Land and Environment Court

New South Wales

Medium Neutral Citation:	**Camden Council v Rafailidis (No 3) [2012] NSWLEC 217**
Hearing dates:	11/9/12, 13/9/12
Decision date:	18 September 2012
Jurisdiction:	Class 4
Before:	Biscoe J
Decision:	(1) The order for a stay made by the Court on 30 May 2012 is discharged. (2) Order 2 made by the Court on 5 March 2012 is varied by extending the 90-day period referred to therein to 4 July 2013. (3) The respondents are to pay the applicant's costs of the applicant's notice of motion filed on 19 July 2012.
Catchwords:	CIVIL ENFORCEMENT - extension of time for compliance with, or a temporary stay of, a demolition order.
Legislation Cited:	Civil Procedure Act 2005 ss 67, 135 Environmental Planning and Assessment Act 1979 s 95 Local Government Act 1993 s 121B Land and Environment Court Rules 2007 r 7.3 Uniform Civil Procedure Rules 2005 r 1.12
Cases Cited:	Camden Council v Rafailidis [2012] NSWLEC 51 Camden Council v Rafailidis (No 2) [2012] NSWLEC 125
Category:	Consequential orders
Parties:	Camden Council (Applicant) Efrem Rafailidis (First Respondent) Koula Rafailidis (Second Respondent)
Representation:	COUNSEL: Mr M Bonanno, solicitor (Applicant) SOLICITORS: Lindsay Taylor Lawyers (Applicant) Michael Vassili Barristers & Solicitors (Respondents)
File Number(s):	40855/11

JUDGMENT

1 This is a motion by the applicant, Camden Council, for a variation of a stay of a demolition order made by the Court in these civil enforcement proceedings in Class 4 of the Court's jurisdiction or for such other order as the Court thinks fit.

2 In 2008, the Council consented to a development application by the respondents, Mr Efrem Rafailidis and Mrs Koula Rafailidis, for the erection of a new dwelling on their land at 955 Camden Valley Way, Catherine Field. It was a condition of the consent that, prior to the issue of an occupation certificate and completion of the new dwelling, a separate development application be lodged with the Council for the demolition of an existing house on the land. It was also a condition of the consent that this existing single storey dwelling on the land be demolished and removed within 28 days of the completion of the new dwelling.

3 The respondents erected the new dwelling but have not complied with those two conditions for the demolition of the old dwelling, which is fibro-clad. The respondents moved into the new dwelling and rented out the old dwelling.

4 In 2010, the Council served the respondents with two orders under s 121B of the *Local Government Act* 1993 requiring them to comply with the conditions of the development consent. They did not comply.

5 The Council then brought these Class 4 proceedings seeking to enforce compliance with the conditions of the development consent. In March 2012, Lloyd AJ heard and determined the proceedings by granting the orders sought in the summons: *Camden Council v Rafailidis* [2012] NSWLEC 51. His Honour held at [9] - [10]:

> 9 The respondents have known all along that the original dwelling had to be demolished following completion of the new dwelling. They have previously been served with two orders under s 121B of the *Local Government Act* 1993, on 25 March 2010, and on 27 June 2010, requiring them to comply with the development consent. The planning controls which are in place would be set at nought if persons could avoid complying with those controls and, in particular, avoid complying with the conditions of any development consent which has been granted.
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> 10 Accordingly it is appropriate that the Court makes the orders sought in the summons. Those orders will be postponed for a period of 90 days to allow the respondents to either demolish and remove the existing single storey dwelling or else apply to the council by way of a modification application under s 96 of the *Environmental Planning and Assessment Act* 1979, or by way of a fresh development application to utilise the existing dwelling.

6 His Honour made the following declaration and orders, at [11]:

> 1. A declaration that in breach of s 76A(1)(b) of the *Environmental Planning and Assessment Act* 1979 the respondents have carried out development otherwise than in accordance with the notice of determination of development application number 701/2008 dated 22 October 2010 [sic] for the proposed development at lot 10 deposited plan 27602 955 Camden Valley Way Catherine Field.
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> 2. An order pursuant to s 124 of the Act that the respondents are within ninety days to demolish and remove the existing single storey dwelling on the property, or otherwise obtain an appropriate development consent to allow it to remain on the land in some form or another.
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> 3. As an alternative to order number 2 an order pursuant to s 124 of the Act that the respondents are:
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> (a) within fourteen days to lodge a development application with the applicant for the demolition and removal of the existing single storey dwelling on the property, and
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> (b) to demolish and remove the existing single storey dwelling within ninety days of the granting of consent to the development application in accordance with such consent.

