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| **Reported Decision :** | (2001) 115 LGERA 130 |

# Land and Environment Court of New South Wales

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| **CITATION :** | **Foster v Sutherland Shire Council [2001] NSWLEC 89** |
| **PARTIES :** | APPLICANT<br>Foster<br><br>RESPONDENT<br>Sutherland Shire Council |
| **FILE NUMBER(S) :** | 10086 of 2001 |
| **CORAM:** | Cowdroy J |
| **KEY ISSUES:** | Question of Law :- order issued pursuant to s 121B of the EP&A Act requiring appellant to cease using such premises for short term accommodation - terms of order uncertain - order invalid |
| **LEGISLATION CITED:** | Environmental Planning and Assessment Act 1979 s 121B<br>Land and Environment Court Act 1979 s 36(5) |

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| **CASES CITED:** | Australian Federation of Construction Contractors v Australian Building Construction Employees' and Builders Labourers' Federation (1984) 73 FLR 61;<br>Miller-Mead v Minister of Housing and Local Government & Anor [1963] 2 QB 196 ;<br>Munnich v Godstone Rural District Council [1996] 1 All ER 930 ;<br>North Sydney Municipal Council v Sydney Serviced Apartments Pty Limited (1990-1991) 21 NSWLR 532;<br>Redland Bricks Limited v Morris [1970] AC 652;<br>Stutchbury v Pittwater Council (1999) 105 LGERA 1 ;<br>Trade Practices Commission v Glo Juice Pty Limited (1987) 73 ALR 407;<br>Trade Practices Commission v Walplan Pty Limited (1985) 7 ATPR 47-174;<br>Van Hasteren v South Sydney Council (2000) 109 LGERA 252;<br>Vicbrow v Willoughby City Council (1997) 96 LGERA 288; |
| **DATES OF HEARING:** | 7/5/01 |
| **DATE OF JUDGMENT:** | 06/07/2001 |
| **LEGAL REPRESENTATIVES:** | APPLICANT<br>Mr W Purdon (Solicitor)<br><br>SOLICITORS<br>William Purdon, Solicitor<br><br>RESPONDENT<br>Mr R Wilcher (Solicitor)<br><br>SOLICITORS<br>Baker & McKenzie |

**JUDGMENT:**

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| **IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES** | **MATTER No.** 10086 of 2001<br>**CORAM: Cowdroy J**<br>**DECISION DATE: 7/06/01** |

**Eric William Foster**

**Applicant**

**v**

**Sutherland Shire Council**

**Respondent**

**JUDGMENT**

**Facts**

1. By application class one dated 7 February 2001 the applicant appeals against an order issued on 4 January 2001 ("the order") by Sutherland Shire Council ("the council") pursuant to s 121B of the Environmental Planning and Assessment Act 1979 ("the EP&A Act"). This appeal is currently being heard by Commissioner Brown of this Court. Pursuant to s 36(5) of the Land and Environment Court Act 1979 Commissioner Brown has referred the following question of law to the Court for determination:-

> *Whether the instrument issued by the respondent pursuant to s 121B of the Environmental Planning and Assessment Act 1979 dated 4 January 2001 served on the appellant constituted a valid enforcement notice*
>
> *Particulars*
>
> *(a) The instrument did not tell the appellant fairly what he had done wrong and what he must do to remedy it*
> *(b) The instrument did not give adequate reasons as to why the use of the appellant's premises for short-term accommodation was prohibited by law as required by the Environmental Planning and Assessment Act 1979.*

2. The order relates to Lot 11 SP 262 (Unit 201, No 4) Boorima Place Cronulla which compromises a strata titled home unit ("the home unit") which is jointly owned by the applicant and his wife. Mr Eric Foster ("the applicant") has instituted these proceedings as the order was issued solely in his name. The home unit is in a building erected on land zoned 2(c) Residential pursuant to the provisions of the Sutherland Shire Local Environmental Plan 2000 ("the LEP"). The objectives of such zone are stated to be '*high density residential development'* in close proximity to shopping centres and railway stations with '*co-ordinated, efficient and economical development of residential flat buildings of high quality and design'*. Non-residential uses are to provide necessary services '*without adversely affecting the residential amenity'*. Development for the purposes of residential flats is a permissible use with council consent pursuant to the

LEP.

