Land and Environment Court of New South Wales

The Council of the Municipality of North Sydney v Sydney Serviced Apartments Pty Ltd [1992] NSWLEC 43 (3 July 1992)

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Matter No. 40273 of 1987 Coram: Bignold J.

Decision Date:

3rd July, 1992

THE COUNCIL OF THE MUNICIPALITY OF NORTH SYDNEY

V.

SYDNEY SERVICED APARTMENTS PTY LTD.

JUDGMENT

Bignold J.:

A. INTRODUCTION

This is a Class 4 proceeding in which the Council seeks to restrain the use as serviced apartments made of a significant proportion (some 25 per cent) of flats contained in the Sydney landmark building known as "Blues Point Tower" situate at harbourside on McMahon's Point (being a residential flat building containing 144 residential units).

The litigation has had a long history which I shall later need to refer to in some detail.

Ultimately the only outstanding issue is the question of how the Court should exercise its statutory discretion in respect of the Respondent's aforesaid use as serviced apartments which, as I held in the course of the hearing, involves breach of the Environmental Planning and Assessment Act 1979 ("the EPA Act") - the Council claiming a permanent remedy by injunction and the Respondent resisting the

grant of injunction.

Before coming directly to the exercise of statutory discretion it is necessary to note the litigation history (including the rulings I made in the course of the hearing), from which it will appear how the sole issue has ultimately been presented to the Court for adjudication.

B. THE LITIGATION HISTORY

There have now been three distinct phases to this litigation.

By its amended class 4 application the Council sought a declaration that the Respondent's aforesaid use was contrary to relevant town planning law and a consequential injunction to restrain that use.

When the application originally came on for hearing the parties had narrowed the basic legal question in dispute to a single question of construction, namely whether the Respondent's use was authorised by a development consent for the erection of a residential flat building granted by the Council on 19 January 1960.

Very sensibly the parties invited the Court to determine the disputed question of construction in advance of its consideration of discretionary matters, and to that end very helpfully presented the Court with a statement of agreed facts, fact No.2 of which was that development consent for the erection of the subject building as a residential flat building was granted by the Applicant on 19 January 1960.

On 5 October 1988 I determined the question of construction in favour of the Respondent and accordingly dismissed the Class 4 application with costs. My judgment is reported in 66 LGRA 373.

The Council appealed against this decision and on 18 December 1990 the Court of Appeal upheld the appeal with costs - see 71 LGRA 432.

Having held that the appeal should be upheld Mahoney JA (in giving the judgment of the Court) stated at 437/8:

"It is agreed that, if the appeal be upheld, the matter should be returned to the Land and Environment Court to enable the determination of such other issues as may be necessary for the determination of the matter. The proceedings should therefore be returned to that Court to be dealt with in accordance with the views which I have expressed."

C. THE RESPONDENT'S APPLICATION TO RE-OPEN ITS CASE

ON THE LAWFULNESS OF ITS USE

Thereafter the parties had prepared their respective cases (including a large number of affidavits) on the outstanding issue of whether the Court in the exercise of its discretion would grant or withhold the relief claimed by the Council, and the hearing of the proceeding had been fixed when the Respondent on 15 January 1992 filed its Notice of Motion seeking to vacate the hearing dates and seeking further directions concerning the question of the lawfulness of the use made by the Respondent of portions of the subject building. By its amended Notice of Motion it became clear that the principal relief claimed was for leave for the Respondent to re-open its case on the question of the lawfulness of the aforesaid use. It appears that the Respondent became aware on 12 December 1991 that there existed in respect of the subject building a development consent granted by the Cumberland County Council on 11 April 1960 for the erection of "a twenty-four storey residential building...". Not only is this a separate

development consent from that the subject of the determination by this Court on the original hearing, and by the Court of Appeal on appeal therefrom, but (and this is a matter of vital significance to the Respondent) the terms of the development consent by referring to "residential building" are materially different from the terms of the development consent previously considered which referred to the proposed development as "a residential flat building".

