NEERG SEMINAR PRESENTATION

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Section 311(1) of the Local Government Act 1919 ("the LGA") provided that a building shall not be erected unless the approval of the council is obtained therefor beforehand.

Conventional wisdom has been, at least since Justice Sugerman decided *Tennyson Textile Mills Pty Limited v Ryde Municipal Council* (1952) 18 LGR (NSW) 231 in the Land and Valuation Court, that the whole legislative scheme of the LGA controlling building work is directed to the necessity for obtaining approval before work is commenced.

Perhaps in more recent times it was not until Hemmings J decided *Hooper and Another v Lucas and Others* (1990) 71 LGRA 27 that the issue was seriously addressed in the context of proposed new building work in respect of an unauthorised building.

His Honour referred to provisions in the former Pt 11 of the LGA which specifically applied to buildings erected without consent (see s 317B and s 317AE which respectively had effect to either require rectification or to dispense either prospectively or retrospectively with the provisions of Pt 11). He also referred to a line of decisions with respect to the lack of jurisdiction to determine an application for a building permit for the erection of a building which had already been erected in that a council would have no power to receive and consider a building application merely to grant a building permit to retrospectively authorise a building that had been already erected. He accepted that the legislative scheme was such that buildings already erected should more appropriately be the subject of an application for a certificate pursuant to s 317AE, as it then was.

The facts in *Hooper v Lucas* were that a retaining wall had been erected illegally on the respondent's property. Subsequently, the respondent lodged a building application to construct a timber deck supported by and at a level above the level of the illegal retaining wall. The proposal included works to improve the structural

soundness of the existing retaining wall. The application was approved. The building works were carried out. Hemmings J formed the opinion that the approved building works were mainly additions to a *"building"* and within the purview of the provisions of Pt 11. The council was completely satisfied as to the height, structural stability and appropriateness of the completed structure.

Notwithstanding that he found there had been a breach of the applicable law, Hemmings J exercised the Court's discretion on the basis that to make the orders sought by the applicants or grant injunctive relief would work such an injustice as to be disproportionate to the ends secured by the enforcement of the legislation. It can be understood from the above account of the facts, circumstances and decision in *Hooper v Lucas* that Hemmings J did not retrospectively approve building work that had been carried out unlawfully by granting or supporting an approval that incorporated the underlying retaining wall. The case is often cited as an authority to the contrary effect. However, all that Hemmings J did was, after finding a breach of the law had occurred, exercise the discretion of the Court not to grant relief in circumstances where relief was not justified. So that rather than changing the conventional approach to the effect of the LGA in respect of retrospective building approvals, Hemmings J in fact confirmed it.

Later decisions such as *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192 confirmed that where work had been completed, retrospective building approval could not be granted in respect of that work, even in the event of an amendment to an existing approval. It was again recognised in *Steelbond* that applications for the issue of a building certificate was the appropriate remedy rather than a retrospective approval.

The approach taken by Hemmings J in *Hooper v Lucas* was expressly approved by Bignold J in *Rancast Pty Ltd v Leichhardt Council* (1995) 89 LGERA 139. His Honour said that in his opinion it would be open to the Court to approve those parts of the building which had not been constructed on the authority of *Hooper v Lucas* provided that the building application were appropriately amended. In the course of the judgment His Honour foreshadowed that it might be possible to read down the terms of the building application as only to refer to *"proposed"* rather than *"existing"*

building development where part of the work the subject of the application had already been completed.

The Satellite Group (Ultimo) Pty Ltd, a developer, was involved in protracted litigation with Sydney City Council and Howard Silvers Investments Pty Ltd in respect of a development application relating to a property in Pyrmont (Talbot J, NSWLEC, 22 December 1998, unreported). An original development application was determined by a grant of consent by the Court on 20 December 1994. The consent was varied by order of the Court on 7 July 1995. Subsequently, there was an application to modify the consent filed on 21 October 1998. The object of the modification was to replace approved architectural plans with a set of more detailed plans. The second respondent, Howard Silvers Investments Pty Ltd, was an objector who had been joined as a party. The original approved plans were essentially schematic but nevertheless sufficient enough to support a development application. It was submitted that the application for modification was made to bring the approved plans into line with the Building Code of Australia, council policy requirements, to take account of practical considerations arising out of construction methodology, the need to comply with conditions of consent and to meet engineering and structural requirements. Changes made to the external facade were largely cosmetic.