3. A Notice of Intention to Give an Order ("the notice") was issued by the council on 21 March 2000 and required the applicant to:-

*Cease using the premises for short-term tourist accommodation*

4. In contrast the order omits the word '*tourist*' and requires the applicant to desist from engaging in the following activity:-

**What you must do: (terms of the Order)**

(1) *Cease using the premises for short-term accommodation.*

The reasons for the order are expressed as follows:-

(1) *The use of the premises for short-term accommodation is a non-residential use, and is prohibited within the Residential 2(c) zone; and*
(2) *The unlawful use of the premises is causing loss of amenity to the immediate adjoining neighbours.*

**Short-term accommodation**

5. The principal ground of this appeal concerns the alleged uncertainty of the order. The applicant submits that the terms of the order do not specify with particularity the use which is claimed by the council to be prohibited. Section 121B of the EP&A Act provides that an order may be given to a person by a council to do, or refrain from doing, some act provided that the circumstances specified in the table attached to s 121B of the EP&A Act exist. Sub-section 1 of such table states that if premises are being used for a purpose that is prohibited an order may be given to a person requiring cessation of that purpose. In this instance the order directs the applicant to cease carrying out a particular activity, namely the use of the home unit for '*short-term accommodation'*. If such use is a prohibited use under the terms of the LEP the order would satisfy the requirements of s 121B of the EP&A Act.

6. Clause 5 of the LEP defines '*Residential flat*' to mean '*a dwelling within a building containing three or more dwellings but does not include a townhouse or villa house*'. '*Dwelling*' is defined to mean '*a room or suite of rooms occupied or used or so constructed or adopted as to be capable of being occupied or used as a separate permanent residence.*'

7. The term '*short-term accommodation'* is not defined in the LEP. The council submits that any use of the home unit which lacks an element of permanence could be regarded as '*short-term accommodation*' and would be a prohibited use under the LEP. The council relies upon the decision of Mahoney JA in *North Sydney Municipal Council v Sydney Serviced*

*Apartments Pty Limited* (1990-1991) 21 NSWLR 532 at 537 wherein His Honour determined that the term '*residential building*' envisages '*a significant degree of permanency of habitation or occupancy*'. Council submits that the concept of '*residence*' incorporated in the definition of '*residential flat*' has the effect of excluding '*short-term accommodation'* because such use is not permanent.

**Requirements of an order**

8. Courts orders are required to formulated in precise terms. In the case of restraining orders, the proscribed conduct must be clearly stated to avoid uncertainty and the potential for continual breaches (see *Trade Practices Commission v Glo Juice Pty Limited* (1987) 73 ALR 407 at 415 per Burchett J; and see also *Australian Federation of Construction Contractors v Australian Building Construction Employees' and Builders Labourers' Federation* (1984) 73 FLR 61 at 62; *Redland Bricks Limited v Morris* [1970] AC 652 at 666 per Lord Upjohn). A court order should not leave unresolved the central issue in the case (see *Trade Practices Commission v Glo Juice Pty Limited* at 415 and see also *Trade Practices Commission v Walplan Pty Limited* (1985) 7 ATPR 47-174 at 47-176 per Pincus J).

9. In *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 the High Court of Australia held that a statutory power to fix a price by a regulation or order would not be properly exercised if the basis or rationale for fixing the price was left uncertain. Dixon J said at 197:-

> *But it is another matter when the basis of the price, however clearly described, involves some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment. When that is done no objective standard is prescribed; it is not a calculation and the result is not a price fixed or a fixed price. That, I think, means that the power has not been pursued and is not well exercised.*

Similarly, Rich J in *King Gee* held at 190 that a formula for fixing the price which ' *depends on uncertain matters of estimate and not of calculation'* was uncertain and did ' *not amount to the the statement of a 'principle standard, rule or guide' (* Vardon v The Commonwealth *(1943) 67 CLR 434 at 448) which is necessary to support the exercise in due form of these powers'* . The order was held invalid by Starke J and Williams J on similar grounds (see *King Gee* at 193 and 205 respectively).

