the applicant’s submission that the issue of ownership dealt with by the Adjudicator is different from that which requires determination here: they are certainly not “identical”, and I, therefore, find that the applicant is not estopped from asserting this ground on the basis of issue estoppel.

395 I also do not accept the argument that ground (3) is “a collateral attack on the Tribunal’s decision [which] amounts to an abuse of process”: *Rippon* (see [382] above). The applicant was apparently not aware of the CDC when the CTTT proceedings were heard.

396 I conclude that the applicant is not estopped from making its claim in ground (3), and I now proceed to determine it.

Consideration of Ground (3)

397 On the assumption that I am correct on the estoppel point. I must now consider whether the works the subject of the CDC did involve works on the common property, and, therefore, whether the CDC is invalid as owner’s consent was not obtained from the applicant (see Tpp205 – 211).

398

Ms Byrne's submission that the registered SP showing the common facilities wholly within Lot 15, is "erroneous" must be rejected, as inconsistent with the High Court decision in *Hillpalm*, which clearly establishes that planning law does not create property rights, beyond those recorded in the register. The applicant's assertion of ownership of that part of Lot 15 on which the common facilities are located is inconsistent with that principle. The proper remedy for any alleged error on the registered title is an application made to the Registrar-General to correct the register under the *Real Property Act 1900*, but any lack of ownership does not preclude the applicant from restraining the respondents from breaching a DC, as I have found that they will if their works proceed.

399 It was also argued that the internal infrastructure (pipes, electrical wiring etc), which is common property, would also be interfered with.

400 I have earlier set out the statutory definitions of "lot", "common property", and "structural cubic space" (see [272] – [273] above).

401 The applicant submitted, that as the works the subject of the CDC impact "pipes, wires, cables or ducts that are not for the exclusive enjoyment of one lot", which are "structural cubic spaces", and, therefore, do not form part of a "lot", the works impact "common property" as defined.

402 Ms Byrne relied on Grevatt's 24 January 2014 affidavit to support the proposition that the pipes and wires were not for the exclusive enjoyment of one lot (at pars 22 – 24):

> 22. Electricity is supplied to the laundry via the ceiling cavity and western external wall cavity. The electricity powers the lights and power points internal to the laundry. Electricity is supplied to the toilet light via the ceiling cavity and internal dividing wall cavity (light switch).
>
> 23. I have observed that the power lines servicing the facilities are connected to the common property circuit board and are sourced from common property services which have separate electricity meter and circuit breaker (formerly fuses). I say that I have carried out a test whereby I have disconnected the common property electricity supply. Upon disconnection, the lights and power within the facilities, being originally switched on, instantly turn off along with all common property external house lighting.
>
> 24. I say that the Strata Scheme has always been billed separately for the common property electricity usages within the facilities, including lighting and power.

403 The pipes proposed to be removed feed the taps, washing machine and toilet facilities in the laundry area, and drain the waste water and sewerage from that area (*Exhibit A4*, fols 3, 5 – 8). The applicant submitted that, as the common facilities are "enjoyed by more than one lot", the pipes and wires servicing them are "not for the enjoyment of Lot 15 exclusively, and, therefore, from part of the common property (see Tp206, LL22 – 36, and the applicant's supplementary submission on ground (3), filed 22 May 2014).

404 Mr Docker rejected this argument, as misconstruing the meaning of "structural cubic space" (speaking notes, par 24):

> The Owners Corporation appears to be arguing that because other lot owners currently use and have used Lot 15 as a laundry and because the owners corporation has maintained the laundry, the pipes and cables in Lot 15 are structural cubic space and therefore not in Lot 15. This misconceives the definition of structural cubic space which refers to exclusive enjoyment of "one lot" and says nothing about users. This is understandable because whoever is using the lot in fact should not be able to affect the ownership of it as boundaries need to be certain and ascertainable.

405 He relied upon Larsen's affidavit of 25 February 2014, in which she deposed (at [36]):

> I agree that there is electricity and water supply to Lot 15 through walls and the ceiling and that there is water drainage from Lot 15 through the floor. The proposed works will not effect the electricity supply or wires. In my observation, the pipes which supply water to Lot 15 are only for Lot 15 and do not supply any other Lot or the common property. Lot 15 is on lowest level of the building at the back and end of the building and the water meter is at the front of the building near the street. Some taps and pipes are to be capped but all capping will be wholly within the space of Lot 15. We are not proposing to cap the floor waste but the toilet drain will be capped above the level of the floor.