Upon the discovery of the existence of this further development consent the Respondent's Solicitors wrote to the Applicant's Solicitors enclosing a copy of the development consent and advising, inter alia, as follows:

"It would appear therefore that until now the case has proceeded on a false assumption namely that it was the North Sydney Municipal Council which granted the development consent in 1960. As it now comes to light it was the County Council.

This would not be of real consequence were it not for the terms of the consent. It is noted that the consent is for a "twenty-four storey **residential building**" (not residential **flat** building). In light of the remarks made by the Court of Appeal, (particularly on pages 10 to 11 of the judgment of Mahoney JA), and in light of the now available facts, your client cannot now succeed on the law applicable under the judgment of the Court of Appeal."

Although no reply was given to this letter on the hearing of the Notice of Motion in resisting the relief claimed the Applicant indicated that it did not concede that its action could not succeed. On 29 January 1992 I granted leave to the Respondent to re-open its case on the issue of the lawfulness of its use, limiting the re-opening to the introduction into evidence of matter relating to the grant of a further development consent in respect of the subject building and to legal argument on the true meaning and effect of that further consent. I indicated that I would publish my reasons for granting limited leave to re-open and I do so now.

In opposing the relief sought the Applicant immediately questioned whether the Motion had been brought in the proper forum, submitting that it was for the Court of Appeal to determine whether to grant leave to re-open the Respondent's case. In my judgment the Motion is properly before this Court and it is for this Court to now determine whether the Respondent should be permitted to re-open its case. If leave to re-open is granted,the result would not be frustrated or denied by the orders of the Court of Appeal. Nor would this Court's entertaining the re-opened case involve any conflict with that Court's orders because it is implicit that that Court's orders were formulated on the assumption that its determination of the proper construction of the 1960 development consent granted by the Applicant fully and finally resolved the question of the lawfulness (in terms of town planning law) of the Respondent's use of the aforesaid building.

The decision of the Court of Appeal (as was the case of this Court's original decision) in terms, concerned, and only concerned, the question of the proper construction of the development consent granted by the Council on 19 January 1960 for the erection of a residential flat building and whether the Respondent's use fell within or beyond the ambit of that consent, properly construed.

The question which the Respondent, if granted leave to re-open its case, wishes to have determined is the quite different question of the proper construction of a different enabling development consent and whether its use falls within the ambit of that consent.

Although it is obvious that the questions are different questions and the existing determination does not operate as a res judicata or issue estoppel preventing the Respondent from raising the question it now wishes to raise, the more difficult question is whether, in view of the previous conduct of the

parties in the litigation, the Respondent should now be permitted to rely upon the other enabling development consent. If the Respondent is allowed to re-open its case so as to rely upon this further development consent, it will necessarily be involved in a radical departure from its agreement in the statement of agreed facts, which has already been the subject of an earlier determination both by this Court and by the Court of Appeal.

At first blush the Respondent's application appears to come into full head-on collision with long established principles which promote finality in litigation. Recently (Haig v. National Parks and Wildlife Service (unreported 18 October 1991) I recited two general principles in the following terms:

"(i) parties to litigation generally must be bound by the course they deliberately adopt in that litigation: see Rowe v. Australian United Steam Navigation Co. Ltd. [1909] HCA 25; (1909) 9 CLR 1 at 24; McCormack v. Federal Commissioner of Taxation [1979] HCA 18; (1979) 143 CLR 284; Uranerz (Australia) Pty Ltd. v. Hale (1980) 54 ALJR 378; and Mapley v. Radial Industries (1981) 61 FLR 189;

(ii) "The evil and cost of prolonged litigation brings justice into disrepute": per Mahoney JA in Radnedge v. G.I.O. of New South Wales (1987) 9 NSWLR 235 at 252."

Additionally there is the doctrine of estoppel in the extended sense, formulated as long ago as 1843 in Henderson v. Henderson [1843] EngR 917; (1843) 3 Hare 100 at pp. 114-115, adopted by the Privy Council in Hoystead v. Taxation Commission (1926) AC 155 at 165/166 and refined by the High Court of Australia in Port of Melbourne Authority v. Anshun Pty Limited [1981] HCA 45; (1981) 147 CLR 589.