7 The respondents did not comply with Orders 2 or 3.

8 The respondents lodged a development application with the Council for the retention of the old dwelling as a secondary dwelling. On 28 May 2012, the Council refused the application on the grounds that it was not established in conjunction with the new dwelling and was therefore not a secondary dwelling as defined by the relevant local environmental plan. As the 90-day period referred to in Order 2 was about to expire, the respondents moved in these proceedings under s 67 of the *Civil Procedure Act* 2005 for a stay of Order 2 made by Lloyd AJ, which I heard and determined on 30 May 2012: *Camden Council v Rafailidis (No 2)* [2012] NSWLEC 125. I granted a stay in the following terms, at [12]:

> Order 2 made on 5 March 2012 is stayed on condition that the respondents file and serve a Class 1 appeal against the Council's refusal of their development application of May 2012 on or before 31 May 2012.

9 The respondents duly filed and served a Class 1 appeal on 31 May 2012.

10 On 4 July 2012, at a conciliation conference in the Class 1 proceedings, the parties reached agreement and a Commissioner of the Court, by consent, allowed the appeal and granted development consent for the old dwelling subject to conditions. Inter alia, the conditions require works to be carried out to the old dwelling in accordance with specified plans outlining the removal of an existing laundry and an existing bedroom so as to reduce the total floor area, and the removal of asbestos. There is also a condition requiring a modification of the 2008 development consent for the new dwelling by deleting the conditions in that earlier consent which required the demolition of the old dwelling. The development consent for the old dwelling expires five years after the date from which it operates: s 95(1) *Environmental Planning and Assessment Act* 1979.

11 On 19 July 2012, the Council filed in these Class 4 proceedings a notice of motion, with which this judgment is concerned, for the following orders:

> 1. Pursuant to section 67 of the *Civil Procedure Act* 2005, that the stay ordered by Biscoe J on 30 May 2012 be lifted and in lieu thereof it be ordered that:
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> a. Order 2 made by Lloyd AJ on 5 March 2012 be stayed until 1 November 2012; unless
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> b. the Respondents procure the lawful issuing of a certificate in accordance with and as required by condition 3.0(6) of the development consent granted by the Court in proceedings 10525 of 2012 and provide a copy of same to the Council prior to 1 November 2012, in which case it be ordered that the said Order No 2 be permanently stayed.
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> 2. Costs.
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> 3. Such further or other order that the Court may see it fit to make.

12 The Council says that it is flexible as to the dates referred to in its proposed orders. The respondents oppose the motion. In Mrs Rafailidis' supporting affidavit, in which she describes progress made in fulfilling the 2012 consent conditions, she says that:

> I have no intention of not acting on the consent nor do I intend to delay acting on the consent as I want to retain the secondary dwelling which is why I have used every effort to progress an appropriate consent for that secondary dwelling to remain.

13 In summary, the Council submits that:

(a) as the Class 1 appeal now has been heard and determined, it is appropriate that the Court revisit the terms on which the stay was granted;

(b) the granting of the 2012 development consent does not regularise the status of the old dwelling. Only the carrying out of the work required by that consent will achieve that objective;

(c) the Council seeks that Order 2 made by Lloyd AJ be stayed permanently if the respondents undertake the works within the stated timeframe, or be restored if they do not do so within that timeframe;

(d) if the work is not carried out, it is appropriate that Order 2 made by Lloyd AJ be restored;

(e) if the respondents now carry out the work, all will be well and the stay will become permanent;

(f) if the respondents do not regularise the position within a reasonable time allowed by the Court, the full power and effect of Order 2 made by Lloyd AJ should apply;

(g) the balance of Mrs Rafailidis' affidavit cited above at [12] goes to the progress already made in fulfilling the 2012 consent conditions. Thus, there appears to be no disagreement that the works shall be done and the only question is one of timing;

(h) the stay proposed is preferable to varying the order of Lloyd AJ.

