

Court of Appeal, New South Wales before Spigelman CJ : Meagher JA : Beazley JA : 14<sup>th</sup> June 2001

**JUDGMENT : SPIGELMAN CJ:**

- 1 This is an appeal from a decision of Talbot J in the Land and Environment Court. His Honour allowed an appeal brought pursuant to s56A of the *Land and Environment Court Act 1979* from a decision of Commissioner Brown of 10 March 1999. This Court granted leave to appeal pursuant to s57(3)(b) of the *Land and Environment Court Act* on 9 October 2000.
- 2 In the proceedings before Commissioner Brown, Julie Zhang, the Appellant in this Court, appealed from the refusal by the Respondent, the Canterbury City Council ("the Council"), to grant a development application to use premises at the rear of 303 Beamish Street in Campsie as a brothel. A second, concurrent appeal was heard before Commissioner Brown. That was an appeal against an order made under s121B of the *Environmental Planning and Assessment Act 1979* to cease using the site for a brothel.
- 3 The premises are located on the eastern side of Beamish Street. The development application concerned the single storey extension fronting Hill Lane to the rear of the site. The remainder of the property, at the front of the site, consists of two storeys. A book shop occupies the ground floor and a three bedroom unit is on the first floor. The book shop has its primary access from Beamish Street; the unit and the brothel site have access from a side passageway that leads to Hill Lane. No parking is provided on the site.
- 4 The premises are located within close proximity to other commercial properties that make up what Commissioner Brown described as the "Beamish Street shopping strip". Immediately to the east of the proposed site is the St Philips Uniting Church. To the south east Hill Lane intersects with a public car park.
- 5 The premises are zoned "General Business 3(a)" pursuant to the provisions of the Canterbury Local Environment Plan No. 148 ("the LEP"). It was common ground that the use of the premises as a brothel is permissible, with consent, within that zone. Development Control Plan No. 23 ("DCP 23") was adopted by the Council on 26 September 1996. The purpose of DCP 23 is "to set objectives and standards for Brothel development within the City". The DCP states that brothels are allowed in business zones, but that Council approval must be obtained.
- 6 The development application was refused by the Respondent on 5 November 1998 for the following reasons:
  1. *The proposal does not satisfy the standards contained in DCP 23 regarding access and locational requirements which would lead to a negative impact on surrounding properties.*
  2. *The proposal does not satisfy the standards contained in Council's DCP 23 regarding the provision of on site car parking.*
  3. *The proposal would have a significant impact on the amenity of the neighbouring properties.*
  4. *The proposal is not in the public interest."*
- 7 Prior to the lodgment of the development application which was the subject of the proceedings before Commissioner Brown, the Council had refused a request for a continuation of the existing use of the premises by the Appellant. Originally, on 8 July 1996, consent had been granted, subject to a twelve month time limit, to a development application for a "body massage and relaxation centre". It was that use for which a request for continuation was refused by the Council.
- 8 DCP 23 sets out a number of general objectives. These objectives are to ensure that:
  - "Brothels are discrete, sensibly located and are not prominent within the community.*
  - Appropriate guidelines are established so that Brothels are located at a reasonable distance from where people live and other sensitive land uses.*
  - Appropriate guidelines are established which discourage a concentration of Brothels in close proximity to one another.*
  - Appropriate health and building standards are maintained."*
- 9 DCP 23 sets out a number of factors relevant to the location of brothels. Clause 4.0 is headed "**Access and Location Requirements**" and has as its objectives:
  - "to ensure Brothels are located at a reasonable distance from residential occupancies and other sensitive land uses.*
  - to encourage the location of Brothels above ground floor level.*
  - to prevent the concentration of Brothels within close proximity to one another.*
  - to ensure safe access to Brothels for staff and patrons."*
- 10 DCP 23 then lists standards concerning the application of those objectives. The standards relevantly state that:
  - "A Brothel must not be located adjoining or within 100 metres walking distance of any residentially zoned site; and*
  - A Brothel should not be located adjoining or within 200 metres walking distance of any place of worship, school, community facility, child care centre, hospital, rail station, bus stop, taxi stand, or any place regularly frequented by children for recreational or cultural pursuits.*