However upon more mature reflection I do not think in the present circumstances that the Respondent's attempt to re-open its case offends these long established and salutary principles. In my judgment the Respondent did not act unreasonably in submitting to the statement of agreed facts and more particularly to the agreed fact that the relevant development consent was that granted by the Council in January 1960 to the erection of a residential flat building. It is a notorious fact that the existence of development consents granted many years ago is often a most difficult matter to establish. Unfortunately there is no centralised system of registration of development consents analogous to the system of registered land titles and although registers of development consents (such as are recognised by s104 of the EPA Act) were also contemplated and required by town planning schemes prescribed under Part XIIA of the Local Government Act 1919 it is a notorious fact that such registers were not reliably kept and maintained. In these circumstances where it appeared, as was revealed by the Council's affidavits supporting the Class 4 proceeding, that the Council had granted the relevant development consent and where the parties were in genuine dispute as to the meaning and scope of that development consent (the Respondent contending for an interpretation thereof which would sanction the use to which it was devoting a number of residential units in the building) the Respondent can excusably claim ignorance of the existence of the development consent granted in 1960 by the County of Cumberland Council (a body that ceased to exist in 1964 when succeeded by the State Planning Authority of New South Wales).

The reasonableness of the Respondent's conduct in the litigation in relation to not hitherto seeking to raise the issue concerning the development consent granted by the Cumberland County Council is not only relevant to the doctrine of estoppel in the extended sense (Anshun) but is relevant to the exercise of the Court's power to allow a party to re-open his case.

The Applicant has argued that the Respondent has not established that it could not, by reasonable diligence, have discovered the existence of the development consent granted by the County of

Cumberland Council. I am unable to accept this argument essentially for the reasons I have already stated.

The power of a superior Court to allow a party to re-open its case, is in my respectful opinion, aptly described by Toohey J (when a Judge of the Federal Court) in Re: AMIEU exparte Ferguson (1986) 67 ALR 491 at 493/4:

"In any event, O 35, r7 is in conformity with a long line of authority. A number of cases were referred to by Starke J. in Texas Co (Australiasia) Ltd v. FCT [1940] HCA 9; (1940) 63 CLR 382 at 457 in support of his statement: "a superior court of justice, it may be remarked, has full power to rehear or review a case until judgment is drawn up, passed, and entered." A question of more concern is the delineation of criteria, according to which the court may re-open a hearing and, of course, the ultimate question whether the facts of the present case meet those criteria.

In situations where a hearing has concluded but judgment has been reserved and not delivered, it has been said that fresh evidence should be admitted only when it is so material that the interests of justice require it; the evidence if believed would most probably affect the result; the evidence could not by reasonable diligence have been discovered before; and perhaps that no prejudice would ensue to the other party by reason of the introduction of the evidence so late: Watson v. Metropolitan (Perth) Passenger Transport Trust (1965) WAR 88; Murray v. Fegge (1984) 4 ALR 612. Similar tests have been applied for the reception of evidence on the hearing of an appeal: Wollongong Corp. v. Cowan [1955] HCA 16; (1955) 93 CLR 435."

In my judgment the specific criteria enumerated by his Honour are satisfied in the present case. In particular the criterion that "the evidence would most probably affect the result" appears to be satisfied by reference to the following passage at 437 in the judgment of Mahoney JA when the present case was before the Court of Appeal:

"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."

In was for the foregoing reasons that I granted the Respondent limited leave to re-open its case on the question of the lawfulness of its use.

D. THE RESPONDENT'S RE-OPENED CASE

On the re-opening, I received into evidence a number of documents relating to the grant of development consent by the Cumberland County Council. The consent was in writing (Exhibit

B) a copy is annexed hereto and marked "A".

It will be seen from the terms of the consent that the essential description of the approved development was as follows:

(i) a twenty-four storey residential building;

(ii) in accordance with specified drawings annexed to a specified deed.

It is further to be noted that that description is potentially variable by the express conditions (a), (b) and (c) imposed on the grant of consent and by the further express condition requiring the permitted development to "conform to the standards prescribed for residential flat buildings Class "C" in Schedule Seven to the Local Government Act 1919..."

