



Takeaways

- A planning certificate issued pursuant to s 10.7 (previously s 149) of the *Environmental Planning and Assessment Act 1979 (NSW)* ("the **Act**") is required to be annexed to contracts for the sale of land in New South Wales.
- A Section 10.7 certificate provides important information about the property and what state and local planning controls apply, including whether the land is effected by any restrictions that may hinder future development, such as flood and bushfire risk.
- What is required to be disclosed in these certificates is regulated by various legislative instruments, and not all affectations to property are required to be disclosed on these certificates.
- A council's duty of care does not extend to volunteering information beyond what is required under the relevant legislation. For example, and as discussed in the below case, a council is not required to disclose on a Section 10.7 Certificate the existence of infrastructure on land, including stormwater drainage and utilities infrastructure.
- A council would only be liable for damages if the information it was required to or chose to provide was incorrect or misleading.

Background

- In 2011, Ms Lorenzato purchased a property in Burwood, NSW.
- Unbeknownst to Ms Lorenzato, in about 1904 a pipe was installed on the subject land for the purpose of draining stormwater. The residence was subsequently built over the pipe. The current council, Burwood Council ("**Council**") was unaware of the existence of the pipe until 2001, investigating recent complaints of stormwater inundation, advised him that there was a deteriorating stormwater pipe underneath his property.
- Following the discovery of the pipe, Council engineers concluded that the pipe needed to be decommissioned, a drainage easement created on the northern and western boundaries of the property, and a new stormwater pipe installed.
- On 11 June 2002, a resolution was passed by Council ("**the 2002 Resolution**"), in which it was decided that Council would attempt to either negotiate or obtain by way of compulsory acquisition an easement over the existing pipe, noting *'future development of the property should include the establishment of an easement adjacent to the side boundary for drainage purposes.'*
- Following the 2002 Resolution, negotiations commenced between Council and the previous landowner, however no agreement could be reached. By 2003, Council had decided not to proceed with the proposed works and would instead investigate the possibility of relocating the pipe onto a neighbouring property at some stage in the future.
- In 2010, the previous landowner placed the property on the market. As part of the conveyance, he had obtained from Council a s 149 certificate. This certificate did not disclose the existence of the pipe, and settlement of the property completed in 2011 without issue.
- A few months after settlement of the property, the pipe became blocked and stormwater caused flooding to Ms Lorenzato's property. It was at that time Council advised her of the existence of the pipe.
- In 2017, Ms Lorenzato commenced proceedings Council claiming damages for negligent misstatement in respect to a s 149 planning certificate issued.

- Ms Lorenzo made various claims, including that the 2002 Resolution was a policy adopted by Council that affected the land by restricting “the development of the land because of the likelihood of ... flooding” and thus, should have been disclosed at Question 7 or 7A of the planning certificate.
- Ms Lorenzo claimed Council had given an incorrect and misleading statement in the s 149 certificate by answering 'no' to those questions.
- Amongst other defences, Council sought to rely on the protection provided by s 43A of the Civil Liability Act 2002 (NSW), which provides that:

“... any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.”

Supreme Court Proceedings

At first instance, Justice Fagan determined that:

- Council could not rely on the defence contained in s 43A as, by issuing a certificate pursuant to s 149, Council was not exercising a statutory power but rather, a statutorily imposed obligation.
- With reference to several decisions in which s 43A was discussed and applied, His Honour held that s 43A only concerned statutory provisions that are discretionary and that, because Council was obligated to issue the certificate, the protection afforded by s 43A could not apply.
- s 43A could only apply to a claim based on a deliberate act or deliberate refraining from action. As the plaintiff's case revolved not around the issuing of the planning certificate but rather that the information contained therein was incorrect, his Honour concluded that the s 43A protection could only apply to the issue of the planning certificate itself, not to the provision or withholding of information.

Court of Appeal Proceedings

Council appealed the decision on a number of issues, including the finding that s 43A did not protect Council from Ms Lorenzo's claim.

In a unanimous decision, the Court of Appeal held that none of Fagan J's determinations in respect of the operation of s 43A could be upheld.

Is Issuing a Planning Certificate a Special Statutory Power?

In determining that the issuing of a planning certification under s 149 was a special statutory power, the Court of Appeal referred to s 43A, and noted the following:

- The issuing of a planning certificate is a function conferred only upon a council under the *Local Government Act 1993* (NSW);
- The contents of a planning certificate are prescribed pursuant to the *Environmental Planning and Assessment Regulation 2000* (NSW);
- The issuing of a planning certificate is a power only conferred on Council in reference to the abovementioned statutory instruments and is not a power that persons generally can exercise.

Accordingly, the issue of a planning certificate was a special statutory power for the purposes of s 43A(2).

Does s 43A Apply to Discretionary Powers Only?

In a very short and concise paragraph, the Court of Appeal stated that there was no statement in the decisions referred to by Fagan J that supported his opinion that s 43A only applied to the exercise of a discretionary power, nor was there any basis for inferring that s 43A only applied in such circumstances.

Does s 43A Apply Only to Deliberate Act or Deliberate Failure to Act?

In response to Fagan J's comments that s 43A could only apply to a deliberate act or deliberate failure to act, the Court of Appeal was unclear whether Fagan J had considered the omission of information from the planning certificate as not being a deliberate act.

Ultimately, the Court of Appeal held that there was no distinction between deliberateness and inadvertence for the purpose of s 43A because no such distinction is relevant to liability in the tort of negligence.

Appeal Submissions by Respondent

On appeal, Ms Lorenzato argued that Council's conduct breached the standard imposed by s 43A(3), namely:

- (3) *For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.*

The Court of Appeal rejected that submission on the following basis:

- Whilst Council's engineering department was aware of the existence of the pipe, the property department responsible for issuing planning certificates did not.
- In issuing the planning certificate, Council had conducted the types of inquiries and investigations that are ordinarily conducted in such circumstances.
- Those inquiries and investigations were in accordance with the general approach taken by other councils.
- Whilst the existence of the pipe could have been disclosed pursuant to s 149(5), there was no obligation on Council to do so.
- The general approach taken by councils was that the information to be included in planning certificates did not require reference to individual items of stormwater drainage (or other infrastructure, such as utilities) commonly found on land.
- Ms Lorenzato failed to prove that no council could properly consider the failure to refer to the existence of the pipe to be reasonable in the circumstances.
- There was no specific evidence to which the Court's attention was drawn which supported the proposition that the statements in the planning certificate were in breach of the standard imposed by s 43A(3).

Implications

The Court of Appeal held that there was nothing in the Supreme Court judgment which provided any basis for concluding that the issue of the planning certificate did not engage s 43A and thus, Council could be afforded protection under s 43A if Council had been negligent.

You can read the full decision here: [Della Franca v Lorenzato; Burwood Council v Lorenzato \[2021\] NSWCA 321](#)