It was contended by the second respondent that the Court had no jurisdiction to grant the application for modification in circumstances where development had been carried out. This submission relied upon the construction of columns at basement level. These columns were depicted in the drawings lodged in support of the application for modification but they were not shown in the development consent drawings. It was acknowledged that no separate development consent had been obtained in respect of the columns.

Mention is made, in the judgment, of the decision by the then Chief Judge in *Ross Connell v Armidale City Council* (Pearlman J, NSWLEC, 25 September 1996, unreported) where Her Honour had endorsed the conclusion reached in *Steelbond*. In light of the decision in *Steelbond*, Pearlman J held in *Connell* that the Court was precluded under s 102 of the Environmental Planning and Assessment Act 1979 ("the EP&A Act") (which then covered applications for modification of development

consent) from entertaining an application for amendment of the development consent where the work the subject of the amendment has already been carried out.

In *Lirimo Pty Ltd v Sydney City Council* (1981) 66 LGRA 47. Cripps J expressed the view that an applicant is not precluded from obtaining a proper and valid application for consent to the use of land or the erection of a building notwithstanding the use or erection preceded the application for consent (at p 52-3). Neither the decision in *Steelbond* nor *Ross Connell* provided support for the obiter remarks made by Cripps J in *Lirimo.*

In *Satellite* the Court distinguished between the facts in *Connell* where there was a fully constructed residential building on the site that had been occupied whereas in the subject case the building under construction could not be regarded as complete in any sense. Furthermore, all of the disputed columns were not already in place. It was argued on behalf of the applicant that the columns were an integral part of a whole development rather than individual structures standing to be considered as separate and distinct items and that, accordingly, the existence of the columns was not a bar to approval of the plans incorporating them as part of an application for modification of the whole development. Alternatively, the applicant offered to delete the columns from the application for modification. The Court did not consider it necessary to amend the application by deletion of the columns in circumstances where what was being approved was a modification for the whole development made up of its many parts. The Court went on to approve the application for modification pursuant to the plans incorporating the columns. The distinction between an original application for development consent and a subsequent application for modification of an existing consent was not fully argued.

However, the issue was fully litigated and argued in *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299.

In the course of judgment in *Windy Dropdown* the Court identified the apparent inconsistency between the decision of Cripps J in *Longa v Blacktown City Council* (1985) 54 LGRA 422 and *Lirimo.* In *Longa* Cripps J had accepted that although it was not open to the council or the Court to approve a structure already erected on the

land other than perhaps pursuant to s 317A of the LGA, as it then stood, nevertheless it would be open for the builders to obtain building approval for future work in respect of the partly constructed building that had been erected without council approval. The remarks in *Longa* were again obiter dicta as the proceedings were an appeal against an order for demolition of a partly erected building under s 317B of the LGA and Cripps J did not have to determine whether consent should be granted.

Reference is also made in *Windy Dropdown* to *Steelbond* and *Connell* in context of an application made under s 106 of the Local Government Act 1993 ("the 1993 LGA") to amend the building approval and the fact that in *Connell* Her Honour extended the principle to an application under s 102 of the EP&A Act. It was also noted that Sheahan J in *Herbert v Warringah Council* (1997) 98 LGERA 270 found that s 102 required approval of works prospectively and therefore could not be used to amend a consent where the works referred to in the application have already been carried out. Sheahan J appears to have relied entirely upon the observations made by Pearlman J in *Connell* where it should be noted that Her Honour was not assisted by a true contradictor in the sense that Mr Connell was not legally represented.

Mention is also made in *Windy Dropdown* of *Jacklion Enterprises Pty Ltd v Sutherland Shire Council* (Pearlman J, NSWLEC, 8 July 1998, unreported) where Her Honour, the then Chief Judge, appeared to accept that a condition which controls the impact of a subdivision may be modified pursuant to s 102 notwithstanding the building work controlled by the condition has been carried out in a manner contrary to the condition.