The plans annexed to the Deed as specified in the written consent were admitted into evidence (Exhibit A). They depict various features of the proposed building including inter alia, typical floor plan showing "bed-sitting room", 2 bedroom and 1 bedroom units - a total of seven such (self-contained) units per floor. The working drawings are described as "Blues Point Home Units".

It appears that the aforesaid consent of the Cumberland County Council was granted pursuant to the terms of the Deed of Agreement which is referred to in the written consent. This is reflected in the penultimate recital in terms of which the County Council agreed to grant development consent to the carrying out of development described in identical fashion to the description appearing in the written consent "such consent however to be given subject to and conditional upon the said development conforming to the standards prescribed for residential flat buildings Class "C" in Schedule Seven to the Local Government Act 1919 (as amended) and complying with Ordinance 71 under such Act".

I also admitted into evidence (Exhibits 1 and 2) subject to the Respondent's objection and to relevance, a number of the documents all obtained from the records of the former Cumberland County Council. There is no need to recite the full content of these documents. They include Mr. Seidler's letter referred to in the written consent and the decision of the County Council to approve the amended plans submitted with Mr Seidler's letter subject to "the development conforming to the requirements of Schedule 7 and Ordinance 71 of the Local Government Act 1919 and the execution of an amended agreement designed to meet the requirements of North Sydney Municipal Council".

It appears tolerably clear from the documentary evidence that the written consent was formally granted by the County Council, in pursuance of its earlier approval in principle, following the execution of the required Deed.

It is well established doctrine that in construing a development consent it is not generally permissible to consider documentary or other material relating to, or providing background to, the grant of that consent except where that material is incorporated (by reference or otherwise) into the consent. On this basis the background documentary material (being Exhibits 1 and 2) is not relevant to the task of construction.

What then is the true meaning of the written consent, bearing in mind that the source for its grant is cl (14)(2) appearing in Part II of the County of Cumberland Planning Scheme Ordinance, ("the County Ordinance") as is recited in the aforesaid Deed of Agreement?

The Respondent submits the description of the development to which the consent applies is a "residential building" according to the definition of that term contained in cl 24 of the County Ordinance. That definition which is expressed to apply to "this Part" (meaning Part III of the County Ordinance which Part did not, in terms apply to land to which Part II applied) is as follows:

"Residential building" means a building, other than a dwelling house, designed for use for human habitation together with such, outbuildings as are ordinarily used therewith, a residential flat building, a hostel, an hotel designed primarily for residential purposes and a residential club, but does not include any building mentioned, whether by inclusion or exclusion, in the definitions of "places of

instruction" and "institution"."

Assuming that the written consent by its reference to "residential building" was intended to adopt the defined meaning, I am unable to accept the Respondent's argument that the consent, properly construed, authorised the erection of a building "designed for use for human habitation". (I should mention that the Respondent in advancing this argument naturally relies upon the judgment of Mahoney JA when the proceeding was before the Court of Appeal - see generally at 436/437 and in particular the passage at 437 that I have earlier recited).

In my judgment, the written consent relevantly permitted a residential flat building, which as the judgment of Mahoney JA at 437 indicates, is a species of the genus "residential building" (or "building for human habitation"). I arrive at this construction of the written consent because of (i) the content of the specified plans (showing typical layouts for self-contained residential flats and the description given to the project "home units", a term relevantly synonymous with "residential flat" - see the "Foreward" and "Introductory" chapter of Rath, Grimes and Moore "Strata Titles" 1962) and (ii) the express condition imposed on the grant of consent that the permitted building "conform to the standards prescribed for residential flat buildings Class "C" in Schedule Seven of the Local Government Act 1919..."

In my judgment the effect of this condition is illuminating, if not totally decisive, of the question of construction. Schedule Seven prescribed three classes of residential flat building and prescribed maximum site occupation ratios and boundary set-backs. The statutory significance of Schedule Seven was secured by s314(1)(c) of the Local Government Act 1919 which expressly forbad a council from approving an application for approval of the erection of a residential flat building "which would not conform to one of the standards prescribed for residential flat building in Schedule Seven".

For the purposes of Part XI of the Local Government Act 1919 (which contains s314(1)(c)) "residential flat building" and "flat" were defined as follows:

"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.