10. The principle in *King Gee* was followed in *Cann's Pty Ltd v The Commonwealth* (1945) 71 CLR 210 in which Latham CJ noted at 217 as follows:-

> *In the case of* King Gee Clothing Co Pty Ltd v The Commonwealth *it*

*was held that where the Commissioner fixes prices by reference to a standard, the standard must not be such that any element therein can be ascertained only by the exercise of discretion in apportionment, allotment, allocation or otherwise.*

**Uncertainty of order**

11. The certainty required for the formulation of a court order or statutory order should apply to an order issued by council pursuant to s 121B of the EP&A Act. The order must be certain. The table to s 121B of the EP&A Act provides that an order may be issued if '*premises are being used for a purpose that is prohibited'*. However the use sought to be restrained by the order is dependent upon the council's discretion concerning the duration required to constitute '*short-term accommodation'*. Council wrote to the applicant on 19 January 2001 as follows:-

> *I refer to the telephone conversation on 10 January 2001 concerning the Order No 1 issued pursuant to s 121B of the Environmental Planning and Assessment Act 1979 (NSW) dated 4 January 2001.*
>
> *I have discussed your question regarding the requisite degree of permanency required for you to lawfully use your unit in the 2(c) Residential zone with a senior planner. The minimum length of time for a person(s) to occupy the unit should be six (6) months.*
>
> *This time period should satisfy the degree of permanency for the use to be classified as residential.*

Accordingly, adopting council's contention, any use of residential accommodation for a period of less than six months duration would constitute a prohibited use in the residential zone. Interpreted literally the order would prohibit the applicant from using the home unit for his own accommodation for short periods as well as any ' *short-term accommodation'* by tourists.

12. Council's determination that use of residential premises for periods of less than six months does not constitute a residential use has no statutory basis. In *North Sydney Municipal Council v Sydney Serviced Apartments Pty Limited* the use of the premises was prohibited because the home units were occupied by third parties as serviced apartments analogous to a hotel use, or a commercial use. Such use is quite different to '*short-term accommodation'* by an owner of his or her home unit.

13. The order has been issued without an objective standard against which the prohibited use sought to be restrained can be determined with certainty. As a consequence, the order does not '*tell him* [the applicant]

*fairly what he has done wrong and what he must do to remedy it*' (per Upjohn LJ in *Miller-Mead v Minister of Housing and Local Government & Anor* [1963] 2 QB 196 at 232). In that decision the Court of Appeal (UK) was concerned with a notice issued pursuant to a planning law requiring a landowner to cease an alleged illegal use. Such test was approved by the Court of Appeal (UK) in *Munnich v Godstone Rural District Council* [1996] 1 All ER 930 per Denning M.R. at 934.

14. If the order adopted the same terminology as the notice its requirements would have been certain. The applicant would have been required to cease using the home unit for '*short-term tourist accommodation'*. If the evidence established that such use was being conducted as a commercial activity (see *Vicbrow v Willoughby City Council* (1997) 96 LGERA 288), it would prima facie constitute a prohibited use in the Residential 2(c) zone. To constitute a valid order made pursuant to s 121B of the EP&A Act it must be unequivocal and relate to a purpose that is prohibited. In this instance the order does not accord with such requirements and is accordingly invalid.

**Particulars of the order**

15. Section 121L of the EP&A Act provides that reasons for orders must be given. The applicant submits that the reasons provided in the order are inadequate and relies upon the judgment of Sheahan J in *Stutchbury v Pittwater Council* (1999) 105 LGERA 1 and Bignold J in *Van Hasteren v South Sydney Council* (2000) 109 LGERA 252. In this instance the particulars provided do not state the objective criteria against which the applicant can establish that '*short-term accommodation'* constitutes a prohibited use. In light of the above findings the Court upholds the submission that the mandatory requirements of s 121L of the EP&A Act have not been satisfied.

