Land and Environment Court

New South Wales

Medium Neutral Citation:	**Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Limited (No 2 re Maestri) [2011] NSWLEC 235**
Hearing dates:	20 May 2011
Decision date:	07 December 2011
Jurisdiction:	Class 4
Before:	Sheahan J
Decision:	1. The respondent (by itself or its agent) is restrained from 1 January 2012 from using the premises situated at and known as 'Oaks Maestri Towers', 298-304 Sussex Street, Sydney NSW ('the Premises') for the purposes of 'serviced apartments' ('the said Purpose') unless and until development consent for such use is granted pursuant to the *EPA Act* and such consent is in force. 2. The respondent (by itself or its agent) is restrained forthwith from: (a) advertising or holding out the Premises or any part of them as available for the said Purpose; and ((b) leasing or licensing the Premises or any part of them for the said Purpose unless and until development consent for such use is granted pursuant to the *EPA Act* and such consent is in force. 3. The respondent pay the applicant's costs of these proceedings as agreed or assessed. 4. The applicant has liberty to apply on three days notice.
Catchwords:	INJUNCTIONS & DECLARATIONS: Final orders in class 4 proceedings after resolution of related class 1 proceedings; possible effect on non-parties against whom orders were not sought; principles of joinder; costs
Legislation Cited:	Civil Procedure Act 2005 Environmental Planning and Assessment Act 1979

	Residential Tenancies Act 2010 Uniform Civil Procedure Rules 2005
Cases Cited:	Ashfield Municipal Council v Andrews (1986) 60 LGERA 248 Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Limited (No 2 re Harmony) NSWLEC 234 Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Ltd [2010] NSWLEC 181 Council of the City of Sydney v Oaks Hotels & Resorts (NSW) No.2 Pty Ltd [2010] NSWLEC 182 CTI Joint Venture Company Pty Ltd v CRI Chatswood Pty Ltd (in Liq) (No 2) [2011] NSWLEC 91 Holroyd City Council v Murdoch (1994) 82 LGERA 197 Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2) (1997) 96 LGERA 254 News Limited & Ors v Australian Rugby Football League Limited & Ors (1996) 64 FCR 410 North Sydney Council v Ligon 302 Pty Ltd [1996] HCA 20; (1996) 185 CLR 470 Oaks Hotels & Resorts (NSW) No. 2 Pty Ltd v The Council of the City of Sydney [2011] NSWLEC 1049 Oaks Hotels and Resorts (NSW) No 2 Pty Ltd v The Council of the City of Sydney [2011] NSWLEC 1054 Pegang Mining Co Limited v Choong Sam [1969] 2 MLJ 52 State of Victoria v Sutton [1998] HCA 56; (1998) 195 CLR 291 Walker v Commonwealth Trading Bank of Australia (1985) 3 NSWLR 496 Wilkie v Blacktown City Council & 3 Ors [2002] NSWCA 284; (2002) 121 LGERA 444
Category:	Consequential orders
Parties:	Council of the City of Sydney (Applicant) Oaks Hotels & Resorts (NSW) No.2 Pty Ltd (Respondent)
Representation:	Mr M Baird (Applicant) Mr T Hale SC (Respondent) Council of the City of Sydney (Applicant) Minter Ellison (Respondent)
File Number(s):	40515 of 2009

JUDGMENT

Introduction

1 These class 4 proceedings and their companion matter (40516 of 2009) are back before the court for final disposition.

2 Sydney City Council challenged the respondent company in separate but similar proceedings over the alleged unauthorised use by the company of residential units it does not own as serviced apartments. The company essentially argues that the use is carried out by the owners and merely facilitated by Oaks.

3 This present matter concerns the property known as Oaks Maestri Towers, occupying a site with frontages to both 298-304 Sussex Street, and 515-519 Kent Street, Sydney (' *Maestri* '). The companion matter concerned Oaks Harmony, 107-121 Quay Street, Haymarket (' *Harmony* ').

