Property Development - Development Approval - Damages Action Against Council

Lavender View v North Sydney Council [1999] NSWSC 699.

Lavender View v North Sydney Council (No 2) [1999] NSWSC 775.

Judgment was handed down in the New South Wales Supreme Court on 14 July 1999, in the long running dispute between developer Dr. Stanley Quek's Lavender View Regency and North Sydney Council over the Colonnades residential development at Milsons Point. The Court found the Council liable for damages of only $227,025.66 – a small portion of the original $64.7 million claim made by the developer.

History

In Februay 1995 development consent (DA1) was granted to Lavender View by North Sydney Council for a multi-storey $100 million luxury residential development. Building Approval ("BA") was granted in November 1995. However, Lavender View had increased the bulk and scale of the building. As a result the plans were not in conformity with the development consent. To overcome this problem Council imposed a condition on the BA that Lavender View submit an application to modify the DA pursuant to section 102 of the *Environmental Planning & Assessment Act* ("*EPA Act*"). In addition, the building did not comply in many respects with the Building Code of Australia ("BCA").

In September 1995 a new "*anti-development*" Council was elected.

In November 1995 Lavender View entered into a $50 million building contract with Multiplex Constructions Pty Ltd. Despite the fact that Council approvals had not been finalised, Multiplex commenced contract works and bulk excavation. Marketing and "*off the plan*" sales commenced using the contract plans. By mid 1996 $53 million worth of pre-sales had been achieved.

The first s.102 application submitted (pursuant to the BA condition) to Council in December 1995 made further increases to the bulk and scale of the building. The further increases were necessary so that the approvals would match the construction and marketing plans.

The adjoining owners, including ex Sydney Lord Mayor Jeremy Bingham, had their own development application rejected by the new Council. In February 1996 these neighbours challenged the validity of Lavender View's development consent in Class 4 proceedings in the Land and Environment Court ("LEC").

Following the challenge, Lavender View withdrew the first 102 and submitted a second development application (DA2). DA2 was a similar development to DA1 and addressed the BCA non-compliances of the original development. If Council had approved DA2 the potential invalidity of DA1 would have been irrelevant.

Contract works were suspended in June 1996 pending determination of DA2.

Although, DA2 was similar to DA1 the new Council refused consent. Lavender View's Class 1 appeal to the LEC was unsuccessful.

At this point in time, the only consent Lavender View held was DA1. With the pending challenge to this consent, Lavender View turned its mind to a potential damages claim against Council. They received legal advice that in order to claim damages they would have to prove that DA1 could have been built. In order to prove this, and due to the unusual condition on the BA, Lavender View had to obtain approval from the new Council for a s.102 modification.

With this in mind a second s.102 application to DA1 was lodged in October 1996. Council refused it in December 1996 on the basis that it was not substantially the same development and caused prejudice to objectors. Concurrently with the s.102 application, a new DA (DA3) was also lodged. DA3 was a smaller building but it was still refused consent by Council in April 1997. An appeal to the LEC was also unsuccessful.

In April 1997, the LEC declared DA1 to be invalid due to the way in which Council had notified and approved the application.

At this point, the Multiplex contract was declared frustrated and the contracts for sale were rescinded and deposits returned.

A further DA (DA4) was lodged in February 1998. This development was smaller than DA3 and was approved by Council in July 1998. Construction of this development commenced in February 1999.

The Supreme Court damages claim

In September 1997 Lavender View commenced proceedings against Council alleging it was negligent in its approval of DA1. Lavender View sought:

Loss of profits from DA1	$23m
Wasted/delay costs	$33m
Loss of opportunity to use DA1 profits for another development	$17.9m
Less current value of site	($9.2m)
Total amount of claim	$64.7m

Council admitted liability at a separate hearing in July 1998.

Court's findings

The Court awarded Lavender View damages of only $227,025.66 on the basis that Lavender View's actions were not influenced by Council's negligence. Put another way, if Council had not been negligent, Lavender View would have found itself in the same position as it is today. Accordingly, Lavender View did not establish that it suffered any substantial loss caused by Council's negligence. In rejecting Lavender View's claim for loss of profit, the Court highlighted the fact that the building approved in the original invalid consent could not have been legally built.

For practical purposes, Lavender View was controlled by its managing director, Dr Quek. During the hearing Dr Quek said that the original development consent was merely "*indicative*" of what he intended to build, requiring further applications to Council for modification before it could be built.

The Court found that the required modification application, the second 102, would never have been approved by the new Council elected in 1995, or by the LEC. Without this approval, the development could not have gone ahead. In effect, the original consent was rendered of no value by Lavender View's own actions in seeking a bigger building in its building application and in the construction plans.

Also the Court found that DA2 was not lodged in response to the challenge to the validity of DA1, as claimed by Lavender View. It said that DA2 was the building Lavender View really wanted to build having decided that DA1 was not the vehicle it wished to pursue. The consequences were that Lavender View would still have been forced to suspend the contract works when it did and rescind contracts when it did.

The only damages caused by Council's negligence were the costs incurred by Lavender View in defending the Class IV proceedings in relation to DA1. This was conceded by Council and the quantum agreed by the parties during the trial.

Costs

Lavender View was ordered to pay the Council's costs of the damages hearing on a party/party basis.

Why, when judgment was "*technically*" in favour of Lavender View and in normal circumstances the unsuccessful party would be ordered to pay the costs?

The Court found that when one stands back from this case, the generally successful party on the issue of damages, was Council. All but a small part of the hearing was taken up in determining the issues on which Council succeeded. Lavender View failed to prove that Council's negligence caused them any substantial losses.

Council's costs of the damages hearing are approximately $1m.

- Carolyn Willson, Partner, Insurance & Financial Services Division, Phillips Fox.