**Existing use**

16. The applicant additionally submitted that existing use rights applied since the use of his premises for '*short-term accommodation'* pursuant to the repealed Sutherland Local Environmental Plan 1993 was conducted prior to the gazettal of the LEP. However this issue is not relevant to the question of law referred to the Court for determination.

**Costs**

17. The applicant has applied for costs of this hearing. The Practice Direction 1993 relevantly provides as follows:-

> *10. Costs in Classes 1 & 2*
> *The Practice of the Court is that no order for costs is made in planning and building appeals unless the circumstances are exceptional.*

In the absence of any exceptional circumstances to justify a departure from such Direction the Court makes no order as to costs.

**Orders**

18. The Court answers the question of law as follows:-

1. The order dated 4 January 2001 issued by the respondent pursuant to s 121B of the Environmental Planning and Assessment Act 1979 is not a valid order.

19. The Court orders that the proceedings be listed before the registrar for directions on 14 June 2001.

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# Land and Environment Court of New South Wales

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| **CITATION :** | **Sutherland Shire Council v Foster & Anor [2003] NSWLEC 2** |
| **PARTIES :** | APPLICANT<br>Sutherland Shire Council<br><br>RESPONDENTS<br>Eric William Foster and Colleen Leola Foster |
| **FILE NUMBER(S) :** | 40002 of 2002 |
| **CORAM:** | Pain J |
| **KEY ISSUES:** | Injunctions and Declarations :- whether residential flat building was being used for holiday or short-term accommodation |
| **LEGISLATION CITED:** | County of Cumberland Planning Scheme Ordinance<br>Environmental Planning and Assessment Act 1979<br>Sutherland Local Environmental Plan 1993<br>Sutherland Local Environmental Plan 2000 |
| **CASES CITED:** | Foster v Sutherland Shire Council (2001) 115 LGERA 130;<br>North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 71 LGRA 432 |
| **DATES OF HEARING:** | 20, 23/09/2002 |
| **DATE OF JUDGMENT:** | 09/24/2002 |

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| | APPLICANT |
| **LEGAL** | Mr J Ayling SC |
| **REPRESENTATIVES:** | SOLICITORS |
| | Baker & McKenzie |
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| | RESPONDENT |
| | Mr W Purdon (solicitor) |

**JUDGMENT:**

**IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES**

**40002 of 2002**
**Pain J**
**24 September 2002**

**SUTHERLAND SHIRE COUNCIL**

Applicant

**v**

**ERIC WILLIAM FOSTER & COLLEEN LEOLA FOSTER**

Respondents

**JUDGMENT**

**Introduction**

1. The Council is seeking certain declarations and an order restraining activity by the Respondents, Eric William Foster and Colleen Leola Foster, in relation to their flat, Unit 201 in 4 Boorima Place, Cronulla, which is in a residential flat building known as Trade Winds (the building).

2. The declarations and orders sought by the Council are as follows:
*(i) A declaration that the Respondents, use or permit to be used the premises being Lot 11 in Strata Plan 262 (comprising Unit 201 in the building known as 4 Boorima Place Cronulla) otherwise than for a*

*purpose permitted by and in accordance with development consent 19/60 of 25 February 1960;*
*(ii) A declaration that the Respondents use or permit to be used the said premises otherwise than as a residential flat, alternatively otherwise than as a residential building, to wit for the purpose of the provision of holiday or other short-term accommodation; and*
*(iii) A declaration that the said use contravenes the provisions of the Environmental Planning and Assessment Act 1979 (the EP&A Act) and is consequently unlawful.*
*(iv) An order that the Respondents, their servants and agents be restrained from using or causing suffering or permitting to be used the premises being Lot 11 in Strata Plan 262 (comprising Unit 11* [sic] *in the building known as 4 Boorima Place Cronulla) for the provision of holiday or other short-term accommodation.*
*(v) Costs.*
*(vi) Such further order or other relief as the nature of the case shall demand.*

3. The Council has argued that, following the grant of Development Consent 19/60 in February 1960 pursuant to the County of Cumberland Planning Scheme Ordinance (the Ordinance), the building could be used only as a residential flat building and continues to be able to be used only on that basis. By that submission, the Council means that the use of the flats in the building should be as a permanent domicile or home.