4 I delivered my earlier judgments in both class 4 proceedings on **30 September 2010** (Re *Maestri,* see [2010] NSWLEC 181, and re *Harmony,* see [2010] NSWLEC 182).

5 Despite their factual differences, I concluded in both cases that the company was, in fact, using various units in the respective residential unit blocks as serviced apartments without relevant consent, but I found no evidence of any environmental or other harm arising from the alleged breach of s 76A(1) of the *Environmental Planning and Assessment Act* 1979 (' *EPA Act*').

6 I did not proceed to make any orders in either class 4 matter, as relevant class 1 proceedings concerning both developments were reserved before Commissioner Murrell at the time. The respondent had proposed in November 2009 that the class 4 proceedings in each case be adjourned after findings, pending the determination of the class 1 appeals.

7 The learned Commissioner gave her judgments in the two relevant class 1 appeals on **1 March 2011** .

8 In respect of *Harmony* , the class 1 appeal (10055 of 2010) was **upheld** , and consent was granted to use 49 residential units as serviced apartments on various conditions, including a two-year time limit (see *Oaks Hotels & Resorts (NSW) No. 2 Pty Ltd v The Council of the City of Sydney* [2011] NSWLEC 1049) .

9 In respect of *Maestri* , the class 1 appeal (10056 of 2010) seeking to expand beyond 24 units the scope of the consent to use units in the complex as serviced apartments, was **dismissed** (see *Oaks Hotels and Resorts (NSW) No 2 Pty Ltd v The Council of the City of Sydney* [2011] NSWLEC 1054) .

10 Final orders are made today in both class 4 proceedings. This judgment deals with *Maestri* . The judgment and orders in the *Harmony* matter can be found in [2011] NSWLEC 234.

Maestri

11 In the circumstances of *Maestri* , the respondent contends that no orders should be made because the court lacks power, but draft orders in the following terms were agreed in the event that I was satisfied of the power to make them:

1. *The Respondent (by itself or its agent) is restrained from 1 July 2011 from using the premises situated at and known as 'Oaks Maestri Towers', 298-304 Sussex St, Sydney NSW ('the Premises') for the purposes of 'serviced apartments' ('the said Purpose') unless and until development consent for such use is granted pursuant to the EPA Act and such consent is in force.*

2. *The Respondent (by itself or its agent) is restrained forthwith from:*

a. advertising or holding out the Premises or any part of them as available for the said Purpose; and

b. leasing or licensing the Premises or any part of them for the said Purpose

unless and until development consent for such use is granted pursuant to the EPA Act and such consent is in force.

2. *The Respondent pay the Applicant's costs of these proceedings as agreed or assessed.*

12 In my substantive judgment on *Maestri* , I made the following comments (at [86]ff):

> *86 It is clear from the evidence that:*
>
> *(1) contrary to Mr Hale's contention, there is indeed a link between lot numbers and apartment numbers (see* Exhibit C1 *);*
>
> *(2) no apartments in the Kent Street Tower are allowed to be used as serviced apartments (as defined in either LEP);*
>
> *(3) the approvals for the Sussex Street Tower do not allow "* **any** 24 *" of its apartments to be so used, and the fact that 24 or fewer are used at any one time does not speak against a clear breach of a requirement to use only a particular 24;*
>
> *(4) only the apartments in the Sussex Street Tower, numbered as apartment/lot 111, 113, 208, 209, 127, 128, 141, 142, 143, 144, 157, 158, 159, 160, 173, 174, 175, 176, 189, 190, 191, 192, 205, and 206 - four on each of six levels (2 to 7) of that Tower, and accessed by a dedicated lift ('E2' to Harding) - are approved for such use; and*
>
> *(5) as the restrictive covenant was required by the Sussex Street Tower consent to specify which 24 apartments could be used as serviced apartments, any exceedence of that specification must be a breach of the condition.*
>
> ...
>
> *91 The issue before the court is whether or not the present respondent, Oaks 2, could be held to be in breach of the law by virtue of its "*using *" any of the "*land *" in the complex, in breach of the relevant consent.*

