Project Intervene and the Courts:

Strata Plan 99576 v Central Construct Pty Ltd

A Quick Case-study

Introduction: How does 'Project Intervene' interact with the Courts or the Tribunal?

Many owners ask us about the interaction between Project Intervene and the courts. In many cases, these clients have matters on foot before the Supreme Court or in other courts (and the Tribunal) and contemplate adding Project Intervene to the mix, so as to perhaps 'get things done earlier' or 'cheaper'.

However in that vein, the owners usually wonder about the consequences of having their claims set, both before the courts and the Building Commissioner, at the same time.

This is somewhat of an 'uncharted territory' and there is as yet very limited case law which can provide us with reliable answers and good guidance. However this article attempts to succinctly survey the very brief history of Project Intervene before the courts and to ascertain, if it were possible, some of the potential consequences to the owners of having their matters effectively 'heard' by both the courts, and the Commissioner.

Background

Using the powers given to NSW Fair Trading under the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act), Fair Trading NSW is seeking to compel parties such as builders and developers to rectify serious defects-- the team which has been tasked with this is the 'Project Intervene' team.

It appears that Project Intervene has been established by the New South Wales Government with the aim of providing what is described as "a way forward for owners corporations to have serious defects remediated."

The relevant website states that the Department of Fair Trading can enforce rectification by using strong compliance powers under the RAB Act. One of the stated benefits of Project Intervene is that there would be "no costly and time-consuming litigation with low prospects of success".

Project Intervene only deals with what is defined as 'serious defects in common property'.

The RAB Act defines 'serious defect' as (under section 3 "**Definitions**"):

a) *a defect in a building element that is attributable to a failure to comply with the performance requirements of the Building Code of Australia, the relevant Australian Standards or the relevant approved plans, or*

b) *a defect in a building product or building element that—*

i. *is attributable to defective design, defective or faulty workmanship or defective materials, and*

ii. *causes or is likely to cause—*

A. *the inability to inhabit or use the building (or part of the building) for its intended purpose, or*

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B. the destruction of the building or any part of the building, or

C. a threat of collapse of the building or any part of the building, or

c) a defect of a kind that is prescribed by the regulations as a serious defect, or

d) the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act.

Hence if an application is made for the Commissioner to become involved via Project Intervene, Fair Trading will consider whether there are serious defects before accepting the application.

The outcome of Project Intervene is effectively work or 'rectification orders' under section 33 of RAB Act, which are to be made against a builder or developer (or the "defendants" if the matter is before the Supreme Court say) to essentially, make good by returning to rectify defects without an agreed scope and by reference only to compliance with the NCC (National Construction Code) or Australian Standards.

The Only Court Case: Are There Consequences?

First, it is very difficult to predict the outcome of court action where there are proceedings on foot, simply because there have not been too many court decisions in relation to this regime.

Suffice it to say, based on what we have seen already, any proceedings on foot, may or may not be 'stayed' or effectively 'stopped' if an application is made by the defendants.

In relation to the 'stay' question, a 'court action' may theoretically be stayed if a court finds that a defendant's ability to face multiple processes against it will be 'vitiated by prejudice', given certain unique circumstances which can have an impact upon a particular defendant.

This brings us to the case involving the Commissioner, in ***Strata Plan 99576 v Central Construct Pty Ltd*** [2023] NSWSC 212 (10 March 2023).

The proceedings were brought for damages and were commenced in the Technology and Construction List of the Supreme Court of NSW by the Owners Corporation (plaintiff), against the builder and the developer of the relevant strata development.

The plaintiff alleged that the building work was seriously defective in various respects, and that it failed to comply with the Building Code of Australia (**BCA**).

The proceedings were originally commenced in August 2021.

The Owners Corporation sought help from Fair Trading in relation to defects.

On 14 December 2022, a Mr Muysken, on behalf of the strata committee, sent a letter to the Department of Fair Trading about the problems with the building, and the committee's inability to reach a satisfactory outcome, including through the Supreme Court proceedings.

By about 24 January 2023, Fair Trading had admitted the scheme into Project Intervene and had engaged *Sedgwick Australia* to assist with the "triage and inspection" of the building and the provision of an expert report.