406 I agree with Mr Docker. It may be true that the pipes and wires supply services to the common facilities on Lot 15 which are **used** by other lot owners, but I am not satisfied, on the balance of probabilities, that the wires/pipes supply services to any lot other than Lot 15. In my opinion, the relevant definition of "structural cubic space", correctly construed, requires the pipes/wires to supply more than one "lot" – not just assist other lot owners – so that such services are "enjoyed" by those other lots. Use by other Lot owners is insufficient to alter the nature of the ownership of the pipes/wires.

407 The definition of "structural cubic space" included (sub-pars (b) and (c)) "any pipes, wires, ... not for the exclusive use of one lot and ... any cubic space enclosed by a structure enclosing any such pipes, wires ...". Campbell J said in *Le v Williams* [2004] NSWSC 645 (at [55] and see Tp243, LL3 – 21):

> Fixtures within the cubic spaces of a strata title lot (not including structural cubic spaces) are part of the lot: *Lawrom Nominees Pty Ltd v Kingsmede Pty Ltd and Another* [("*Lawrom*")] [2000] NSWSC 1048; (2000) 10 BPR 18,417 at [65] per Hodgson CJ in Eq. Thus, even if such fixtures are affixed to a wall, ceiling or floor which is common property, the fixtures themselves are owned by the registered proprietor of the lot. It is unusual, in real property law, for a fixture to be owned by someone different to the owner of the real estate to which it is affixed, but that unusual consequence follows, so far as owners' fixtures are concerned, from the structure of the *Strata Schemes (Freehold Development) Act 1973.*

408 Accordingly the works are not on common property, and do not require owner's consent. See also *Burgechard v Holroyd Municipal Council* [1984] 2 NSWLR 164; 53 LGRA 346 (Roden J), upon which Hodgson J relied in *Lawrom*.

409 Ground (3), therefore, fails.

Ground (4) – Council inspection

410 Ground (4) asserts that no "inspection" of Lot 15 was undertaken by the Council, prior to the grant of the CDC, as required by cl 129B(1) of the 2000 Regulation. A record of such inspection is required to be kept by the Council pursuant to cl 129C (see [248] above).

411 It is common ground that no record of inspection can be found in respect of the CDC. Ms Byrne submitted that, from this absence, the Court can infer that no inspection took place, thus invalidating the CDC.

412 Mr Seymour submitted that such an inference should not be drawn. Alternatively, he argued that (1) on a proper construction of cl 129B(1), a failure to inspect does not render the CDC invalid, and/or (2) a "desktop survey" of material concerning the subject land would suffice.

413 I have earlier summarized the evidence of Ellise Mangion (the town planner assigned to assess the CDC application), on the inspection issue (see [93] – [101]).

414 Larsen deposed (affidavit 20 May 2014) that, "towards the end of the week" prior to the issuance of the CDC, she received a phone call from a Council officer whose name she could not recall. During that conversation, the Council officer allegedly said that he/she was ringing to make sure the Council could get access to the relevant area, so that an inspection could take place. Larsen replied that access could be gained through the laundry door, which was unlocked, and that she would make sure to leave the garage door unlocked as well. Ms Byrne tested Larsen on this evidence at (Tp141, L11 – p142, L4), and Larsen was adamant that she received a telephone call from a Council officer requesting access.

415 The hearsay aspects of this evidence are clear, and were the subject of considerable debate (Tp114, L39 – p116, L38). The evidence was admitted, but not for its hearsay purpose.

416 However, during her cross-examination of Larsen, Ms Byrne raised the issue of her credit, in particular the question of whether she actually remembered such a conversation taking place. Following this, the following exchanges took place at (Tp142, L26 – p143, L6):