92 The definitions of " real estate agent *" and "* real estate transaction *", contained in s 3 of the* Agents Act *, and other relevant provisions of that Act, do not preclude a finding that the activities of Oaks 2 in respect of* Maestri *, which may include but are not limited to the traditional tasks of a real estate agent (including "* property management services *", not specifically defined), amount to "* using *' the subject land.*

93 Oaks 2, as the applicant for consent in the DA the subject of the class 1 appeal (see Exhibit R1 *), announced itself as manager of the serviced apartments in* Maestri *(in its Statement of Environmental Effects at cl 4.2). The way it deals with the units in its care (offering apartments for short term lettings, setting tariffs, taking bookings, maximising income, informing short-term occupants in detail, organising servicing, etc) is clearly to "* use *" them as serviced apartments, in many cases beyond the conditions of consent.*

The *Super League* Principles

13 As in *Harmony* , the respondent relies on the principles laid down in *News Limited & Ors v Australian Rugby Football League Limited & Ors* (1996) 64 FCR 410 (' *Super League* ') as applying to the present circumstances, such that orders would not be made against it. Council proceeded only against the respondent, and not against any individual unit owners, and the respondent contended that it was acting purely as an agent of the owners of the relevant units with whom it had a contractual relationship, and that any orders made by the court would have a direct impact on owners given no hearing.

14 Mr Hale, senior counsel for Oaks, submitted at the February 2010 hearing of both matters (respondent's submissions, filed 9 February 2010, par 22):

> *...only the respondent, the real estate agent, has been joined as a respondent. For reasons best known to the applicant it did not join or seek orders against:*
>
> - *Oaks Hotels and Resorts Limited, to whom the Council sent the letter of demand on 21 October 2007;*
> - *...*
> - *Each of the principals of the respondent which have contractual relations with the respondent. Any orders made would effect* [sic] *the contractual interests of the unit owners as well as their rights as owners of those units; and*
> - *The lessees under any leases.*

15 It is now submitted on the basis of these facts, and in light of *Super League* , that " *[s]ince those parties have not been joined to the proceedings no orders should be made which effects* [sic] *their rights or interests"* (c.f. those submissions, par 22.1).

16 In *Super League,* a submission was put to the court on behalf of the players and coaches engaged in that League, that as they were not joined, the relevant claim (among many claims and cross-claims) was " *improperly constituted* ". The relevant Federal Court rule at the time required that all parties necessary

for determining a point in issue must be before the court. The situation is now dealt with by *Uniform Civil Procedure Rules* 2005 (' *UCPR* ') r 6.24 which provides:

> **6.24 Court may join party if joinder proper or necessary**
> *(cf SCR Part 8, rule 8 (1); DCR Part 7, rule 8 (1); LCR Part 6, rule 8 (1))*
> *(1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.*

17 The NSW and Australian Rugby Leagues contended that the Super League players and coaches were not necessarily parties who " *ought to have been joined* " within the meaning of the rule, as it was possible " *to do justice between the existing parties to the litigation* " without joining them.

18 The relevant players and coaches were on " *sufficient notice of the proceedings and the remedies sought* ", but had elected not to take up the opportunity to seek to be joined. Solicitors for the NSW League had sent to each of the players a copy of the orders sought in the relevant cross-claim and put the recipients of the letters on clear notice that they could possibly be affected by orders of the court in the proceedings. They encouraged the recipients to take their own legal advice, but emphasised that orders were not sought against any player. No such letter was sent to coaches.

19 The rationale of rules such as *UCPR* 6.24 has been the avoidance, where reasonably practicable, of a multiplicity of proceedings (*Super League* , at 524B).