4. The Council argued the Respondents had been using Unit 201 for holiday and short-term accommodation and that activity is not a permitted use of the flat in the building given the existing development consent.

**Legal framework issues**
5. Under the relevant local environmental planning instruments, the Sutherland Local Environmental Plan 1993, which was in operation when the Respondents purchased Unit 201, and now the Sutherland Local Environmental Plan 2000 (the 2000 LEP), the building is in a Zone 2(c), Residential zone. The planning tables in the LEPs for that zone shows that holiday and short-term accommodation is prohibited development.

6. I should note there was an argument put to me by the Respondents' solicitor to the effect that the objectives of the 2(c) zone and the overall objectives of the 2000 LEP, which the Respondents claim they were complying with, in some way override the provisions concerning permissible and prohibited development in the planning table. It seems to me the 2000 LEP is clear on what is permitted and not permitted in this zone, and I do not accept this argument.

7. The Ordinance does not have a definition of residential flat building or

flat. The legal issue here is very similar to that which was considered in a series of cases concerning the operation of serviced apartments at the Blues Point Tower at McMahons Point in Sydney. Those cases also dealt with a consent for a residential flat building and the scope for use of that building under the Ordinance.

8. In terms of these particular proceedings, I rely on the decision of Mahoney J in *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd* (1990) 71 LGRA 432. I particularly rely on a passage at 437:

> *In the end, my conclusion is that the meaning of the consent, though not determined by, is to be read consistently with the use of language in the relevant definitions in the* County of Cumberland Planning Scheme Ordinance *. The definition of "residential building" requires nothing more than use for human habitation. However, it includes within its terms descriptions of buildings or usages involving different kinds of human habitation. The kind of human habitation required to satisfy each of these will vary according to the nature of each of them and will, inter alia, require different degrees of permanency. Thus, a residential hotel may have a smaller degree of permanence than a residential club or a hostel. It is, I think, not inconsistent with the thrust of the definition that there should be within it a kind or category of residential building which envisages a significant degree of permanency of habitation or occupancy.*
>
> *The description of a flat as a "dwelling" or a "domicile" carries with it the notion of that degree of permanency.*

9. I am adopting that formulation by Mahoney J in relation to this matter, so that I consider the overall issue before me is whether the use of Unit 201 by the Respondents has been as a permanent domicile or home as Development Consent no. 19/60 required.

**Evidence relied on by the Council**

10. The Council filed a number of affidavits in support of its case. This evidence showed that from approximately late November 1999 until approximately May to June 2001, and again from June 2001 until approximately March or April 2002, there were attempts being made by the Respondents to let out Unit 201 for short-term accommodation. There was quite extensive evidence in relation to this.

11. The evidence included advertising of Unit 201 in the NRMA Open Road magazine as holiday accommodation on a number of occasions,

with the last occasion being in the November/December 2001 edition of the Open Road magazine. There was evidence that the NRMA advertising had been organised by one of the Respondents, Eric Foster. There was also evidence of printed brochures advertising the use of Unit 201 for short-term accommodation in approximately 1997 and 1998 and the distribution of those brochures over a substantial period. The evidence showed the distribution of the brochures was conducted through the Sutherland Shire Tourist Association office, and that this continued into March 2002. There was also evidence that there were signs in the window of Unit 201 advertising a weekly or monthly rental during September 2000. The telephone number on all the forms of advertising about which there was evidence was that of the Respondents at their Sylvania home.

12. There are direct admissions from the Respondents of the use of Unit 201 for short-term accommodation, sometimes for payment, although the extent of that payment is unclear. There was also evidence of conversations in January 2002 between Mr Busa, the Council's solicitor, and in November 1999 between Mr Ilken, the body corporate solicitor, with Mrs Foster or one of her daughters to the effect that Unit 201 was available for short-term rental accommodation. While there was some disagreement about the precise content of those conversations on the part of Mrs Foster, I accept that conversations in fairly similar terms to those attested to in the affidavits of Mr Busa and Mr Ilken were held.