"Residential flat building" means 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 known as semi-detached or terrace buildings."

The Respondent sought to avoid the effect of the express condition by arguing that if the approved building was in fact "a residential flat building" then there would have been no necessity for the condition to have been imposed at all since s314(1)(c) and Schedule Seven of the Local Government Act 1919 would operate by their own force. It is correct, of course, that the operation of the Part XI of the Local Government Act 1919 did not, (and still does not) depend upon being activated by conditions of development consent. However it is a long established practice for development consents to contain conditions or notations that it may be necessary to obtain additional approvals under the Local Government Act 1919. In the present case it is instructive to notice the difference in wording and effect between the two express conditions. Moreover, the close relationship between town planning regime operating under Part XIIA of the Local Government Act 1919 and the building control regime operating under Part XI of that Act cannot be ignored cf: Woollahra Municipal Council v. Banool Developments Pty Ltd (1973) 28 LGRA 411 at 417.

For all the foregoing reasons I hold that properly construed the written consent permitted the erection of "a residential flat building", being a particular type of the more broadly defined term "residential

building".

E. IS THE RESPONDENT'S USE LAWFUL?

Since the matter was first before this Court (in 1988) there have been some changes to the facts, which were then relevant. The statement of agreed facts was appended to my earlier judgment - see 66 LGRA at 391/394. (The same set of agreed facts was appended to the Court of Appeal judgment - see 71 LGRA at 438/440).

The changed facts again have been the subject of an agreed statement (Exhibit D) a copy of which is annexed hereto and marked "B".

Those changes include the introduction of a governing planning instrument now zoning the subject land "Residential 2C".

The Respondent now controls 34 (previously 37) residential units in the "Blues Point Tower" building. The patterns of occupation of these units have changed as is reflected by the new Fact 18 which states:

"18. There is a great variability in the length of stay of an occupier. On 53 separate occasions during the period June 1991 to September 1991 an occupier stayed for one night only. At one time the First Respondent had a policy that bookings be accepted for a minimum period of three days. This policy ceased at about the end of 1988. The First Respondent no longer has any policy about the minimum period of stay. The accommodation charge for such occupation is calculated on a daily basis."

Notwithstanding these changes it is still appropriate, in my judgment, to understand the Respondent's use as being relevantly use as serviced apartments where there is no significant degree of permanency of habitation or occupancy.

It follows in my judgment, that the consent granted by the County Council which the Respondent now relies upon and which I have construed as permitting a residential flat building does not authorise the Respondent's use. This conclusion is, I believe, required by the decision of the Court of Appeal, because the present facts and the present consent relied upon by the Respondent are not materially different from the facts and the relevant consent, the subject of the Court of Appeal decision .

Having regard to the manner in which this litigation has been conducted, this conclusion would be expected to have determined the question of the lawfulness of the Respondent's use against the Respondent.

However when, during the hearing, I announced my decision on the disputed question of construction, the Respondent sought an adjournment to enable it to have the opportunity to investigate the question of possible existing use entitlements that the Respondent might conceivably invoke to establish a legal entitlement to continue its use of the subject premises. Not surprisingly this adjournment application was vigorously opposed by the Applicant.

Having regard to the course of the litigation which the parties deliberately adopted had consistently followed, and to the fact that this litigation had become so protracted I refused the Respondent's application for adjournment.

The question of existing-use had been adverted to when the matter was first before this Court - see 66 LGRA at 375 when I said:

"...the parties having conducted the litigation on the basis that if the first respondent's aforesaid use

falls within the ambit or scope of that consent the application must fail. Thus it is not necessary to trace or deal with the intricacies of the succession of different planning controls applying to the subject building since the date when the consent was granted and the legal consequences of those changes on that consent. The case has been argued on the basis that no question is raised concerning the existing use entitlements under ss 106 and 109 of the Environmental Planning and Assessment Act 1979 (NSW)."

By the time the case came before the Court of Appeal, there had been a change in the relevant planning controls. Mahoney JA at 434 traces the relevant zoning history (subsequent to the grant of the 1960 development) consent and deals with the question of existing-use as follows:

"In 1963 the North Sydney Planning Scheme Ordinance came into operation.

