NEW SOUTH WALES

CONTRIBUTION FOR PROVISION OF SERVICES

Allsands Pty Ltd v Shoalhaven City Council

Court of Appeal 40769/91, Mahoney, Priestley, Meagher JJA.
9 March 1993

SUMMARY

This case concerned the construction of s94(2A) of the *Environmental Planning and Assessment Act 1979* NSW. The court of Appeal held that:

- s94(2A) requires that the actual cost of amenities or services existing at the date of development consent be used to determine the level of contribution.
- Interest payments made on borrowing to meet the once only cost may be taken into account. Any subsidy provided by government that reduced the amount actually paid by the Council is not to be included as part of the "cost" for the purpose of such a calculation.
- The cost of maintaining the physical asset is not included in the "cost" for the purpose of determining a contribution.

FACTS

Section 94(2A) was inserted in 1985 and provides that where-

(a) a consent authority has, at any time, whether before or after the date of commencement of this subsection, provided public amenities or public services within the area in preparation for or to facilitate the carrying out of development in the area; and

(b) development, the subject of a development application, will, if carried out, benefit from the provision of those public amenities or public services, the consent authority may grant consent to the application subject to a condition requiring the payment of a monetary contribution towards recoupment of the cost of providing the public amenities or public services.(emphasis added). Section 94 permits local authorities to require, as a condition of development consent, a monetary contribution for future public amenities and services from which the proposed development will benefit.

Allsands was granted residential subdivision approval, subject to a number of conditions, including the payment of monetary contributions. It appealed successfully to the Land and Environment Court against the imposition of certain conditions. Allsands appealed to the Court of Appeal, however, in respect of the conditions requiring contributions for sewerage and water headworks, which Bannon J had upheld in the Land and Environment Court.

"COST"

Priestley J held that in assessing the contribution for the "cost" of providing services, the actual cost of providing the services must be used:

> "To the practical objection that in regard to physical assets constructed so long ago as, for example, 1962, it may sometimes not be possible for a consent authority, in fixing contribution figures, to have access to the actual cost figures of construction of the physical asset, I think the answer is that such a difficulty may quite properly be met by estimating its cost in 1962; I do not think the statutory language authorises estimating its current cost and depreciating it. Even if all records have disappeared, some data must exist, even if only of a fairly general kind, from which a reasonable estimation of the 1962 cost may be made."

His Honour's reasoning was that section 94(2A) contemplates a contribution of actual cash amounts, rather than the estimated cost at some later time. The use of the term "recoupment" "carries a strong idea of getting back something paid out". His Honour considered that this interpretation of "cost" was supported by s94(3A), where "cost" means 'actual cost', and that the similarity between the two sections justified giving s94(2A) a similar meaning.

GOVERNMENT SUBSIDY

The second issue before the Court was whether a government subsidy given to the Council was part of the "cost" to the Council. There was no evidence that the subsidies were in any direct way paid through the rate of the Council ratepayers. They appeared to have been met ultimately by the State. The court held that, since "the Council was never liable to anyone for payment of part of the cost of a work, the power to impose a condition requiring contribution towards recoupment of cost cannot be referable to a cost not incurred by Council."

It was therefore an error on the Council's part to take such unincurred costs into account in fixing the contributions.

QUESTION OF FACT

A further argument was put that some works had been wrongly included in the recoupment calculation. Allsands argued that a dam was not relevant because it had been built at such a time that its cost had nothing to do with preparation for, or facilitation of, the carrying out of development in the area of the proposed development. The Court held that such a matter was a question of fact, not law, and could not be argued in the appeal which was limited to questions of law (s57 *Land and Environment Court Act* 1979).

ONGOING COSTS

Part of the ongoing costs of keeping physical works in service were included in the Council's calculation of the contribution to be paid. His Honour held that:

> "cost towards the recoupment of which conditions may be imposed is the cost to the Council of having put in place public amenities or services in preparation for or to facilitate the carrying out of development in the area, rather than the meaning which would justify the inclusion of this factor in the formula. That is, those words seem to me to convey the meaning that the cost referred to is a once for all cost. The same sense seems to me to be conveyed (although by no means conclusively) by s94(3A). Such a once for all cost as I think is indicated by a reading of s94 as a whole would in my opinion include interest payments on moneys borrowed to meet that once for all cost, but not in my opinion the cost of maintaining the physical asset after it has been provided."

The judgment of the Court below was set aside and the matter was remitted to the Land and Environment Court for further hearing. The Council was required to pay Allsands' costs in respect of the appeal and the hearing before Bannon J.

CONSEQUENT AMENDMENTS

The approach taken by the Court of Appeal was contrary to the practice of local authorities in assessing monetary contributions. As a result of the Allsands decisions, s64 of the *Local Government Act* 1993 was amended to allow councils to charge for water and sewerage headworks directly. The *Local Government (Consequential Provisions) Act* 1993 removes such works from the operation of s94 of the *Environmental Planning and Assessment Act*. At the time of writing, it was expected that the *Local Government Act* would come into force on 1 July 1993. The Allsands decision remains relevant, however, for other services or amenities existing at the time of a development consent and for which a condition is imposed requiring a monetary contribution.

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