Ultimately, in *Windy Dropdown* the Court found that the language of s 96 (or the former s 102) itself does not mandate against retrospective development. The judgment speaks for itself in [27] and [28] as follows:-

> 27. …*The only prospective language is the reference to "the proposed modification" in subs 1A(a). A practical purpose of s 96 is to provide an opportunity to deal with anomalies in design unforseen at the date of grant of development consent or, as the history of the legislation suggests, to legitimise partial changes*

> *that do not have the effect of radical transformation. The original concept of the modification of the details of a consent appears to have been reintroduced by s 96(1), although not in the same terms.*
>
> *28. Subsection (4) of s 96 is the same as the previous subs (4) of s 102. It expressly distinguishes modification of a development consent from the granting of development consent, thereby suggesting that at least in some respects the consideration and approval of an application for modification is to take place in a different context to the consideration of an application for development consent. Furthermore, the subject of an application made pursuant to s 96 is the development consent, not the development itself.*

The Court expressed an opinion that the broad construction of s 96 leads to a practical result that enables a consent authority to deal with unexpected contingencies as they arise during the course of construction of development, or even subsequently, provided of course the development to which the consent as modified relates is substantially the same development. The decision on the point of law in *Windy Dropdown* was that an application that relates to development, which has already been carried out, can be made pursuant to s 96. Thereafter, the application then before the Court was considered on its merits.

The decision in *Windy Dropdown* seems to have taken many observers by surprise.

Not necessarily Bignold J, who elected to follow it expressly in *Willoughby City Council v Dasco Design and Construction Pty Ltd and Another* (2000) 111 LGERA 422. His Honour, in his usual thorough way, noted that *Windy Dropdown* was a decision in conflict with the current state of authority in the Court on the question and it therefore became necessary for him to decide how the question was to be determined. His Honour observed that but for the supervening judgment in *Windy Dropdown* he would have been disposed, in the interest of judicial comity and certainty in the law, to adopt the existing settled state of authority as exemplified in

the decision of Sheahan J in *Herbert*, which had been recently cited by the Court of Appeal in *Tynan v Meharg and Newcastle City Council (No 2)* (1998) 102 LGERA 119. However, having considered for himself the competing authorities in the Court he arrived at the same conclusion as the Court in *Windy Dropdown*, namely that the power of modification conferred by s 96 of the EP&A Act construed in its context and having regard to its obvious purpose in the legislative scheme is available even in the case where the relevant works have already been carried out.

Further support for the decision in *Windy Dropdown* is found in the decision of Cowdroy J in *Austcorp No 459 Pty Limited v Baulkham Hills Shire Council* (2002) 122 LGERA 205 when His Honour noted from the judgment in *Windy Dropdown* that s 76A and s 78A (making of an application for development consent):-

> *…clearly operate in the context of a prospective proposal whereas a modification of consent pursuant to s 96 operates retrospectively by dint of s 96(4). A modification may or may not alter some aspect of the development itself. That some degree of change is contemplated is recognised by the constraint in s 96(1A) and (2) that the development to which the consent as modified relates must be substantially the same development.*

Cowdroy J followed the decision in *Windy Dropdown* and *Dasco Design*.

So far as I am aware, at least Commissioner Murrell (*King v Parramatta City Council* 10170 of 2001), Senior Commissioner Roseth (*Adler v Warringah Council* 11152 of 2000) and Commissioner Watts (*Oatley v Manly Council* 10196A of 2000) have embraced and applied the decision in *Windy Dropdown*.

The following observations made by Senior Commissioner Roseth in *Adler* are apposite:-

> *[15] In Windy Dropdown Pty Ltd v Warringah Council (2000) 111 LGRA 299, Talbot J held that a modification application under s96 of the EPA Act could be granted in respect of*

development already carried out. In his written submission Mr Howie suggested that, on the proper construction of the EPA Act, the Court has no power under s96 to grant consent retrospectively. He further suggested that if I were minded to grant the application on its merits, I should refer the matter to a judge of the Court as a question of law.

[16] I do not think that referral of this question to a Judge would be justified. First, the suggestion that there is a question of law arose only at the end of the hearing. There is no justification for not identifying the question earlier. More importantly, I do not think that there is *a question of law here. The Windy Dropdown decision has not been reversed. It is the authority that I must follow in this case. The fact that not everybody agrees with it does not make it any less of an authority.*

The applicant in *Signorelli Investments Pty Ltd v Sutherland Shire Council* (2001) 114 LGERA 27 sought to rely on *Longa, Windy Dropdown* and *Dasco Design* to seek consideration of a development application in respect of works that have already been completed. The earlier decisions were distinguished as follows:-