14 In summary, the respondents submit that:

(a) Order 2 made by Lloyd AJ does not require the development consent referred to therein to be obtained within 90 days. Only the time for demolition is governed by the 90-day requirement. Therefore the 2012 development consent achieves the second part of Order 2 made by Lloyd AJ, and consequently, that order is final and spent and cannot be varied;

(b) alternatively, if the respondents are in breach of Lloyd AJ's Order 2, this could be appropriately remedied by granting a permanent stay of that order;

(c) if any urgency or emergency arises in relation to the old dwelling, the Council has statutory powers to do something about it which it can place before the respondents and the Court;

(d) there is no evidence that the respondents are not going to comply with the 2012 consent. Mrs Rafailidis' evidence is that they will;

(e) the 2012 development consent lapses in five years. The Council's motion seeks to vary that and is an abuse of process.

CONSIDERATION

15 In my opinion, Order 2 made by Lloyd AJ required that, within 90 days, either the old dwelling be demolished or its presence on the land be legalised by an appropriate development consent. This means that if a conditional development consent were obtained within the 90-day period, the consent had to become unconditional (in the sense of any conditions being satisfied) within the 90-day period. Only then would the presence of the old dwelling on the land be legalised. If that were not so, then if a conditional development consent were obtained within the 90-day period, Order 2 would permit the old dwelling to remain unlawfully on the land forever, or at least for five years until the consent expired, if the conditions were never satisfied. That is not a reasonable construction of Order 2. It is also repugnant to his Honour's reasoning in the last sentence of [9] of his judgment. In my opinion, the respondents would be in breach of Order 2 and in contempt of court unless there were a stay or extension of time for compliance with Order 2.

16 On that construction, the respondents themselves propose that Order 2 be stayed permanently: see above at [14(b)]. At this point of the analysis, the issue between the parties is not whether there should be a stay but the terms of the stay.

17 The conditions of the 2012 development consent warrant further consideration of the stay that I ordered in May 2012 because the old dwelling remains unlawfully on the land unless and until the work required by the conditions is carried out, and the work may never be carried out.

18 In the circumstances, it is appropriate to discharge the May 2012 stay order and mould an order which would permit time within which the works required by the 2012 consent must be carried out. One year from the date of the development consent seems reasonable. The evidence of Mrs Rafailidis that the respondents intend to carry out the works does not detract from this conclusion; indeed, it indicates that such an order should not prejudice the respondents.

19 Power to order a stay of Order 2 may be available under s 135 of the *Civil Procedure Act* but, contrary to the parties' assumption, does not seem to me to be available under s 67. Section 67 authorises the Court to stay "proceedings" and I doubt that it permits a stay of a final order made in the proceedings. However, I think that the preferable course, which achieves the same result of protecting the respondents from the sanction of contempt of court for a reasonable period, is to use the power in r 7.3 of the *Land and Environment Court Rules* 2007 (virtually identical to r 1.12 of the *Uniform Civil Procedure Rules* 2005) to extend the 90-day period in Order 2 to 4 July 2013. That rule provides:

> **7.3 Extension and abridgment of time**
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> (1) The Court may, by order, extend or abridge any time fixed by these rules or by any judgment or order of the Court.
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> (2) The Court may extend time under this rule, either before or after the time expires, and may do so after the time expires even if an application for extension is made after the time expires.

20 As the Council has been substantially successful and costs normally follow the event in Class 4 proceedings, the respondents should pay the Council's costs of its notice of motion.

ORDERS

21 The orders of the Court are as follows:

(1) The order for a stay made by the Court on 30 May 2012 is discharged.

(2) Order 2 made by the Court on 5 March 2012 is varied by extending the 90-day period referred to therein to 4 July 2013.

(3) The respondents are to pay the applicant's costs of the applicant's notice of motion filed on 19 July 2012.

(4) The exhibit may be returned.

Decision last updated: 20 September 2012