13. Further evidence was also presented by the Council in the form of logs kept on the movement of peoples and cars by Mr Brian Merton, who was another unit owner in the building. He kept a log over a fairly lengthy period, which disclosed extensive movement of different people in and out of Unit 201 and the use of cars related to the use of Unit 201. I have to say the material in the log kept by Mr Merton is equivocal in some regards, but the overall weight of information he supplies does support broadly the position that Council has taken in relation to the use of Unit 201 by large numbers of people for short-term periods.

14. There was also evidence of searches conducted by the Council in relation to car registration numbers seen by Mr Merton in relation to occupants of Unit 201, and material which was subpoenaed from motor vehicle registration authorities in New South Wales, Queensland and Victoria was presented to the Court. That confirmed that a number of the vehicles recorded by Mr Merton were from other states and not, presumably, from the immediate area of Cronulla in Sydney.

**Evidence relied on by the Respondents**

15. There were affidavits dated 22 September 2002 and 19 April 2002 from one of the Respondents, Mrs Colleen Foster, who stated that the use by her family of Unit 201 was always as a permanent home with any

visits being ancillary to that use. It was her evidence in her affidavit of 22 September 2002 that a large number of people had stayed at the unit and that these people were family, friends, relations, acquaintances and that some of them did pay. Once again, the extent of the receipt of payment from visitors was unclear. Mrs Foster attached to her affidavit of 22 September 2002 a list of approximately seventy people who she could recall had stayed at Unit 201 from approximately late 1999 to 2001. The evidence was that some of these people had rented the unit, but she was unable to say the number of times this had occurred.

16. There was also an affidavit from Mr Dean Kutsch, also a resident of the building, in support of the Respondents' case, to the effect that the Respondents had not caused disturbance in the building. I note that he did also confirm there had been some use of Unit 201 for short-term accommodation.

17. Further, there was evidence that there was a tenancy in Unit 201 for approximately two months in May and June 2001. There was oral evidence from Mrs Foster to that effect and also the provision of a statement of a summary of account from a real estate agent. I therefore note that for the period May to June 2001 it appears there was a tenancy arrangement for Unit 201.

18. I also note that evidence was provided of a residential tenancy lease entered into by Mr Eric Foster, one of the Respondents, with Transfield Pty Limited, which commenced in March 2002 for a period of three months.

**Finding**

19. It seems to me that there is overwhelming evidence that there were attempts made by the Respondents to use, and actual use of, Unit 201 for holiday and short-term accommodation from late 1999 to at least March 2002, apart from the tenancy period in approximately May to June 2001.

20. The precise extent of the short-term use of Unit 201 is impossible to quantify in terms of the evidence presented to the Court, but it would appear that it has been considerable in terms of a large number of people using Unit 201 for short-term accommodation.

21. I have trouble accepting the evidence presented to the Court by the Respondents that the use of Unit 201 was as a permanent home as the Respondents claim. There is evidence that the Respondents certainly stayed there, and on one occasion for approximately a month it appears from the log kept by Mr Merton. There may well have been other occasions, but there was no evidence of that.

22. In her affidavits of 22 September 2002 and 19 April 2002, Mrs Foster gave her address as 34 Young Street, Sylvania. I also note that the contact telephone numbers in all the advertisements for Unit 201 were the telephone number at that Sylvania address. While Mrs Foster's written and oral evidence asserted that Unit 201 was also her permanent residence, there is insufficient evidence to support that conclusion. I agree that it is theoretically possible to have more than one home, but I am simply not satisfied on the evidence, or rather lack of it, before me that Unit 201 has been a permanent residence for the Respondents.

23. There is one other issue that I need to refer to in relation to the Respondents' arguments. The Respondents relied to a great extent on a decision of Cowdroy J in the matter of *Foster v Sutherland Shire Council* (2001) 115 LGERA 130. That case concerned the validity of an Order requiring the use of Unit 201 for short-term accommodation cease that was served on one or both of the Respondents by the Council pursuant to s 121B of the EP&A Act.