It is agreed that, by reasons of s 342(u)(4) of the Local Government Act the consent continued in operation. On 11 April 1975 an interim development order, IDO No 57 - North Sydney, came into operation. The 1963 and the 1975 instruments operated, or continued to operate, under Pt XIIA of the Local Government Act.

On 1 September 1980 the Environmental Planning and Assessment Act 1979 (NSW) came into force. By s 109 of that Act and by the **Miscellaneous Acts (Planning) Repeal and Amendment Act 1979** (NSW), Schedule 3, cl 7, provision was made for the continuation of previously effective consents.

On 3 November 1989 the North Sydney Local Environmental Plan 1989 came into force. It is accepted that the relevant provisions of the Environmental Planning and Assessment Act operated upon that plan so that, if the company's use of the relevant units is to be lawful, that use must fall within the terms of the consent."

It is clear from these passages that the question of existing use was addressed, but it was confined to the question whether the Respondent's use fell within the terms of the relevant 1960 development consent.

In my judgment the Respondent should not be permitted to depart from this set and concluded course.

It only remains to note more particularly the effect on the Respondent's use of the now governing planning instrument. When it originally came into force on 3 November 1989 (see the Government Gazette of that date) the North Sydney Local Environmental Plan expressly permitted, subject to the obtaining of development, consent, the carrying out of development on land within Zone No 2(c) (which includes the land upon which the "Blues Point Tower" building is erected) for the purposes of "serviced apartments" which was (and remains) defined as follows:

"serviced apartment" means a building containing two or more dwellings which are cleaned and serviced by the owner or manager of the building or the owner's or manager's agent, and which provides short-term accommodation for travellers or tourists but does not include

a hostel or a building or place elsewhere specifically defined in this clause; ..."

However only six weeks later North Sydney Local Environmental Plan 1989 (Amendment No 1) was made (see Government Gazette No 124 of 22 December 1989). One of its express aims was:

"(c) to prohibit serviced apartments on land in Zone No 2(c)..."

This aim was effected by suitable amendment to cl 9 by deleting reference in Item 2 ("only with development consent") to "serviced apartments" with the result that that purpose became an absolutely "prohibited" purpose).

For all the foregoing reasons I conclude that the Respondent's use:

(i) is relevantly use for the purpose of "serviced apartments";

(ii) is prohibited by the terms of cl 9 of the North Sydney Local Environmental Plan 1989; and

(iii) constitutes a breach of the Environmental Planning and Assessment Act 1979.

F. THE COURT'S DISCRETION TO GRANT OR WITHHOLD INJUNCTIVE RELIEF

This brings me finally to the question of how the Court should exercise its statutory discretion to grant or withhold a remedy for the established breach of the EPA Act. Much evidence was adduced directed to how the Court should exercise its broad statutory discretion. The evidence fell into a number of discrete categories:

(i) evidence from a number of permanent residents of the "Blues Point Tower" building indicating that some residents are inconvenienced by the use of units in the building as serviced apartments (it appears that another Real Estate Agency controls and occupies some twenty to thirty units as serviced apartments in addition to the Respondent's use) and some are not inconvenienced;

(ii) evidence from town planners/architects giving divergent opinions on whether use of serviced apartments of a large proportion of the units in the building is compatible, (in terms of amenity considerations and sense of community), with use for more permanent residential purposes of other units, in the building; on whether the Respondent's use was contrary to recognised principles of urban consolidation, on distinctions if any, for planning purposes of serviced apartment use compared with permanent residential use; and on of the contribution made to tourism in Sydney by the availability of serviced apartments; and

(iii) evidence from financial analysts of tourism earnings of the serviced apartments market and contribution to tourism income.

Ultimately, I have not found this great mass of evidence to be particularly persuasive one-way or the other, in its effect on the question of how the Court should exercise its statutory discretion. In large measure much of the evidence was argumentative. Perhaps it is this feature that leads me to regard the evidence as not being particularly helpful on the question of discretion. In any event it is difficult to appreciate the ultimate value of this evidence in the light of the express prohibition on "serviced apartments" development within Zone No 2(c) so expressly and deliberately effected as recently as December 1989 by the North Sydney Local Environmental Plan (Amendment No 1). There has been no challenge to the validity of this amendment.