20 Lord Diplock on behalf of the Judicial Committee of the Privy Council said, in *Pegang Mining Co Limited v Choong Sam* [1969] 2 MLJ 52 *('Pegang')* , (at pp55-56, quoted at 524C-D of *Super League*), that one of the principal objects of such a rule is:

> *...to enable the court to prevent injustice being done to a person whose rights will affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his first being given an opportunity of being heard..*

21 His Lordship went on to say that it was " *undesirable* " to attempt to lay down any general proposition which could be applicable to all cases. He rejected any artificial dichotomy being established between " *legal* " and " *commercial* " interests, and said (see *Super League* , at 524E):

> *A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?*

22 The Federal Court adopted the test as proposed by Lord Diplock, and noted (at 525B-E) that it:

... involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be directly affected. The requirement that a third party's rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or lesser extent. This is particularly so with remedies in the nature of an injunction ... The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential... the test is not whether the conduct of the third party is raised in the pleadings between the existing parties, or whether the third party is a party to a contract, the meaning or effect of which is pleaded as a matter relevant to the ascertainment of the rights between those parties...

23 The Federal Court put it quite simply (at 524E-F):

An order which directly affects a third person's rights against or liabilities to a party should not be made unless the person is also joined as a party. If made, the order will be set aside.

24 The court concluded that the Super League players and coaches were not necessary parties who ought to have been joined. An award of damages against News Limited and the Super League companies would not directly affect the rights or liabilities of the players or coaches, and their non-joinder did not prevent the court from considering whether breaches of their contracts with their clubs had occurred. The court noted (at 525-6):

The absence of the players and coaches was a deliberate choice by the [NSW] League and the ARL. As the players and coaches were not joined, the relevance of their non-joinder became a matter of importance when orders were formulated at the conclusion of the trial. They remain matters of importance in the formulation of the orders that are to operate between the parties in consequence of the judgment of this court.

In our opinion, the notice given to the players before trial does not, and could not, extend the jurisdiction of the Court to make orders which offend the test stated in Pegang Mining *. Absent an application for joinder by a defendant, or by a third party who claims to be directly affected by the proposed orders, it is for the party prosecuting the proceedings to choose who are the necessary parties to enable the Court to make the orders sought.*

25 The Federal Court went on to express the view that the orders sought in the *Super League* proceedings, read without the pleadings, gave an inadequate description of their scope and possible effect. " *They were not likely to be readily understood by people without legal training"* (526-7). Some orders were ultimately made at first instance which went beyond the orders in the copy provided. Those orders directly affected Super League players and coaches in respect of their rights against or liabilities to their Super League employers. The orders did so in a way that restricted their freedom to choose the employer for whom they would work. The court said (at 527B-D):

This is likely to be a matter of fundamental importance, at least to many of them. In our opinion, these orders do in a direct and substantial way affect the obligations and rights of the players (some of whom were not subject to player contracts with any of the clubs when they signed Super League employment contracts) to and against parties to the first cross-claim. The same applies to the coaches.

In our opinion, the non-joinder of the players and coaches, to the extent that orders made did so affect them, is not cured by the fact that they were permitted to make submissions after the delivery of judgment to the trial judge as to the form of the orders. By that stage, they had been deprived of the opportunity to participate in the trial of the issues that had already been determined in a way that the trial judge thought required redress in terms of the orders made. It follows that [some orders] ... should be discharged by reason of the failure of the cross-claimants to join the Super League players and coaches in the proceedings.

Submissions on Joinder of Owners

26 Mr Hale submits that the position of owners in *Maestri* , apart from the owners of the 24 designated units, are in a *Super League* situation and their joinder in the proceedings was " *necessary in order to enable the court effectively and completely to adjudicate upon and settle all matters in dispute in the proceeding".*

27 The unit owners were on notice that an order of the court may upset their serviced apartment arrangements with the defendant company, but no orders were sought against individual owners. No owners in this case, and no players (or coaches) in *Super League* sought to be joined as parties to the relevant proceedings.

28 Oaks contends that the rights of the unit owners in the present case are directly affected and they should have been joined. After the trial is too late, even if they were on notice.

29 In response, Mr Baird, counsel for the Council, did not see that the question was simply whether third parties were directly affected, but rather, he framed the question now before the court in a way (T 20.5.11, p39, LL9-13) which relies on the precise words of r 6.24; the obligation under s 56 to reach a just, quick and cheap solution; the relevant parts quoted above from *Super League;* and the decision of the Court of Appeal in *Wilkie v Blacktown City Council & 3 Ors* [2002] NSWCA 284; (2002) 121 LGERA 444 (' *Wilkie* ').