NOTE: *If there are circumstances when it is not relevant to comply with the above standard, applicants must provide a written submission detailing the reasons why this standard should be varied. This submission must also detail how the objectives of the Code will be satisfied. ...*

*Access to Brothels is to be discreet, particularly if provided from street level. Council will not approve Brothel applications where access to the Brothel is common to other commercial uses or to dwellings.*

*No patron access is to be provided from a laneway. ...*

*A Brothel must not be located within the vicinity of a licensed premises ie. hotel, club, restaurant."*

11 It was common ground before Commissioner Brown that with the exception of the first point, the proposal did not satisfy these criteria. In the present case both a church and a primary school were located within 200 metres of the site of the proposed brothel.

**Proceedings before Commissioner Brown**

12 Commissioner Brown identified what he called "*three main issues*" concerning the Council's rejection of the development application. The issues were:

1. *the appropriateness of the location taking into account the proximity to the adjoining church, local schools and hotel.*
2. *the appropriateness of the location in terms of security and public safety.*
3. *the adequacy of car parking.*"

13 Only the first issue is pertinent to this appeal.

14 A number of witnesses gave evidence before the Commissioner. For the Council evidence was given by a town planner, Mr Rodney Lindsell, and several lay witnesses including Mr Emmet Yellop, the Parish Secretary of St Philips Uniting Church, Ms Carol West, the relieving Principal of Campsie Public School and Mr Charles Prince, the President of the Campsie Chamber of Commerce. Two witnesses gave evidence for the Appellant. The first was Mr John Hewitt, a director of Transport and Traffic Planning Associates and the second was a consultant town planner, Mr Ross Lemming.

15 Commissioner Brown discussed the evidence of the witnesses. In particular, he referred to concerns expressed by Mr Yellop who had given evidence that the Church property was not only used by the Church but also as a community and drop-in centre. Mr Yellop also referred to certain specific incidents concerning the brothel. The Commissioner said that the incidents to which Mr Yellop referred "*were not excessive in number or objectionable in nature*". Commissioner Brown said that similar conclusions could be drawn from the evidence of Ms West and Mr Prince "*in relation to any demonstrable effect from the brothel*". Ms West had expressed concerns over the use by school children of Hill Lane.

16 Commissioner Brown referred in particular to the evidence of Mr Fleming. In relation to the proximity of the premises to the Church he had stated that there was no conflict as the public entrance to the Church and the entrance to the brothel are not in view of each other and the Church is oriented away from the premises.

17 The Commissioner noted that the Council's case was based to a large extent on non-compliance with DCP 23. However, he also noted that: "*... it must be remembered that the distance standards within DCP 23 cannot be read as prohibiting Brothels within these distances. To do so would be to give DCP 23 greater power than LEP 148 in this regard. DCP 23, correctly, allows for variations to some of these standards, subject to providing reasons why the standard should be varied.*"

18 Commissioner Brown referred to the unreported decision of Talbot J in **Croucher v Fairfield City Council** (Talbot J, 2 July 1997, unreported) where his Honour had said: "*The Court accepts that there are members of the community who regard brothels with total repugnance on moral grounds and those views are respected. Where persons holding those views are likely to be confronted by a relevantly proximate, extravagant and audacious display as a consequence of a proposed development, such as a brothel, then questions of morality may arise for consideration under s90.*"

*Any casual observer who has not taken the trouble to inquire further will be unaware that the subject premises are being used for the purposes of a brothel. Different considerations might apply if the subject premises were to be presented in an unambiguous way. Even accepting that the premises may gain some notoriety as a consequence of the natural inquisitiveness of children, there is no actual direct evidence of this occurring in respect of the present business or, for that matter, any of the other number of brothels operating within the precincts of the current centre."*

19 Commissioner Brown also referred to a decision of Murrell AJ, **Lonza v Fairfield City Council** (Murrell AJ, 9 December 1996, unreported), where her Honour said that community "*standards and views on the morality of brothels are not relevant under any s90(1) head of consideration*". However, though "*the morality issue per se is irrelevant, the demonstrable effect of a particular brothel is relevant under s90(1)(d)*".