24. I should note that in the view of Cowdroy J the order that had been served was invalid, so that the Fosters were successful in terms of the matters before Cowdroy J. He did note at par 14:

> *If the evidence established that such use was being conducted as a commercial activity... [that is, the short-term accommodation use], it would prima facie constitute a prohibited use in a residential 2(c) zone.*

25. This was said to support the Respondents' case, for the reason that they had complied with the law and they relied on a statement made by Cowdroy J in his judgment. The Respondents maintained in these proceedings that ever since Cowdroy J's judgment was handed down on 7 June 2001 they had not conducted such a business.

26. Firstly, I should note the nature of the proceedings before Cowdroy J was quite different to the matter before me and the legal issues were of a different type. I was not provided with any evidence such as transcript or affidavit material relied on in the proceedings before Cowdroy J. It is therefore difficult to see how the statements made by his Honour in his judgment, which the Respondents relied on, are of any assistance to me or them in this case.

27. Secondly, there is uncontested evidence in my view that after Cowdroy J's decision was handed down in June 2001, there was further advertisement of Unit 201 as holiday accommodation in the NRMA Open Road magazine. There was also evidence that the brochures advertising Unit 201 as holiday accommodation continued to be available at the Sutherland Shire Tourist Association, and Unit 201 appeared as at March 2002 to be on the current accommodation list at that office. There was

also evidence from Mr Merton's logs, which continued to identify numerous different people using Unit 201 up until early 2002 when the log ceased. There was also evidence in Mr Busa's affidavit of a telephone conversation with Mrs Foster in January 2002 during which the availability of Unit 201 for short-term rental was confirmed. It appears to me that efforts to let Unit 201 for short-term accommodation did continue after Cowdroy J's decision.

28. The Respondents' solicitor urged on the Court the proposition that the activities which may have been undertaken at Unit 201 before 2002 were irrelevant and that the Court should focus on the current rental arrangements at Unit 201 in place since March 2002. I have already noted there was a lease entered into with Transfield Pty Limited commencing in March 2002, which is obviously a material matter in terms of the current use. However, I cannot agree with the Respondents' solicitor's submission, given that proceedings were commenced in February 2002. It is clearly necessary for the Council to demonstrate to the Court a history of the use of Unit 201 in order to show that its case was well founded.

29. I do consider the evidence presented by the Council is relevant to the matter in issue, and I consider that overall the Council has proven, on the balance of probabilities, the Respondents have not been using Unit 201 as a residential flat in accordance with the development consent number 19/60 of 25 February 1960, but rather there have been attempts to use, or it has actually been used for, holiday and short-term accommodation from late 1999 to approximately March 2002, with the possible exception of one period of a two months tenancy in mid-2001. Although I have reservations as to whether that tenancy could be said to be use of Unit 201 as a domicile, I do not need to make a definitive finding on that matter for current purposes.

30. A residential tenancy agreement has been presented to the Court between Eric Foster and Transfield Pty Limited dated 21 March 2002, and that lease has now expired. The use of the premises under the terms of that lease may be more acceptable to the Council, although there has been no detail provided as to what that use was.

31. In all the circumstances of this matter, I am minded to make declarations 1, 2 and 3 as sought in the Amended Application Class 4 filed by the Council. There is, however, one other matter that I should raise. The Council has also asked that I consider making the order in prayer 4 of the Amended Class 4 Application on a quia timet basis. I am prepared to consider, given the history of the matter, making an order, but have concerns about the broad nature of the order sought in prayer 4 of the Amended Class 4 Application.

32. I will refer the issue of the form of any order I should make back to the parties for further discussion, and I would ask that the parties file within seven days, if they are able to, a more narrowly confined order that the Court could consider. I would ask that the matter come back before me for callover in ten days and I can decide at that point if I will make an order and what the terms of that order ought to be.

33. I will reserve on the question of costs at this stage and I will order that the exhibits be returned, except for exhibits 2, D and the subpoenaed documents forming part of exhibit J which need to remain with the Court.

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