30 Rule 6.24 distinguishes between potential parties who are directly affected, and those who are indirectly affected. It is necessary to identify precisely " *the matter in dispute* ". A proposed joinder does not satisfy the test of necessity if its only purpose is to have the proposed party bound by the decision and no relief is claimed directly against it: *Walker v Commonwealth Trading Bank of Australia* (1985) 3 NSWLR 496.

31 Some of the authorities stress the importance of the plaintiff's entitlement to choose the defendants against whom it will proceed, and *Ritchie* notes that there is no absolute position applicable in all circumstances.

32 Mr Baird argues that a party should be joined only if orders are sought against it. Here the Council had proceeded against only the party against which/whom it was and is seeking orders, because the respondent company was the only party that the Council alleged had breached the consent, and there was no evidence to suggest that the owners of certain units were responsible for the breaches.

33 In *Wilkie* at first instance *,* Pearlman J granted an injunction against the continuation of a use found to be unlawful and held that a rectification order should be made. The land was owned by Constantine, leased to Wilkie, and used for waste purpose by two other respondents, Reid and Graveyard Recycling Pty Ltd ('Graveyard'). Her Honour held that Wilkie had not breached s 76A(1) of the *EPA Act* , but that she had " *permitted or suffered* " the unlawful development of the land. Her Honour did not find that Mr Constantine had himself used the site for the deposit of waste, nor that he permitted or suffered the site to be so used, nor did he acquiesce in that use. No consequential orders were made against him. However, Her Honour made Wilkie the subject of part of the rectification order.

34 Pearlman J's decision was appealed, and the principal issue on appeal was whether the findings of the trial judge against Wilkie were sufficient basis for the rectification order. Her Honour had proceeded on the basis that the court could make a remedial order when satisfied there had been a breach of the *EPA Act* , against any party who has played any part in the breach, even if not in contravention of the Act.

35 The principal judgment in the Court of Appeal was delivered by Davies AJA, with whom Heydon JA agreed without comment, and Young CJ in Equity agreed with some short remarks. The court held that Ms Wilkie did not breach the *EPA Act* . As she was not the owner of the premises, she could not be held to have derived any benefit from the unlawful development.

36 Mr Baird submits that the present matter could be analogous to *Wilkie* , where the use of the property by the lessees was not a use that could be attributed to the owners of that property. Davies AJA said (at [39]-[40] - emphasis his):

39 In Ashfield Municipal Council v Andrews (1986) 60 LGRA 248, it was held by Cripps CJ that mere ownership of a building, the subject of a lease, was insufficient to support the making of a restraining order against the owner of premises which the tenant had commenced to use for an unlawful purpose. The Ashfield Municipal Council had commenced proceedings seeking orders that certain persons including the owners of premises be restrained from acting otherwise than in accordance with an Environmental Planning Instrument. Cripps CJ rejected the claim made against the owners. At 252, his Honour said that the Court was concerned with the meaning of the words "carry out development" in s 76(3) of the EPA Act and with the meaning of the word "used" where appearing in the defined meaning of "development". His Honour said at p 252:

> "But if I had to characterise the purposes of the use of the land by Mr and Mrs Andrews upon an assumption that the reasoning in *Macquarie University* ought to be applied to the present facts I would say they were using the land for the purposes of investment. In *Macquarie University* Gibbs ACJ (at 643) said:
>
> *'If the land in question had been let simply to raise money for the purposes of the university, the decision in* Commissioners of Taxation v Trustees of St Mark's Glebe *[1902] AC 416 would have been directly applicable, and it would not have been possible to say that the land was 'used' for the purposes of the university within par (fii).'*
>
> But whether Mr and Mrs Andrews were using the land for the purpose of investment or not, they were not using the land for the purpose of a brothel. They were not using it for any unauthorised planning purpose. Even if it be assumed that Sandra Gordon had obtained development consent for the stipulated use (which she had not) and had in fact used the building for an office or residence (which she did not) Mr and Mrs Andrews would not have been relevantly using the premises for an office and residence. But even if they had been, they would not have been carrying out development within the meaning of s 76."