20 The Commissioner said that the effect of those decisions was that any impacts had to be demonstrable. It was not enough "*to simply rely on a brothel's presence to justify its unacceptability*". In his opinion, the evidence presented at the hearing was "*not of sufficient severity to suggest that the brothel should not be granted approval*".

21 Commissioner Brown's conclusion was: "*In my view, the evidence presented to the Court could not justify the refusal of the application. The instances where there was interaction between the community, the Church or the school and the brothel could not be seen as offensive or objectionable. The mere presence or knowledge of the brothel is not sufficient for its refusal when considered in a planning context, and the existing legislative requirements. ...*"

*... I do not see that the proposal conflicts with the general objectives of DCP 23. The location is discreet and not prominent in that there is nothing to distinguish the site as a brothel if a person was walking down Hill Lane without any specific knowledge of the use."*

22 However, Commissioner Brown did not think that that approval should be unlimited. In dealing with the extent of the consent, Commissioner Brown found that evidence concerning the previous history of the site was unreliable in justifying its unlimited ongoing use as a brothel. There was also an absence of evidence concerning the future operation of the brothel. The Commissioner also discussed issues of security and public safety, particularly with regard to the effect of DCP 29, which deals with the creation of a more defensible environment through the design aspects of development, and the adequacy of car parking.

- 23 In Commissioner Brown's opinion, it was appropriate that a twelve month limit be placed on the approval. In the course of considering the time limit Commissioner Brown noted that there was a "fundamental incompatibility" with a brothel and the land uses set out in DCP 23.
- 24 The Commissioner's conclusion on this aspect was: "The 12 month limit will allow the opportunity for a more detailed assessment of the operation and any impacts that may be generated by the brothel."