> SEYMOUR: Your Honour, I do have an application, based on the conclusion of my friend's cross examination of the witness, and that is that your Honour revisit the issue of whether that paragraph 2 [(sic)] of the affidavit sworn yesterday can be used for a hearsay purpose. The basis is this. My friend has now challenged this witness on her credit, whether she would have remembered that conversation and the witness has said, "Yes, I remembered it."
>
> That's now relevant to the credibility issue of the witness and, based on section 60, because it's admitted for that purpose it can now be used for its hearsay purpose. It was my friend's choice to cross examine the witness in that way. The Act is clear in its terms that, once it's in for a credibility purpose, it can be used for a hearsay purpose. My application is that the court now use that paragraph for that purpose.
>
> DOCKER: I join in the application, your Honour.
>
> BYRNE: Well, I was asking the questions so I didn't take notes, but I'm told by my instructing solicitor that she didn't validate the actual words.
>
> HIS HONOUR: But that's the whole point, isn't it? You asked would she be able to really remember that if she didn't remember what the person's name was. No, I think the application is well founded.
>
> BYRNE: In any event, I say that because of, one, the late service of the affidavit and the non-identification of the person, giving my client very little chance to test the conversation, section 136 applies and it's unfairly prejudicial to my client. Now, I heard what Mr Docker said about that, but the fact of the matter is we served the proposed amended further amended summons on 11 April, your Honour - 11 April - and they had to make a forensic decision, as any lawyer does, as to whether the amendment is likely to be allowed and prepare accordingly. So that's my application.

417 Section 136 of the *Evidence Act 1995,* as noted above ([258]) provides:

> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing.

418

Given the late service of the Larsen affidavit, and her inability to verify that it was indeed a Council officer with whom she had the conversation she alleged, I agree that admitting evidence of this conversation to prove the facts contained therein, namely that a Council officer requested access to the property for the purpose of an inspection, would be unfairly prejudicial. Accordingly, I have not had regard to the evidence of this conversation for its hearsay purpose.

419 Ms Byrne submitted (Tp212, L41 – p213, L8):

> As to the evidentiary requirements, firstly we say the evidence doesn't rise high enough that an inspection actually occurred. Secondly, there's no record of the inspection. Thirdly, we tendered the notice to produce which asked for the record of inspection and there was nothing produced, and that became exhibit A7. There's a principle that's enunciated by the Court of Appeal in a case called [*Baiada v Waste Recycling and Processing Service of NSW* ("*Baiada*") [1999] NSWCA 139; 130 LGERA 52]. What the Court of Appeal is saying there is that a decision maker has an evidential burden of proving the negative proposition. At paragraph 55:
>
> > "Where relevant facts are peculiarly in the knowledge of a defendant and where the defendant has the greater needs to produce evidence relating to those facts, then providing the plaintiff establishes sufficient evidence from which the negative proposition may be inferred, the defendant carries what has been called an evidential burden."
>
> So we say there's no evidence of the actual inspection and counsel was unable to produce any documents of the inspection.

420 In *Baiada*, Mason P actually said (at [55]):

> Where, however, relevant facts are peculiarly in the knowledge of a defendant or where the defendant has the greater means to produce evidence relating to those facts, then provided the plaintiff establishes sufficient evidence from which the negative proposition may be inferred, the defendant carries what has been called an evidential burden ... This principle would have assisted the appellants in seeking to disprove the existence of consent granted to the respondent. However, they succeeded on this point and no notice of contention has been raised against them.

421 His Honour later said (at [60]):

> Nevertheless, in my view the appellants did establish to the requisite standard that no consent had been granted by the Council to itself. My reasons follow:
>
> > "(a) The registers were as probative in relation to the non-existence of consent to the Council as they were in relation to the non-existence of the relevant consent to the respondent. ...
> >
> > (b) ... this particular application of the presumption of regularity cuts both ways in the present case. True it is that the appellants bear the onus of establishing the failure to do an action (ie obtain consent) the breach whereof is punishable at law. But the same can be said about the Council's obligations stemming from the BPSO and Ordinance 32 to record any consent in the register. ...
> >
> > (c) The evidentiary groundwork was not laid for drawing the distinction that was ultimately critical to the determination of this case at trial. Indeed, it is somewhat unclear why his Honour was prepared to infer that no consent had been granted to the respondent, but was not prepared to infer that no consent was granted by the Council to itself. The same primary material is relevant to each. ...
> >
> > (d)This was a case where it was proper to infer that, if the respondent held a relevant consent or evidence thereof, then it would have been produced. The proceedings were civil proceedings in which the appellants established evidence from which an inference favourable to their ultimate contention was clearly capable of being drawn. The respondent had it within its means to produce evidence of consent if it had it. Its failure to do so leads to an inference that no such evidence exists ... *Jones v Dunkel* (1959) 101 CLR 298 ...