40 Some subsequent cases appear to have been influenced by other remarks made in Macquarie University v Ryde Municipal Council [1977] 1 NSWLR 304. However, that was a rating case and the issue was whether the subject property was "land which ... is used ... by the University ... solely for the purposes thereof". It was held that the Macquarie University was entitled to an exemption in relation to that part of its property which provided banking and commercial facilities for the benefit of its students and staff. In my opinion, cases concerning rating and taxation statutes of that type, and there are many of them, have no application to the present issue. As Handley JA, with whom Priestley JA agreed, said in Minister Administering The Crown Lands Act v New South Wales Aboriginal Council (1997) 42 NSWLR 641 at 643-5:

> "In my opinion the appropriate conclusion is that a person making a passive use of land does not 'carry out' development for the purposes of s 76(2) of the Act. There is no decision, either of the High Court or this Court, which constrains the Court to a different conclusion.
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> ...
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> In my opinion the prohibition on the carrying out of development in s 76(2) by the use of land can only be contravened by an active use and has no application where the use is entirely passive. Although a passive use of land may be a use of it for some purposes, the remarks of the High Court in *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 477 referred to by Sheller JA were not directed to this question in the context of s 76(2) and in my opinion have no application in that context.
>
> The use of this land on the relevant date was entirely passive and was therefore not unlawful."

37 At [41]-[45] of *Wilkie* , Davies AJA went on to deal with the case of *Holroyd City Council v Murdoch* (1994) 82 LGERA 197. His Honour was critical of Stein J's decision in some respects, and preferred the Court of Appeal's unreported decision on the appeal from it (*Murdoch v Holroyd City Council* , 20 November 1996).

38 In *Ashfield Municipal Council v Andrews ('Andrews')* (1986) 60 LGERA 248, Cripps J held that mere ownership of a building, the subject of a lease, was insufficient to support the making of a restraining order against the owner of the premises which the tenant had commenced to use for an unlawful purpose. Cripps J commented that the Andrews were using the land for purposes of investment, and not for the brothel. They were not using it for any unauthorised planning purpose.

39 In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1997) 96 LGERA 254; 42 NSWLR 641, Handley JA (with whom Priestley JA agreed) said (at 256) " *a person making a passive use of land does not 'carry out' development for the purposes of s 76(2)"* of the Act. His Honour said that that provision could " *only be contravened by an active use and has no application where the use is entirely passive* ". Although a passive use of land may be a use of it for some purposes, remarks of the High Court in *North Sydney Council v Ligon 302 Pty Ltd* [1996] HCA 20; (1996) 185 CLR 470 (at 477) *"... were not directed to this question in the context of s 76(2) and in my opinion have no application in that context. The use of this land on the relevant date was entirely passive and was therefore not unlawful* " (at pp256-257).

40 In *Murdoch v/ats Holroyd* , Stein J at first instance made an order against an owner of a property who had stood by and failed to take steps to prevent illegal dumping of fill. Davies AJA found that the facts can be strong enough to warrant an inference that an owner participated in an unlawful use or took advantage of some breach. The principal judgment on the appeal was delivered by Cohen AJA (with whom Priestley and Sheller JJA agreed), who found that in the absence of steps being taken to remove the fill which the owner allowed to remain on the land, amounted to continued storage, a use of the land within the definition and, therefore, a breach of the section.

