

Certifiers : Under Fire

We explore below three of the significant recent developments in case law concerning building certification practices.

Firstly, does Council owe a duty of care to owners and subsequent owners concerning certification practices?

The answer is “Yes” as found in the case of *Chan v Acres (No 2)*[2016] NSWSC 1185 (11 December 2015) & 557 (6 May 2016). In this case:

- Mr Acres was an owner builder with no relevant experience, except for knowing his liability under the Home Building Act 1989. He had contracted out of almost all of the relevant work including the design, construction and certification.
- Mr & Mrs Chan were an unfortunate couple who purchased this building riddled with structural defects, which were not identified at the time they purchased the property.
- Others were drawn into the dispute, such as, Mitchell Howes Civil & Structural Engineers Pty Ltd (MHE), the design engineer who also conducted the inspections sought by Mr Acres from time to time and Ku-ring-gai Council, as the certifier.
- There were many interesting findings throughout the case, including:
 - a) MHE did not owe a duty of care to Mr & Mrs Chan mainly because they could not establish that they relied on MHE’s services.
 - b) MHE owed a duty of care to Mr Acres and breached it. MHE was therefore found liable to contribute to 60% of the costs to rectify defects associated to the breaches.
 - c) Council owed a duty of care to Mr Acres and had the power to halt the work when it detected a non-compliance during one of its critical stage inspections. Further, it should not have issued an occupation certificate when it should have been aware of the non-compliances.
 - d) Council was found liable to Mr Acres for the other 40% of the costs to rectify those defects for which MHE was also liable.
 - e) In respect of liability for defects where Mr Acres and Council were both liable, the Court found that Mr Acres was liable to be indemnified in full by Council.
 - f) Council owed the same duty of care to Mr & Mrs Chan that it owed to Mr Acres.

This case is important as it illustrates that:

- anyone dealing with owner builders, needs to be particularly wary;
- Council's liability to owners and subsequent owners is squarely placed, however, beware Council do have a good faith defence which might alleviate any liability it owes; and
- Engineers may well need to consider more cross-claims against Councils in the event of claims being made on them.

Secondly, does the failure of Council to undertake a physical site inspection and make a record of that inspection prior to issuing a complying development certificate (CDC) render the certificate invalid?

The answer is "Yes" as found in the case of *The Owners Strata Plan 432 v Seddon NSWLEC 69* (1 May 2015). In this case:

- The owners corporation were fixated on preventing works in a lot which would have removed a laundry and toilet facility unlawfully used by other owners for many decades.
- The Court reluctantly found in favour of the owners corporation, mainly due to Council's failure to physically attend the site and inspect the area and make a record of the site visit prior to the issue of the CDC.
- This failure of Council meant the CDC was invalid. This resulted in terrible outcome for the owner who needed a valid CDC to overcome a Supreme Court injunction and declarations precluding it from commencing the works the subject of the CDC.

This case illustrates the statutory nature of CDC's and, if all of the relevant steps are not followed, it can be invalidated.

Thirdly, does a construction certificate that does not comply with development consent, render the construction certificate void and of no effect?

The answer is "No" as found in the case of *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404. In this case:

- When Council saw the façade of a new building upon removal of the scaffolding was substantially different to what was approved in the development consent conditions, it brought Land & Environment Court proceedings to seek orders that the construction certificates issued by private certifiers were void and of no effect and sought orders to require works be undertaken to have the façade conform with the development consent.
- On appeal the Court of Appeal found against Council's arguments that the construction certificate was void, mainly due to the statutory wording but also due to the possible adverse flow on effects to the subsequent owners.
- The recourse for Council was to pursue complaints through the Building Professionals Board against the certifiers. In many instances multiple offences have to occur before significant penalties or ramifications occur.

This is important and illustrates the statutory nature of the certification process, but also the failing of that scheme, in that Council's ability to address environmental and safety issues are not as broad as the community would expect.

Key takeaways

- Councils owe a duty of care to owners and subsequent owners regarding certification practices.
- The failure of councils to conduct site inspections can invalidate complying development certificates.
- Construction certificates that do not comply with development consent are not automatically void.
- Owner builders must be cautious, as councils may have defences against liability.
- Engineers may need to consider cross-claims against councils in defect liability cases.

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