> (e)In my view the inference of lack of consent can more safely be drawn in the light of the letters of particulars from the Crown Solicitor's office which are extracted above. Coming from the solicitor for a party in the context of providing a response to a request for particulars, the letters are properly to be read as admissions that no 'relevant approval' was obtained other than the approvals identified in the letter of 13 December 1997 (none of which were found to constitute an approval under the BPSO). ...
>
> (f)It is true that the appellant did not call anyone to prove the system of record keeping at the Council during the relevant period. But the appellants were not obliged to do so having regard to the probative effect of the registers produced.
>
> (g)Talbot J considered that the accuracy of the register was undermined by the absence of any record relating to the development consent referred to in para (g) of the particulars provided by the Crown Solicitor's Office on 13 December 1996 ...
>
> (h)To my mind, this is an area where the law should lean in favour of doing things 'by the book'. A Council is not above the law, and should as a general proposition stand accountable for its actions. The creation of proper records evidencing the seeking and granting of consent serves several functions, including that of being the means of forcing a decision-maker to ensure due consideration of relevant issues and interests. Bearing in mind that the civil onus is involved, I see no reason why a court should hasten to draw a favourable inference in circumstances where the Council itself was shown to have been unable to produce the ultimately relevant consent."

422 In light of Mason P's reasoning in *Baiada* (c.f. J D Heydon, "Cross on Evidence", Butterworths, 7th ed, 2004, p181, par [3240], and *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713, at 721), I am of the opinion that it should be inferred in the present case that no physical site inspection took place.

423 The Council had an obligation under s 129C to make a record of site inspections carried out for the purpose of CDC assessment pursuant to s 129B. Had there been a physical site inspection, it can reasonably be inferred that such an inspection would have been recorded, particularly as Mangion said that it was "standard practice" to make such records. The absence of such a record provides a reasonable basis for the negative inference that there was no physical inspection.

424 The evidential burden on the inspection question rests on the Council, and Mr Seymour observed that, as s 129C(3)(c) provides that a record must be kept of the "type of inspection", Mangion's "desktop" perusal of the documentation which, she said, Council personnel include on the application file to assist assessment officers such as herself, should be sufficient. He submitted (Tp291, L50 – p292, L12):

> If there are different types of inspection that implies that there's a range of things that someone can do to inspect a premises and physical attendance there is only one type. So there must be times when you can carry out something less than physical inspection at the site and here I can remind your Honour we have internal alterations to a garage in a residential flat building when the assessing officer has those printouts on the file - does your Honour remember seeing those printouts that are put on every file that had an aerial photograph showing the footprint of the building in its locality and in its streetscape? And your Honour knows from the schedule that I took your Honour to on Friday, there are no requirements when it comes to internal alterations. You can carry out internal alterations to your heart's content because there are no prescribed conditions on doing it.

425 Ms Byrne responded (written reply subs 4 June 2014, pars 11 – 12) as follows:

> 11. An 'inspection of the site of the development' could not be read down to be satisfied by a desktop survey as submitted by Mr Seymour. The time period in which a CDC has to be determined means that a prompt and thorough inspection of the site of the development to determine if in fact the proposed development fits within the category of complying development under the EPI is essential. Subclauses 129C(3)(i) and (j) are specifically directed to this purpose. To suggest as Mr Seymour did that a 'tick the box' analysis from an assessing officer's desk is sufficient is to set at naught the statutory mandate for a determination by the assessing officer that the proposed development is in fact in the location on the site and of the magnitude and scope stated on the application. This is particularly important for works to a RFB that is the subject of a plan of strata subdivision and to the issue of whether owner's consent of the body corporate might be required before the CDC can be determined.
>
> 12. Given that an accredited certifier can also issue [CDCs], to read down the prescriptive requirements in clause 129C as submitted by Mr Seymour creates a dangerous precedent. The court is well aware of serious failures by private certifiers since the EPA Act was amended to allow private certification of development in NSW. A variety of scenarios can be envisaged whereby an application for a CDC could be used to mask an unlawful use or unlawful demolition or serious environmental impacts which would not be discoverable unless the officer or accredited certifier actually physically inspected the site and made the records of inspection set out in clause 129C.

426 I agree with those submissions of Ms Byrne, and, therefore, conclude that the inspection requirement was not satisfied, by either means. It is, therefore, now necessary to determine the consequences of such a failure.

427 Mr Seymour then submitted that a failure to "inspect" the property would not necessarily invalidate the CDC. Such invalidation issues were the subject of consideration by me at first instance in *Burwood Council v Ralan Burwood Pty Ltd* [2013] NSWLEC 173, and then by Sackville AJA on appeal: *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404; 206 LGERA 40.