21. I agree with Mr Hale that decisions such as Longa v Blacktown City Council (1985) 54 LGRA 422; Windy Dropdown Pty Ltd v Warringah Council (2000) 111 LGERA 299; Willoughby City Council v Dasco Design and Construction Pty Ltd & Anor [2000] NSWLEC 257 do not deal with the grant of development consent. The argument by Mr Hale relies upon the distinctive provisions in the LG Act for regularising building works to submit that it is hardly surprising to find a provision such as s 124 which enables the Court to remedy a breach retrospectively because of failure to obtain a development consent. That situation has now changed following the amendments made to the EP&A Act by Act No 152 of 1997 with the introduction of ss 149A - 149G facilitating the issue

of building certificates. Even if the 1997 amendments had not been made to the EP&A Act, I would remain convinced that s 124 cannot be relied upon to develop an argument in favour of a grant of development consent retrospectively.

22. Nevertheless, it is open for the Court to give consideration to the development application on the basis that it seeks only a consent to the future use of that part of the building which has been constructed or altered without development consent.

Before leaving the situation as it existed prior to the recent amendments to the EP&A Act, it is worth reiterating the options which Bignold J identified in *Rancast* as the possible outcomes where an applicant is seeking to obtain an approval for illegally completed elements of a building.

(1) Whether the Court can approve, on a s 176(1) appeal under the LGA, a building application embracing completed (illegal) and contemplated work.

His Honour expressed the opinion that in the absence of amendment to the building application and disregarding for the moment the possible beneficial application of s 95 and s 96 of the 1993 LGA, for the Court to grant approval to the unbuilt 30 per cent of the building there in question would be for it to grant approval to an entirely different building from that for which approval was sought. In other words, the Court had no power to approve part only of the building the subject of the building application.

(2) Can a building application be amended to allow consideration of only 30 per cent of the building work that has not yet been commenced?

His Honour quoted s 87 of the 1993 LGA, as it then was, which referred to the making of minor amendments to a building application and then expressed the view that deletion of all reference to 70 per cent of the completed work on what is clearly

an integrated building the subject of a building application did not constitute a minor amendment. Furthermore, His Honour did not consider that the power of amendment under s 68(1) of the Land and Environment Court Act ("the Court Act") would facilitate such an amendment as, in truth, the appeal would have been transformed into new and different proceedings. Furthermore, the original building application would remain unchanged. His Honour nevertheless for the sake of completeness considered the question on the assumption that an amendment could validly be made under s 87 of the 1993 LGA or could be granted by the Court under s 68 of the Court Act to allow the unbuilt 30 per cent to be considered separately (for legal purposes) from the built component. In His Honour's opinion, it would have been open to the Court to approve those parts of the building which had not been constructed on the authority of *Hooper v Lucas* provided that the building application was appropriately amended.

(3) In the absence of an amendment could the Court grant *"in principle"* approval pursuant to s 95?

His Honour considered that a s 95 condition requiring illegal work to be the subject of a building certificate could not be said to have the effect of purporting to grant approval for a building erected in contravention of s 68. In his opinion, that breach would have been effectively dealt with by virtue of the provisions of s 168 before the approval came into existence. Without deciding the matter, His Honour stated that he leaned towards the view that s 95 was not intended to have the effect of overriding s 68.

(4) Is there a possible role for s 96?

It was suggested that s 96(1)(b) of the 1993 LGA would allow the Court to approve the activity "*except for a specified part of the activity*", namely the illegally built 70 per cent, subject to a condition for that illegal part to be the subject of a building certificate granted under s 172. His Honour found that it was clear from a reading of s 168 that a building certificate was not an approval. It merely has the effect of preventing the council from making certain orders or taking certain proceedings in

relation to the building. The result was that the suggested building certificate conditions did not readily fit with the s 96 scheme.

The present legislation

The recent changes to the EP&A Act appear to warrant a revisit to the *Windy Dropdown* decision and the line of authority confirming retrospective approval to development or building work already carried out cannot be obtained by way of development consent or building approval.

Section 81A(2) supersedes the earlier requirement for a building approval. Although couched in different language in some respects, the new section nevertheless maintains a scheme whereby it is contemplated building approval in the form of a construction certificate must be obtained before the erection of a building in accordance with a development consent is commenced. Section 81A does not in terms specify that a construction certificate for the building work cannot be issued after work has commenced. However, the issue of a construction certificate after commencement would not necessarily validate the work commenced illegally and perhaps may not justify the attribution of legality to the work which follows and is dependent upon the work being commenced illegally.