By 17 February 2023, the process was well underway.

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Once this happened the defendants (the builder and developer) brought a Notice of Motion on 22 February 2023 seeking a stay of the proceedings until 23 February 2024 in circumstances where the work, the subject of the proceedings, had by that time become also the subject of the investigation under Project Intervene.

The defendants argued that there was a concurrent or parallel process underway that dealt with the subject matter of the proceedings and which could ultimately result in the making of orders under the RAB Act against the defendants to carry out building rectification work.

In effect their argument was that this could be considered 'double dipping' which could be prejudicial to the defendants in terms, for example, of costs, expenses and time expended on a 'parallel process', and that there was a risk of 'inconsistent findings'.

Justice Darke of the Supreme Court rejected the application by the defendants saying in the process that [at 16]:

> *I do accept that there is a risk of inconsistent findings in different courts if the process under the Act leads to court proceedings. That risk could not be described as fanciful, but I do not think that it is a risk of such a magnitude that it should impinge upon the plaintiff's prima facie right to seek to vindicate its legal rights in this Court. That is to say, I do not think that that factor warrants the proceedings in this Court being delayed on that account. That seems to me to be so even if, in a practical sense, the actions of the plaintiff can be seen as the cause of the commencement of the investigation and ensuing process under the Act, and I note that the plaintiff appears, from the evidence of Mr Muysken, at least content to let that process continue.*

His Honour went on to say [at 18]:

> *The defendants have not pointed to any particular prejudice that they would suffer were a stay not granted, although I think that the very existence of the parallel processes is likely to cause some prejudice to the defendants. I have taken that into account.*

In other words, the builder and the developer did not show such prejudice to them resulting from the parallel process, so as to demonstrate to the Court that a stay of the proceedings until a date in the future was absolutely necessary.

However in dismissing the application brought by the defendants, His Honour also had this to say [at 14]:

> *It seems to me that the outcome of the process under the Act is attended with great uncertainty. Moreover, even if orders were ultimately made and complied with, there is no facility under that process for any damages to be awarded by way of compensation to the plaintiff. Not only is the overall outcome of the process quite uncertain, the time for completion of the process is itself most uncertain, particularly when regard is had to the possibility of legal proceedings arising out of that process, whether that be in the nature of an appeal to the Land and Environment Court or an administrative law challenge to decisions made under the Act*.

Essentially then, *uncertainty* is a mainstay of Project Intervene insofar as a scheme has court proceedings on foot.

In the above case, if the defendants had actually shown some 'prejudice', it could have been that the matter would have been stayed by the Court.

RAB Act also contains provisions dealing with 'natural justice' requirements in respect of rectification orders, and so, appeals may be taken in respect of those orders to the Supreme Court.

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Section 49 of the RAB Act also provides that a developer who is given a building work rectification order may appeal to the Land and Environment Court against the order.

These avenues of appeal could open the door to the 'inconsistent findings' argument, which could essentially lead to more appeals 'downstream'.

However there may be other consequences, including as to costs.

For example owners may be exposed to the defendants' costs in case of say, discontinuing the court proceedings after orders from Project Intervene have been issued. Similarly, the Owners may be precluded from recovering their legal, expert and out of pocket costs incurred to date as a result of seeking to have their case removed or dismissed from the Court, unless the other side consents.

The issue of costs loom large in all of this.

But there are other uncertainties including as to the attitude that different courts or the Tribunal members may take in relation to any rectification orders. Section 43 of the RAB Act provides:

> (1) *A building work rectification order must be considered by the Civil and Administrative Tribunal for the purposes of determining a building claim under Part 3A of the Home Building Act 1989 and by any other court in proceedings relating to the building work the subject of the order, if the order is brought to the attention of the Tribunal or the court in the proceedings.*
>
> (2) *Nothing in this section binds the Tribunal or court.*

This section holds in effect that if for example, a defendant builder is ordered by the Commissioner to affect rectification works, then that builder may bring 'that fact' to the attention of the court or the Tribunal where the other 'parallel process' or the 'other proceedings are running'. What the court will do with that is utterly unclear.

Hence in respect of all this confusion, we need more pronouncements from the court. And so only time will tell.

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