428 The word "must" in cl 129B of the 2000 Regulation does not always mean "mandatory". Mr Seymour said (Tp291, LL38 – 48):

> So my friend says "must" indicates mandatory. Well, if that's so, then everything about a complying development certificate is ... (not transcribable) ... including how it's delivered to the council. Get that wrong and the whole thing is invalid. I mean, the word has been used but it can't be derived that there is an absolute legislative intent that every time it's used it means invalidity if you don't do it. It's a common word. It's a neutral factor.

429 In contrast, Ms Byrne submitted (reply sub 10) that the use of the words "must not issue a development certificate unless an inspection is carried out", in s 129B, clearly indicates that inspection is a mandatory requirement, so a failure to inspect would result in the invalidity of the CDC (Tp214, L31 – p215, L26).

430 I agree again with Ms Byrne. While it is true that the word "must" appears frequently in the regulations, sometimes it is perhaps employed loosely, and may not always signify a truly mandatory requirement, s 129B uses the clear words "**must not**", and it seems to me that the Court should enforce the clear prohibitive wording of the provision.

431 For those reasons, I am satisfied that, on the balance of probabilities, the Council failed to carry out an inspection of Lot 15 prior to the grant of the CDC, and that such a failure renders the CDC invalid.

432 Accordingly, ground (4) is made out.

Summary on the Grounds of Challenge

433 In summary, the applicant succeeds on grounds (1), (2), and (4), but fails on ground (3), of its challenge.

434 It is, therefore, necessary now to turn the Court's attention to questions of discretion, relief, and costs.

G: Discretion, Relief, and Costs

Delay

435 The Council raised the question of delay on the applicant's part, arguing that the delay of more than three years in bringing these proceedings after the CDC was issued disentitles the applicant to any relief: *Ex parte Abraham Malouf; Re Gee* (1943) 43 SR (NSW) 195 (at 201 – 202 per Jordan CJ, and Council's speaking notes, pars 41 – 43).

436 Mr Seymour said that the delay has caused prejudice to all respondents, as the memories of key witnesses, such as Ms Mangion, have faded. She could not be expected to recall precisely whether, in her busy assessment duties, she conducted an onsite inspection of a particular property over 3 years ago (Tp292, LL38 – 43).

437 He also criticised the applicant's failure to enquire earlier as to whether CDC approval had been obtained for works to remove the common facilities, as the Owners Corporation was otherwise on notice of the respondents' intention to exercise their rights over the whole of Lot 15, including the common facilities, many years previously (Tp292, L45 – p293, L34). He said (Tp293, L39 – p294, L2):

> … your Honour can find that the delay has not been satisfactorily explained and that the applicant is just not worthy of a grant of relief. Now, I've framed that in paragraphs 41 to 43, both in terms of delay on itself is a ground for refusing judicial review and that's Jordon J in Malouf's(?) case that I've cited in paragraph 43. His Honour is saying where there's unexplained delayed judicial review can simply be refused.
>
> But I've also framed it in terms of discretion, your Honour. If your Honour was against everything that the council has put and there is a ground that your Honour is unsatisfied that the assessment in some respect of this complying development certificate we would submit to your Honour that given the length of delay and given the starting of proceedings without having done any search of the records and the subsequent change to the case to allege these challenges against the CDC, we would say it's an appropriate case where your Honour would decline relief in any event.

438 In reply, Ms Byrne submitted that the Council's making of a submission on delay is contrary to authority. She referred to *Fatsel Pty Ltd v ACR Trading Pty Ltd* (1984) 54 LGRA 291, where Bignold J held (at first instance, at 295, not overturned on appeal) that, as s 123 of the EPA Act provides a statutory remedy which is not equitable in nature, equitable considerations, presumably including delay, are "irrelevant" (Tp295, LL8 – 28).

439 She also submitted that it was entirely reasonable that the applicant would wait, before commencing proceedings, until the respondents communicated their intention to act upon the CDC, particularly as the Owners Corporation had not been notified of the CDC approval (Tp296, L39). She said (Tp296, LL7 – 11):

> Now the CDC is valid for five years. So why would you rush off to the Land and Environment Court seeking the inconvenience of rustling up the duty judge. As your Honour would know, one has to have a reason. Why would you do it any sooner than when there was the threat to actually commence the work

440 Given the fact that the applicant was not notified of the CDC when it was issued in 2010, I find it entirely reasonable that these proceedings were not brought until it not only became aware of the CDC, but also of the respondents' imminent intention to rely on that CDC to commence works.