41 Davies AJA surveyed other authorities and endorsed (at [54]) the approach of Cripps J in *Andrews* and Cohen AJA in *Murdoch* . He decided to agree with the trial judge, in light of these authorities. Ms Wilkie was not shown to have done more than sub-lease the land for a lawful purpose. There was no evidence that the rent was fixed by reference to the illegal use. She, therefore, was not a participant in the unlawful development. Her situation was not unlike that of Mr Constantine. Ms Wilkie had the capacity to terminate the sub-lease, but failed to do so. However, she did not occupy and was not in control of the land

used by Reid and Graveyard. As the statutory provision did not envisage " *permitted or suffered* " or " *permitting or allowing* " there could be no obligation on her to remedy the breach. Section 124 does not cater for aiding or abetting or involvement in the contravention. The Court of Appeal set aside the order for rectification in so far as it was directed to Ms Wilkie.

42 Turning to *Super League* , Mr Baird specifically took the court to the statement (at 525D) that " *attention should be directed to the orders sought in the proceedings* " when determining whether the necessary parties have been joined, and submitted that the contractual relationship that exists between the respondent and the owners is not sufficient to warrant joinder, because (T 20.05.2011, p42, LL30-40):

> ... *these third parties could be the ... 150 plus [unit holders] in Harmony, because all of those may have an interest that might be affected. But it is important for the Court then to look by reference to that to the documentary evidence that discloses what may be this potential relationship. I say potential relationship as identified between the respondent and the owners or the individual owners of the building, in the circumstances where the council is not complaining about what individual owners are doing, not seeking orders, not preventing them from carrying out their obligations in any way, shape or form, not even seeking relief against the owners for potentially allowing this - serviced apartment units to continue. None of that is happening.*

43 The court's attention was then directed to the passage of the *Super League* judgment (at p527), quoted above at [25], but Mr Baird distinguished the present matter, where, in his submission (T20.05.2011, p43, LL15-17, and LL30-37):

> *...the orders that are being sought against the respondent are orders that require them to carry out or to conduct their business in accordance with their lawful development consent* .
>
> *...any third party owner of any unit can still with their unit what they wish to do. They're not the subject of orders. And can I say conceivably any of those owners could still rent out their apartment for serviced apartment use. That's not being restrained by the council. They've been notified that the use for short-term stay is a breach of the Act and that may lead to other matters between the unit holders down the track, but in relation to the orders sought, nothing it seeking to restrain their enjoyment - their lawful enjoyment of their lawfully permitted use.*

44 Mr Baird further submitted, on the basis of evidence before the court, and my comment (my previous judgment at [22]), that, although the apartments were not leased out in accordance with the consent, it was possible to lease them out under the *Residential Tenancies Act* 2010 and not affect the relationship between the respondent and any third parties (owners or tenants).

45 Not long after I reserved this decision (on 20 May 2011) the question of joinder was addressed by Craig J in this court (on 23 May 2011) in *CTI Joint Venture Company Pty Ltd v CRI Chatswood Pty Ltd (in Liq) (No 2)* [2011] NSWLEC 91 ('

CTIJV ').

46 Craig J considered a motion by the first respondent under *UCPR* 6.24(1) to join four additional respondents to class 4 proceedings, to make a total of nine respondents. The motion was opposed by the applicant and by the four proposed additional respondents. The second, third, and fourth respondents neither opposed nor supported the motion, and the fifth (the Registrar-General) had filed a submitting appearance.

47 The applicant was not seeking any order or relief against the four proposed additional respondents, but, if it were to succeed against the first respondent, the first respondent may choose to take separate action in contract or tort to recover loss and damage from the proposed four additional respondents, claims which would fall outside the scope of the current proceedings and beyond the jurisdiction of this court.

