Thomson Playford

Your Registered Title and Your Development Consent - Are They What They Seem?

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F&D Bonaccorso Pty Ltd -v- City of Canada Bay Council & Ors [2007] NSWLEC 159

On 30 March 2007, one of our clients successfully obtained a court order that the NSW Land and Property Information Office ("**LPI**") Register of Titles be rectified to reverse an unlawful sale by a Council of a public park to a developer. In those same proceedings, our client also successfully challenged a development consent which had been invalidly granted by Canada Bay Council ("**the Council**") to that developer.

This case is important for developers, Councils, financiers and property vendors and purchasers generally, or anyone who is seeking to rely on the veracity of the LPI Register to establish title, and the validity of development approvals.

Validity of Development Approval

In 2003, the Council purported to approve a development application for the demolition of houses (including five heritage houses) in Chapman Street, Strathfield, and the construction of a high-rise residential development. Our client owns a neighbouring property adjacent to the development site.

The Land and Environment Court of NSW only had to look briefly at the question of the validity of the development consent, as the Council conceded that the development application had not been properly advertised, and was therefore invalid. Such a mistake by a Council has consequences for the developer who applied for and obtained the development consent, any financier who has financed the development project, and any purchaser who may have bought off the plan.

In NSW, the validity of a development consent is open to challenge (by anyone) for a period of 3 months after it has been granted and publicly notified. Therefore, anyone seeking to rely on the validity of a development consent less than 3 months old, should ensure that they inspect the register of development consents maintained by the Council, check that the consent has been publicly notified, and review the circumstances under which the consent was granted.

The Sale of Community Land

This case looks again (so soon after *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*) at the shortcomings of the indefeasibility provisions of the *Real Property Act* 1900 (NSW) ("**RPA**") in light of the provisions of other later statutes, which can create rights over land or impact on the way in which land can be dealt with in New South Wales.

In this case, the relevant later statutory provision was Section 45 of the *Local Government Act* 1993 ("**LGA**"), which prohibits the sale of community land by New South Wales Councils.

All Council land is classified as community land or operational land. Community land can only be dealt with by Councils in limited ways (in particular it cannot be sold). Operational land can be dealt with more generally and, in particular, it can be sold.

Prior to lodging the development application in 2003, the Council contracted to sell Chapman Reserve (a public park in Chapman Street) to the developer for inclusion in the development site. In August 2006, the developer registered the transfer and became the registered proprietor of Chapman Reserve.

In his judgment delivered on 30 March 2007, His Honour Justice Biscoe found that Chapman Reserve was a public park and community land within the meaning of the LGA, and that its sale to the developer was a breach by Council of section 45(1) of the LGA, which provides that a Council has no power to sell community land.

The principle of indefeasibility, which is a well established principle of property law in Australia, means that the registered proprietor of land holds its title free from all other interests which are not recorded on the Register. The practical effect of this principle is that a purchaser or mortgagee does not have to undertake historical searches of Torrens Title properties, making the conveyancing or mortgage lending process a more simple and secure one. There are a number of well established exceptions to indefeasibility, but on the whole, most of these exceptions are effectively dealt with in the conveyancing process in New South Wales, and the requirement for a vendor to provide certificates to the effect that no statutory authorities have any interest in the relevant land. Prior to this court decision, the most recent exception was that unregistered and unfulfilled Council imposed development consent conditions relating to the continuing use of land, even if not shown on the title, would be likely to bind a subsequent owner, as established in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472.

The question in this case was whether section 45 of the LGA, being the later law in time, overrode the earlier indefeasibility provisions of the RPA. His Honour Justice Biscoe held that section 45 of the LGA does provide an opportunity for the indefeasibility provisions to be overridden. Once the Court found that the Council had breached section 45 by selling the community land, it was then in a position to order that the Register be rectified to again show the Council as the registered proprietor of Chapman Reserve. The effect of this decision is that the registered proprietor is stripped of its property (and the developer has a claim against the Council for a refund of the purchase price).

What are the Practical Ramifications of this Decision?

The Torrens system of registered title was designed to avoid the need to make historical searches of title.

Following this decision, a purchaser of land from a Council (or a prospective mortgagee of that land) should obtain a certificate from the relevant Council stating the classification of public land as at the date of the certificate. Details should also be sought about when the classification was made and pursuant to what instrument or resolution.

An appeal by the Council against the Judgment of Biscoe J to the Court of Appeal is currently pending, which will be reported on in due course.

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