441 Accordingly, I find that delay is not a bar to the applicants' obtaining relief, if otherwise appropriate.

Declarations

442 My findings on the grounds of challenge clearly entitle the applicant to its declarations. However, my rejection of ground (3) requires that I **not** declare that the proposed works involve common property.

Injunction(s)

443 The question of what injunctions ought follow is not so straightforward.

444 In prayer 3 of its FAS, the applicant seeks an order restraining the respondents from:

(i) doing any works on the common property or facilities; and

(ii) preventing the other Lot owners from using those facilities in Lot 15.

445 Mr Docker concedes, on behalf of the respondents, that the Court may restrain the respondents from acting on the CDC, but argues that it cannot restrain them from exercising their proprietary rights in respect of Lot 15, as to do so would sanction an ongoing trespass on their land, and would exceed the minimum relief appropriate to give effect to any success in the challenge. Mr Docker relied, in this regard, on Holland J's decision in *LDJ Investments Pty Ltd v Howard* ("*LDJ Investments*") [1981] Strata Title Law and Practice 30-035, at p 50,409, where His Honour talked about "wrongful" use and occupation of a plaintiff's land in a Strata'd project as a "trespass".

446 In his original written submissions, filed 19 May 2014, Mr Docker had said (par 24):

> Prayer 3 in the Amended Summons seeks an injunction restraining Seddon and Larsen "from hindering or interfering with or preventing the use by" various others of Lot 15. Even if any grounds 1-3 are established, such relief goes well beyond the minimum relief necessary or appropriate to give effect to any of those grounds. This is because grounds 1-3 are raised in aid of the contention that the CDC is invalid. If it is invalid, the Court may restrain Seddon and Larsen from acting pursuant to the CDC but the invalidity of the CDC does not justify restraining Seddon and Larsen from exercising their proprietary rights in respect of Lot 15. To do so would be to sanction the ongoing trespass that is occurring on Lot 15 ...

447 In his oral submissions on 23 May, he submitted (Tp255, LL11 – 22):

> In respect to discretion and the injunction, in my submission your Honour wouldn't make an injunction that in any way requires the first and second respondents to continue to provide laundry facilities or toilet facilities in the lot or to provide access for that purpose. Firstly, because that would be sanctioning a trespass. Secondly, it would be inconsistent with the restrictive covenant that applies to the lot. Thirdly, what it would be doing is making the first and second respondents satisfy The Owners Corporation's obligations in respect to the condition, which is particularly inappropriate in any event, but particularly in this case in circumstances where there's an available alternative to

> The Owners Corporation who is choosing not to take it. Your Honour might recall that Mr Grevatt said that The Owners Corporation had no plans to build another laundry in cross-examination

448 Mr Docker later added, at the conclusion of his oral submissions on the respondents' behalf (Tp258, LL27 – 36):

> The last point I make is that in terms of an injunction there's no evidence, firstly, that there's been any breach yet. It's all about apprehended breach. Also, in terms of what work is to be done the evidence is that it's only what is referred to in the scope of works that was lodged with the CDC application. In my submission there would be no need for an injunction. If your Honour were to set aside the CDC then there's no suggestion that the first and second respondents would proceed with the work anyway, and the rest of the injunction goes well beyond that and tramples on our property rights and so forth. So even if your Honour were to set aside the CDC, in my submission your Honour wouldn't make an injunction.

449 The applicant's argument that some distinction must be drawn, and acted upon, as between what is, at law, a trespass to land, and some type of "authorized intrusion", by which I presume the applicant to mean what could technically be a trespass, but is allegedly authorized by some form of consent or user, was not developed, and I find no substance in it.

450 Mr Docker also submitted (par 25) that the Court lacks jurisdiction to enforce any proprietary rights or personal equity which the Owners Corporation may have in respect of Lot 15, such as to require correction of the register in respect of SP 432.

451 I agree with these submissions.

452 Whilst it is true that removal of the common facilities from Lot 15 would be contrary to the DC, the respondents remain the lawful owners of the land upon which those facilities are presently located, and orders which hinder the respondents' assertion of their proprietary rights would be inappropriate.