Essentially the Court is being asked to pass over, this express prohibition and the Respondent's breach thereof, in the exercise of its statutory discretion, broad and salutary though that discretion be: cf Warringah Shire Council v. Sedevcic (1987) 10 NSWLR 335.

My findings on the evidence, which in my judgment are relevant to the exercise of statutory discretion, can be stated as follows:

1. Findings supporting the grant of a remedy

(i) the statutory prohibition on "serviced apartments" development within Zone No 2(c) can be supported by planning principles concerning urban consolidation, and promoting residential amenity;

(ii) the breach of the Environmental Planning and Assessment Act 1979 by the Respondent's use is contrary to the planning principles referred to in (i) though the actual harm caused by that contrariety is not great;

(iii) the Respondent's use, if unchecked, has the further potential planning detriment of creating a precedent for other serviced apartment uses of residential flat buildings within the Municipality of North Sydney; and

(iv) the grant of remedy has not been shown to involve disproportionate hardship on the Respondent, though obviously it will destroy a particular aspect of its business in real estate.

2. Findings Supporting the Withholding of Remedy

(i) "Blues Point Tower" building is particularly advantaged by (a) location and (b) building design features for serviced apartments use;

(ii) the availability of serviced apartments enhances the stock and variety of Sydney tourism accommodation and contributes to Sydney's tourism;

(iii) use of a residential building for serviced apartments involves a difference, only in degree, of duration of residency, from conventional permanent residential use;

(iv) by good management and maintaining good relations it is possible for serviced apartments use to co-exist with conventional permanent residential use of the "Blues Point Town" building; and

(v) the Respondent's use commenced in good faith and did not involve any deliberate breach of planning laws.

Having regard to these findings and having carefully considered the very comprehensive arguments advanced, I have come to the conclusion that I should exercise my discretion by granting the remedy of the injunction claimed by the Applicant. I cannot regard, as the Respondent inviting me to, the relevant breach of the Environmental Planning and Assessment Act 1979, as merely technical. The Respondent's use involves a clear breach of an absolute prohibition on a particular type of development effected as recently as December 1989.

It is not for the Court to question the merits of the planning rationale for that statutory prohibition. It does have a planning rationale though necessarily general and somewhat theoretical. If there is a case for an ad hoc rezoning of "The Blues Point Tower" building, it is for the planning authorities to consider that case. The Court has no such function. This is not a case of an obsolete planning control. It is a very recent control and was deliberately implemented by the Applicant, as the responsible local planning authority.

In all the circumstances, I intend to grant the permanent injunction claimed by the Applicant to restrain the Respondent's unlawful use.

There should be some limited stay or suspension of the injunction to enable the Respondent to make arrangements with its tenants and occupiers and its business so as to not unnecessarily dislocate present arrangements. The parties are required to bring in Short Minutes to give effect to my decision.

At the trial, the Respondent sought the opportunity to further address on the form of the injunction, if that remedy were to be granted. At the time it appeared that there may be a need to distinguish according to their degree of duration, between occupancies that were unlawful and those that fell within the terms of consent for a residential flat building. On reflection, I do not think there will be any need to so demarcate what occupancies are lawful and what are not, because it is use as "serviced apartments" that is prohibited by the planning instrument and it is that use that must be enjoined by appropriate injunction.

Accordingly I direct the parties to bring in Short Minutes to give effect to my decision that a permanent injunction should be granted restraining the Respondent's use, as serviced apartments of the residential units in the Blues Point Tower Building with an appropriate stay or suspension of injunction to enable suitable arrangements to me made in respect existing occupiers and the like.

Additionally, I make the following orders:

1. The question of costs is reserved.

2. Liberty to apply on three days notice.

3. Exhibits to be returned.

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I HEREBY CERTIFY THAT THIS AND THE PRECEDING 22 PAGES

ARE A TRUE AND ACCURATE COPY OF THE REASONS FOR JUDGMENT

HEREIN OF HIS HONOUR MR. JUSTICE N.R. BIGNOLD.

ASSOCIATE