Section 109F specifically imposes restrictions on the issue of construction certificates without reference to the temporal context of the certificate. The section speaks of the restriction on the issue of a construction certificate in terms of satisfying the requirements of the Regulations and other matters which do not appear to preclude retrospectivity.

Section 109O and s 109P do not appear to take the matter any further. Section 109O merely enables the certifying authority to exercise the function of satisfaction vested in a consent authority or council by the Regulations, an environmental planning instrument or the terms of a development consent or complying development certificate. Section 109P protects a person carrying out work pursuant to a Pt 4A certificate. Pursuant to that section a person is entitled to assume that a construction certificate has been duly issued, that all conditions precedent have been complied with and that all things that are stated in the certificate are in effect correct.

The capacity of a council to issue a building certificate is maintained by s 149A to s 149E of the EP&A Act. These provisions appear to be designed to facilitate the equivalent of a building certificate previously issued pursuant the LGA.

The Table to s 121B appears to imply that there could be situations where a prior construction certificate may not be required. Pursuant to the section and the Table, a council may firstly require a person to demolish or remove a building in circumstances where the building is erected without prior development consent in a case where prior development consent is required. It then goes on to state in the alternative that the order may be issued where the building is erected without prior development consent of the consent authority and a prior construction certificate in a case where both prior development consent and a prior construction certificate are required. The implication from those provisions is that it will always be illegal to erect a building without prior development consent where consent is required. However, it will only be illegal to erect a building without a prior construction certificate where both are required.

Section 81A(5) contemplates that the Regulations may make provision concerning the issue of certificates for the erection of buildings and the subdivision of land.

One of the Regulations is reg 146 which stipulates that a certifying authority must not issue a construction certificate for building or subdivision work under a development consent unless it is satisfied a condition requiring the provision of security or a monetary contribution before work is carried out has been complied with. Furthermore, a construction certificate must not be issued unless the certifying authority is satisfied that each other condition of the development consent that must be complied with before a construction certificate may be issued in relation to the building or subdivision work has been complied with. However, apart from the inference arising from reg 146, the Regulations do not, as far as I can see, contain any specific provision which requires that the construction certificate be issued before commencement of work.

The statutory regime maintains a set of statutory controls, which include the imposition of criminal sanction on those who do not comply. Accordingly, any developer who commences building work without a construction certificate is liable to a penalty, as well as the prospect of an injunction. Arguably, the criminal or civil enforcement remedies could be regarded as appropriate means of dealing with non-compliance.

It appears at least open to argument that the previously understood impediment to the issue of a retrospective building approval may not have been maintained in connection with the issue of a construction certificate. However, I know of no decision in the Court which discusses this, although I understand the issue has been raised in argument before the Chief Judge where judgment is presently reserved (*Baulkham Hills Shire Council v Austcorp No 459 Pty Ltd*). I do know, however, that senior members of the Bar have maintained over the years that *Tennyson Textiles* was incorrectly decided. Nevertheless, it has stood the test of time.

The introduction of the new scheme may present the opportunity to re-address the issue of retrospectivity. After all, the decision in *Windy Dropdown* did not materialise overnight.

It must be expected that there will be a diffidence to overturning the long line of authority maintained since *Tennyson Textiles* was decided. Justice Sugerman explained his decision in regard to the effect of s 311 of the LGA at p 232 as follows:-

> *In so far as the appeals relate to building approval under Part XI of the* Local Government Act *1919-1951, the Court can make no order. The appellant has chosen to do the whole of the work included in two of the applications, and a considerable portion of that included in the third, notwithstanding the absence of approval. The Council's approval must be obtained "beforehand" (s. 311). The Court's decision is to be deemed "the final decision of the Council (s. 341 (3)), which can only be a decision given "beforehand." The whole scheme of the Act is directed to the necessity for obtaining approval before work is commenced. The*

work here in question was done in contravention of Part XI and, more particularly, of s. 311, and nothing can be done by this Court to affect that situation or its consequences.