#### Appeal to Talbot J

- 25 The Council appealed to the Land and Environment Court pursuant to s56A of the **Land and Environment Court Act**. That section says, relevantly, that:  
*"(1) A party to proceedings in Class 1, 2 or 3 of the Court's jurisdiction may appeal to the Court against an order or a decision of the Court on a question of law, being an order or a decision made by a Commissioner or Commissioners."*
- 26 Talbot J first summarised the Commissioner's judgment and noted that the aim of the standard in DCP 23 is referable to the stated objective which is to ensure that brothels are located at a reasonable distance from residential occupancies and other sensitive land uses.
- 27 Before Talbot J, the Council submitted that the Commissioner failed to give proper, genuine and realistic consideration to DCP 23 and, accordingly, displayed a "fundamental misunderstanding" of the statutory scheme. In the Council's submission, the Commissioner misapplied the decisions of **Croucher** and **Lonza**. Further, it was submitted that the Commissioner fell into error by assuming that the Council bore an onus to demonstrate relevant incompatibility with surrounding land uses. In addition, it was contended by the Council that the power to grant time limited approval to a development application does not extend to a situation where there was fundamental incompatibility with a development control plan and where the Court is not satisfied that there was sufficient evidence to justify an unlimited approval.
- 28 Talbot J thought the appeal should be upheld. His Honour considered the submissions under three headings. The first was "Consideration of the DCP". His Honour commenced by referring to the decision of this Court in **North Sydney Council v Ligon 302 Pty Ltd [No. 2]** (1996) 93 LGERA 23. In that decision, Cole JA, with whom Meagher JA and Abadee AJA agreed, discussed the effect that Bannon J had given to the development control plan in that case. Cole JA said that: "... whilst his Honour stated that he had 'given weight to the Development Control Plan' that statement was made against his clear view that the document to which he was purportedly giving weight was invalid and, accordingly, of no effect. Further, he determined not to apply it. The consequence must be that, in truth, his Honour did not give any real consideration to or have regard for the provisions of the Development Control Plan (**Parramatta City Council v Hale** [(1982) 47 LGRA 319] (at 339)). There has not been a 'proper genuine and realistic consideration' of the application having true regard to the Development Control Plan (**Broussard v Minister for Immigration & Ethnic Affairs** (1989) ... 21 FCR 472 at 483 per Gummow J; **Turner v Minister for Immigration & Ethnic Affairs** (1981) 55 FLR 180 at 184 per Toohey J.) It follows, in my view, that the reconsideration by the Land and Environment Court was not in accordance with the order of this Court ... which made clear that consideration of the development control plan was required by s90(1) of the Act." (at 28)
- 29 Cole JA disagreed with Bannon J's conclusion that the development control plan at issue was invalid. Talbot J also referred to another passage of Cole JA where his Honour said: "The content of development control plans is addressed by s72. It is to contain 'the more detailed provisions' that are contained in the North Sydney Local Environmental Plan, which council regards as necessary or desirable (s72(1)). Generally the development control plan must conform to the North Sydney Local Environmental Plan (s72(3)). However that does not mean that where a use is permissible with consent under a **North Sydney Local Environmental Plan**, 'more detailed provisions' regarded as desirable or necessary and specified in a development control plan may not regulate the circumstances in which a use is permissible with consent. There is no reason in principle why those 'provisions' would not have the character either of a 'prohibition' unless certain criteria are satisfied, or of a 'development standard', which permits a development only on satisfaction of certain criteria." (at 30)
- 30 Cole JA also noted that the manner in which the requirement which is regarded as necessary or desirable by the Council is expressed in a development control plan does not determine the validity or invalidity as being within or without power. Rather, content and not form is to be looked at.
- 31 Talbot J noted that the Commissioner had started with the premise set out above that DCP 23 could not be read as prohibiting brothels within the distances specified in cl 4, otherwise the provisions of the DCP would have greater force than the LEP. His Honour said in relation to the approach taken to the determination by the Commissioner that: "By accepting the lack of evidence in regard to the severity of impact to justify refusal, the Commissioner appeared to make a judgment that the provisions of the DCP do not control development within the prescribed distances of sensitive land uses. He particularly noted that he was mindful no evidence on the past and future operation of the brothel was produced at the hearing. The absence of the evidence in this respect in his opinion justified a 12 month limit on any approval." (at [23])
- 32 Talbot J said that the decision to disregard the distance requirements of the DCP arose out of the Commissioner's interpretation of **Croucher** and **Lonza** which "he took to mean that any impacts of a brothel must be 'demonstrable'." (at [24]) Talbot J said that in **Croucher**, although a draft LEP had been prepared, there was no DCP in force. In **Lonza**, although Murrell AJ used the words "demonstrable effect", her Honour only used it in the context of its relevance in contrast to the issues of community standards and views on the morality of brothels.