453 This outcome means that, in many ways, the "dilemma", of which I spoke in the Introduction to this judgment (at [7]), remains.

454 I have earlier referred ([264]) to the corrective provision in s 12 of the *Real Property Act 1990*. For many years the courts took the conservative approach to s 12, as Holland J did in *LDJ Investments* (see p 50,410).

455 That approach has softened in more recent times: see now *Sahab Holdings Pty Ltd v Registrar-General* [2011] NSWCA 395; *Sahade* per Kunc J; and the Case Note in (2014) 88 ALJ 452, at 458 – 9.

456 This present case has some factual similarities to *LDJ Investments*, where elements of a carparking area in a strata'd RFB in Point Piper were divided by a non-structural wall, which was omitted from the SP, and a dispute arose between the incoming owners of the two lots, one of whom, in choosing which lot to buy, was the victim of an "implied representation", which he did not check out, and which proved incorrect. Only 3.8m² of space was in dispute.

457 In fact, the wall stood entirely on the plaintiff's lot, and was not an encroachment.

458

Holland J took a conservative approach to the corrective power of the Registrar-General, but, "on the merits", he made an order for possession, and a declaration of rights, and granted an injunction to the plaintiff, observing (at p 50,407) that the defendant was "the innocent victim of a mishap".

459 His Honour found (at p 50,409 – as noted above in [445]) that the "wrongful act" was not the wall, but the use and occupation of the plaintiff's land, which was a trespass. He opined (at p 50,409), that it was "not ... oppressive" to require the defendant to conform to his title, because he contracted to purchase according to a plan annexed to his contract, a plan which it was open to him to search.

460 His Honour, relevantly for the present case, commented (p 50,408):

> unfortunately for the defendant, property law is cold hearted and whilst he may have the merits in his favour – I think he does – he does not have the law. Merits on the plaintiff's side are at best, I think, dubious but not so the law. The plaintiff's claim is made in the field of proprietary rights, where the law seldom permits sympathy or moral's to intrude.

461 I will grant an amended form of the injunction sought in Prayer 3(i), but, in my discretion, I decline to grant the injunction sought in Prayer 3(ii).

Costs

462 Costs are sought by the applicant in Prayer 5 of the FAS, but, in her written "reply" submissions on 10 June 2014 (par 16), Ms Byrne said the applicant wished to be heard on costs.

463 In his written submissions on Council's behalf, Mr Seymour twice (sub par 36, and final sub par 15) said only that costs should be ordered in Council's favour if the applicant's summons were to be dismissed. He did, however, frequently express, during the trial, Council's concern regarding the amount of costs involved in these proceedings.

464 As earlier noted, the respondents drew the Court's attention to ss 229ff of the 1996 Strata Act (see [286] above). In his speaking notes of 22 May 2014 (par 4) Mr Docker sought a s 229 order, but in his oral submissions on that same day, he said (Tp217, L43 – p218, L5):

> The other thing I should, before I go into ground 3, raise is that there's a section in the Strata Schemes Management Act 1996 which is section 229 that deals with costs in relation to cases or actions between strata owners corporations and lot holders. My primary submission in relation to costs, your Honour, is that it ought to await your Honour's decision, but I just wanted to put it on the record perhaps mostly for Ms Byrne's benefit, but the first and second respondents will be seeking an order under that section which provides that the court can make an order preventing an owners corporation from levying against the lot owner against whom it's litigating to pay its own fees. As your Honour knows, the way in which owners corporations raise their fees is by levying the lot owners and that section is in there to protect lot owners who are being sued by owners corporations from having to contribute to The Owners Corporations' fees.

465 In all these circumstances, it is appropriate that the question(s) of costs be reserved.

Orders

466 The Orders of the Court are, therefore:

(1) The Court declares:

(i) that the first and second respondents are carrying out or threatening to carry out works at 15 Crescent Street, Fairlight, being Lot 15 SP 432, in breach of the *Environmental Planning and Assessment Act 1979*; and

(ii) that Complying Development Certificate No CD56/10 issued by Manly Council on the 27th October 2010 to the first and second respondents is null and void and of no effect.

(2) The Court orders that the first and second respondents, by themselves, their employees, agents and contractors be restrained from carrying out any works in the northern part of Lot 15 Strata Plan 432 occupied by laundry and toilet facilities and/or in any common property associated with such facilities.

(3) Costs are reserved.

(4) All exhibits are returned.

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Decision last updated: 01 May 2015