It is interesting to note that His Honour did not take the same approach to an approval required under the County of Cumberland Planning Scheme Ordinance ("the Ordinance") when in respect of the provisions of the Ordinance he said further down on p 232 and at p 233:-

Approval, in its ordinary sense, is not limited to an approval given beforehand. The word is equally capable of referring to an approval of something which is being done or has already been done. Parts III and IV of the Ordinance do not readily disclose, so far as this point is concerned, the underlying scheme to which they are intended to give effect, and it is impossible to say with confidence whether or not the Ordinance here contemplates an approval which must be given beforehand.

It seems to me that the Court must give the phrase "approves the alteration," &c. in cl. 35 (1) (a) its ordinary meaning, in the absence of any sufficient indication furnished by the Ordinance that it was intended to have some more restricted meaning. The golden rule of construction is that "in construing all written instruments, the grammatical or ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance, or to some inconsistency with the rest of the instrument" – per Lord Wensleydale *in* Thellusson v. Rendlesham. *There is no manifest absurdity in a power to approve something already done; on some views of the matter it is not at all inconceivable that responsible authorities were intended to have such a power. The effect of the provisions of the Ordinance, or the scheme they embody, or evidence, does not appear with sufficient clarity to be such that to give the words in question their ordinary meaning would lead to some inconsistency with the rest of the*

> *Ordinance. And when the Principal Act with which the* Local Government (Amendment) Act *1951 containing the Ordinance is to be read and construed, refers to approval in dealing with a cognate subject matter, it expressly says "beforehand" (s. 311).*

However, in a subsequent decision concerning a different provision of the Ordinance (*Lowe v Mosman Municipal Council* 19 LGR (NSW) 193) Sugerman J appeared to have reservations about the correctness of his application of the other provision of the Ordinance in *Tennyson.*

In the more closely reasoned decision in *Lowe* he explained that the provisions of the Ordinance taken over all formed part of one consistent scheme which, taken with the purpose of the Ordinance, seemed to be directed to the control of development by means of the requirement of consideration of many forms of proposed development by responsible authorities and the obtaining of their consent before the development proceeds. He concluded that appeared to be essential to the effective administration of legislation of this character.

In a sense a construction certificate is defined prospectively in s 109C of the EP&A Act as a certificate to the effect that works completed in accordance with specified plans and specifications will comply with the requirements of the Regulations referred to in s 81A(5). Nevertheless insistence that a construction certificate can only be legally issued before the work commences may create an insurmountable difficulty in circumstances where the council is of the opinion that notwithstanding the failure to obtain a construction certificate beforehand, the building has been soundly built in such a way that it complies with the building codes and meets all the requirements for safe occupation so that a building certificate can be issued or that the council is satisfied to the extent that it does not intend to pursue an order for demolition pursuant to s 121B or s 123 of the EP&A Act. Despite the fact that the building might, as a matter of discretion in that case, remain as a structure, it is doubtful that an occupation certificate could be obtained in light of s 109H(1)(b):-

> *(1) A final occupation certificate must not be issued to authorise a person to commence occupation or use of a new building unless the certifying authority is satisfied:*
>
> > *(a) that a development consent or complying development certificate is in force with respect to the building, and*
> >
> > *(b) in the case of a building erected pursuant to a development consent but not a complying development certificate, that a construction certificate has been issued with respect to the plans and specifications for the building, and*
> >
> > *(c) that the building is suitable for occupation or use in accordance with its classification under the Building Code of Australia , and*
> >
> > *(d) that such other matters as are required by the regulations to be complied with before such a certificate may be issued have been complied with.*

If the only construction certificate that is acceptable in the terms of s 109H(1)(b) is a certificate obtained prior to commencement of the work then there would be an anomalous situation where, I expect, the building could be allowed to remain but never be capable of being legally occupied. That result might suggest that the draftsperson must have contemplated that a construction certificate could be issued subsequent to commencement. Otherwise, part of the scheme of the EP&A Act can never be made to work.

If a retrospective certificate can be accepted then rather than demanding demolition in every case where there is an omission to obtain the certificate prior to commencement, the council might nevertheless opt to seek a criminal sanction for breach of the Act pursuant to s 125 but allow the integrity and utility of the completed building to be maintained. So far as I understand the position the impediment now imposed by s 109H did not arise under the previous legislative scheme. The distinction made by Sugerman J between the competing provisions of the Ordinance in *Tennyson* and *Lowe* might still prove to be achievable as a consequence of s 109H, being a new element in the latest scheme.

The navigation of these unchartered waters will be watched with interest.

RN Talbot.