48 Craig J summarised the relevant authorities on the issue of joinder (at [10]-[12]) as follows:

> *10 The principle to be applied in an application of the present kind is found in statements of high authority. The principle in its most succinct form is that articulated by Lord Diplock in* Pegang Mining Co Ltd v Choong Sam *[1969] 2 MLJ 52 (at 55 - 56) where, by reference to the English rule, his Lordship said this:*
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> > "It has sometimes been said ... that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between 'legal' and 'commercial' interests helpful. A better way of expressing the test is: will his rights against or liabilities to any person to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"
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> *11 That formulation of the test was approved and adopted by the full Federal Court in* News Ltd v Australian Rugby Football League Ltd *(1996) 64 FCR 410 where their Honours said (at 525):*
>
> > "In our opinion, the question should be decided according to the test proposed by Lord Diplock. The test involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be directly affected. The requirement that a third party's rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or lesser extent ... .
> >
> > Where, before trial, a question arises whether a necessary party has been joined, attention should be directed to the orders sought in the proceedings. It is the effect of the orders upon the third party that must be determined. The test is not whether the conduct of the third party is raised in the pleadings between the existing parties, ..."
>
> *12 The test articulated by Lord Diplock and the observations made in relation to it in* News Ltd v Australian Rugby Football League Ltd *were adopted as appropriate by McHugh J in* State of Victoria v Sutton *[1998] HCA 56; (1998) 195 CLR 291. His Honour there stated (at 316):*

> "The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order. That practice also assists in avoiding duplication of hearings on the same issues and in avoiding the spectre of inconsistent decisions by courts or the judges of the same court."

49 I respectfully adopt His Honour's concise summary. As joinder is a discretionary matter, the court must consider it " *necessary to the determination of all matters in dispute* " (see *UCPR* 6.24(1)). The question was, therefore, whether the parties that were proposed to be joined were **directly affected** by those orders that the court could likely make. Any success by the applicant would affect the liability of the certifiers and surveyors, such that it reached the " *arguable possibility* " requirement articulated by McHugh J in *State of Victoria v Sutton* (see the citation and quotation from McHugh J in par [12] of *CTIJV* , quoted immediately above). His Honour also found that orders granted to the applicant in *CTIJV* may operate *in rem* and so affect any recovery cases, and he considered it preferable to have all parties before the court in the proceedings falling within jurisdiction, even though their joinder would not add new issues for decision in those proceedings.

50 Mr Baird submits that, as the units are used by Oaks under a contractual arrangement with owners under which their units are included in a pool for leasing by Oaks, and the owners do not themselves lease their apartments as serviced apartments, they commit no breach, and threaten no breach, of the *EPA Act* or consent. If Mr Hale's submission were correct, every owner in each complex should have been joined to the proceedings prior to the earlier hearing. At worst, they merely " *permitted* " (as with the brothel in *Andrews*) a use of their land, contrary to the consent, but joining in these and the *Harmony* proceedings 250 unit owners could not be in the interests of those owners adversely affected by the respondent's breach of the condition, or in the public interest (T20.05.2011, p45, LL40-43).

51 I accept Mr Baird's submission that the unit owners will not be " *directly affected* " by orders against Oaks in the way Craig J found the proposed joinder parties to be in *CTIJV* .

Conclusion

52 I am firmly of the view that the issues at the heart of these class 4 proceedings are squarely between the Council and the entity conducting the service apartment business, and that, although the outcome might well have some effect on owners who have contracted with Oaks, there was not and is not any need for any owners to be (or have been) joined as parties to the matter. They

were on notice before both the first hearing and this one, and none sought to be heard.

53 That aspect of the case having now been disposed of, the orders set out in [11] above can now be made by consent. In view of the lapse of time, the restraint should apply from 1 January 2012, with Council having liberty to apply if satisfied that date should be changed.

Orders

54 Accordingly, the court orders:

1. The respondent (by itself or its agent) is restrained from 1 January 2012 from using the premises situated at and known as 'Oaks Maestri Towers', 298-304 Sussex Street, Sydney NSW ('the Premises') for the purposes of 'serviced apartments' ('the said Purpose') unless and until development consent for such use is granted pursuant to the *EPA Act* and such consent is in force.

2. The respondent (by itself or its agent) is restrained forthwith from:

(a) advertising or holding out the Premises or any part of them as available for the said Purpose; and

(b) leasing or licensing the Premises or any part of them for the said Purpose

unless and until development consent for such use is granted pursuant to the *EPA Act* and such consent is in force.

3. The respondent pay the applicant's costs of these proceedings as agreed or assessed.

4. The applicant has liberty to apply on three days notice.

Decision last updated: 07 December 2011