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Environment & Planning Alert

Saab Corp Pty Ltd - Valid conditions and orders against company directors

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Outline

The NSW Court of Appeal has upheld the validity of a consent condition requiring cables to be placed underground at a developer's expense, and has also held that its directors were not liable for the company's breach of that condition.

Click here for a full copy of the judgment in *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308.

The case provides a useful examination of the manner in which conditions of development consent should be properly construed.

The case also highlights that, when undertaking development under the E*nvironmental Planning and Assessment Act 1979* (**Act**), while a director may be the primary actor on behalf of a company, that does not mean that the act is the director's own, as distinct from that of the company.

The development consent

In May 2003, the Botany Bay City Council granted development consent for the construction of a residential flat building at the corner of O'Riordan Street and Church Avenue, Mascot.

At the time consent was granted, there were aboveground electricity and telecommunications cables adjacent to the site on both roads.

Condition 32 of the consent provided that all existing aboveground cables within the road reserves and the site were to be replaced, at the developer's expense, by underground cables and appropriate street lights.

The condition was imposed with reference to *Development Control Plan No. 30 – Mascot Station Precinct* (**DCP 30**) which provided that *'...all service cables in the street, adjacent to...any development site...are required to be placed underground'*.

In July 2003, the site was sold to Ralansaab Pty Ltd. Construction of the residential flat building was executed on behalf of Ralansaab by a building company, Saab Corp Pty Ltd. During the course of road widening for the development, the aboveground cables adjacent to the site on Church Avenue were removed and placed underground, while those adjacent to O'Riordan Street remained aboveground.

LEC proceedings

The Council brought proceedings in the NSW Land & Environment Court alleging a breach of condition 32 of the consent and seeking orders that the companies and directors, at their own expense, undertake all necessary works in relation to the aboveground poles and cables, and replace them with underground cables and appropriate street lights.

Sheahan J rejected the Council's claim for three principal reasons, namely, that:

- condition 32 was invalid and unenforceable, for lack of certainty and unreasonableness;
- if there had been a breach of condition 32, the breach was committed by the companies only, and not by the directors, as only the companies had carried out the development; and
- if condition 32 had been valid, His Honour would have declined to exercise his discretion to grant the relief sought by the Council.

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Click here for a full copy of His Honour's decision in *Botany Bay City Council v Ralansaab Pty Ltd & 7 Ors* [2010] NSWLEC 225.

The appeal

It is from those orders that the Council appealed to the Court of Appeal. Ralansaab went into voluntary liquidation in February 2009 and was not a party. The issues for determination on appeal were:

- whether condition 32 was valid;
- if valid, whether condition 32 had been complied with; and
- assuming that there was a breach of condition 32, whether the company directors were also liable for the breach.

For the reasons below, the Court of Appeal allowed the appeal against Saab Corp, but dismissed the appeal in relation to the company directors.

Validity of the condition?

In summary, the Council submitted that Sheahan J had misconstrued condition 32 as requiring the developer to place underground cables not only adjacent to the site but within the road reserves of O'Riordan Street and Church Avenue for their entire length, which was considerable. The Council argued this was in error because it departed from the well-settled approach to properly construing consents.

Saab Corp and the other respondents contended that the Council's interpretation of condition 32 could not be supported by its wording, and that any lack of clarity or certainty in the terms or conditions of the consent was the responsibility of the council who imposed it. Accordingly, they argued that the Council should bear the consequence of its failure to specify accurately the terms of the condition.

In relation to the validity of the condition, the Court of Appeal held that:

- condition 32 did not lack particularity or precision because, when properly construed, the condition did not fall outside the power in the Act under which it was imposed;
- the statutory authority for condition 32 was section 80A(1)(a) and (f) of the Act, which relevantly referenced section 79C(1) which, in turn, referred to DCP 30 as a relevant matter for the Council to consider. Accordingly, DCP 30 defined the outer boundaries of the statutory power for the condition;
- as DCP 30 simply referred to all service cables in the street adjacent to the site, it was not open to the primary judge to find that condition 32 was uncertain or unreasonable; and
- a '*modicum of common sense*' and '*practical construction*' should be adopted in the construction of condition 32. There was no proper basis upon which the condition was to be read so literally that the undergrounding of cables the full length of the two streets was required. Such a suggestion by Saab Corp and the other respondents was '*an absurdity*'.

Accordingly, the Court of Appeal held that condition 32 was valid.

Was the condition complied with?

The Court of Appeal held that condition 32 imposed an obligation on the developer to place underground '*all service cables*' within the site and the road reserve '*adjacent to*' the site on both O'Riordan Street and Church Avenue. There was no reason to limit the obligation to cables providing services to the development only.

Indeed, improvement to the amenity of the area immediately adjacent to a development was held by the Court to be the proper subject of an approval, which was not advanced by restricting the obligation to cables only providing services to the development itself.

The Court held that the condition required all cables, in that part of both streets adjacent to the site, be placed underground at the developer's expense.

As the developer had only removed and replaced underground cables adjacent to the site on Church Avenue, while those adjacent to O'Riordan Street remained aboveground, the developer had not complied with condition 32 and was in breach of the Act.

Were the company directors also liable?

Further, the Council submitted that each of the individual respondents were also in breach of the Act because they carried out the development by giving instructions, in their capacities as either a director or company secretary of Ralansaab and/or Saab Corp, which had breached the consent.

The respondents contended that there was no provision in the Act which extended liability for a breach to a party who, although they did not '*carry the development out*' were '*involved in the contravention*', '*aided or abetted*' or '*permitted or suffered*' the contravention.

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In support of their contentions, the respondents cited *Wilkie v Blacktown City Council* [2002] NSWCA 284, a decision which was followed and applied by Preston CJ in *North Sydney Council v Moline (No. 2)* [2008] NSWLEC 169. In that matter, His Honour observed that a person who did not '*carry the development out*' cannot commit an offence against the Act. Further, His Honour observed in that matter that a positive act was required to 'carry out' development.

With regard to the parties' submissions, the Court of Appeal held that:

- a person can only be in breach of the Act if they carry out development contrary to the relevant consent. Thus, it is only the person who has actually carried out the development in breach of that consent who is open to an order under the Act;
- as Preston CJ observed in *Moline*, for there to be a breach of the Act, a positive act is required on the part of the offending party. However, it does not follow that because the individual directors of Ralansaab and/or Saab Corp were performing positive acts in their capacity as directors of those companies in implementing the consent that they, rather than the companies, were carrying out the development;
- a company always acts through the agency of its directors. The fact that a director is the primary actor on behalf of the company does not mean that the act becomes that of the director as distinct from that of the company; and
- given the nature of the company and the task it was performing, its directors were doing no more than performing the directorial duties of a building company.

Interestingly, Tobias AJA observed that there have been,

'...hundreds of cases in which Class 4 proceedings have been instituted in the Land and Environment Court...against a company for breach of a condition of a consent. The Council was not able to point to any case of that nature where not only the company but also the directors were joined as respondents and where an order was successfully sought against those directors to remedy the company's breach.'

The Court of Appeal held that the primary judge was correct in finding that the company directors could not be the subject of an order to personally remedy the breach. Such an order lay only against the companies of which they were directors.

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