- 33 In Talbot J's opinion, there was nothing in the decision of *Ligon* which: "... leads to a conclusion that the provision regarding the location of a brothel adjoining or within 200 metres walking distance of a place of worship is not in conformity with the LEP. This is particularly so in light of the note to that provision in cl 4 which requires the applicant to provide a written submission detailing the reasons why this standard should be varied. Thus it was for the applicant to show why this particular brothel should be allowed in circumstances where a church is immediately located to the east of the subject site within the prescribed distance of 200 metres." (at [26])
- 34 Talbot J said that the Commissioner's opinion that the evidence was not of a sufficient severity to suggest that the application should not be granted approval was, in the light of his acceptance of a "fundamental incompatibility" with a brothel and the land uses set out in DCP 23, "difficult to comprehend" (at [27]). Talbot J said that though a development control plan contains "more detailed provisions" than are contained in a LEP, those provisions may have the character either of prohibition or require development to satisfy certain criteria.
- 35 In relation to DCP 23 his Honour said: "A proper reading of the DCP is that consent should not be granted to a brothel that is to be located contrary to the provisions of cl 4 unless there are circumstances which render compliance with the standard irrelevant." (at [30])
- 36 Talbot J said that Commissioner Brown appeared to accept the view that because any impact was not "demonstrable", and the evidence did not show sufficient severity to justify refusal, "the standard in the DCP could be ignored, notwithstanding the general objectives of the DCP to ensure that brothels are discrete, sensitively located and at a reasonable distance from sensitive land uses." (at [31])
- 37 Talbot J said that the DCP says nothing about the "orientation" of a place of worship, other than distance to the proposed brothel. In his Honour's opinion: "The decision to allow the development on a site immediately adjacent to a place of public worship without explaining the grounds for the variation of the standard indicates that the Commissioner did not have proper regard to the provisions of the DCP.
- It is evident therefore that he did not give any real consideration to the provisions of the DCP, in the same way as Cole JA found in Ligon [No. 2].*
- It is not a question of weight given to the DCP by the Commissioner. He incorrectly applied the relevant test by determining that the council had not demonstrated sufficient severity of impact rather than requiring the applicant to provide reasons why the standard should be varied. In that sense the Commissioner asked himself the wrong question and therefore fell into error." (at [33]-[35])*
- 38 In the opinion of Talbot J, the Commissioner made an error of law, under s56A of the *Land and Environment Court Act*.
- 39 Under the heading "Time Limited Condition" Talbot J reviewed the Commissioner's imposition of a twelve month limit on the consent. Talbot J said that though a condition of development consent may be imposed if it limits the period during which the development may be carried on, "the reasons given by the Commissioner demonstrate that he failed to take into consideration the likely impact of the development as required by s79C(1)(b) [of the *Environmental Planning and Assessment Act*] and the suitability of the site for the development as required by s79C(1)(c)" (at [41]).
- 40 His Honour said: "Deferring a more detailed assessment of the operation and any impacts that may be generated by the brothel for a period of 12 months gives credence to a proposition that the applicant is prima facie entitled to development consent merely because brothels are a permitted use under the LEP. If there was insufficient evidence to justify the grant of an unlimited consent, as the Commissioner found, then the only option open to him was to dismiss the appeal.
- The Court is required to give consideration to the likely impacts at the date of determination. Instead, this matter was left in abeyance. In my opinion, the Commissioner effectively postponed determination of an essential matter for one year. Adopting that course is no different in principle to leaving to others the adjudication of matters unresolved by the consent that is granted (see *King v Great Lakes Shire Council* (1986) 58 LGRA 366 at 384-385).*
- In other words, the Commissioner was obliged to understand the consequences of allowing the use of the premises before the grant of development consent. By failing to do so he fell into legal error." (at [42]-[44])*
- 41 His Honour upheld the appeal. He concluded: "The decision to grant a time limited approval in the circumstances means that the Commissioner failed to consider an essential criteria pursuant to s79C of the *EP & A Act* ... by deferring the adjudication of those matters for the period of 12 months." (at [47])
- 42 Talbot J ordered that the matter be remitted to Commissioner Brown for redetermination in accordance with his decision.

#### Grounds of Appeal

- 43 The Appellant appeals from the decision of Talbot J. There are seven grounds as follows:
1. His Honour erred in reviewing the Commissioner's findings of fact when the appeal to His Honour, pursuant to s56A of the *Land and Environment Court Act 1979*, is limited to questions of law.
  2. His Honour erred in holding that the Commissioner 'failed to give proper, genuine and realistic consideration to the provisions' of a certain development control plan known as DCP 23.
  3. His Honour erred in holding that the Commissioner 'failed to give proper, genuine and realistic consideration to the requirement in DCP 23 for separation from other sensitive land uses'.

4. His Honour erred in failing to hold that, having regard to the findings of fact made by the Commissioner, the Commissioner implicitly held that the requirement in DCP 23 for separation from other sensitive land uses, in the factual circumstances of this case, was irrelevant.
5. His Honour should have held, having regard to the findings of fact made by the Commissioner, that it was not open to His Honour to hold that the requirement in DCP 23 for separation from other sensitive land uses, in the circumstances of this case, was relevant.
6. His Honour erred in holding that the Commissioner 'fell into error by determining the application on a basis that required the Council to discharge an onus that it did not bear'.
7. His Honour erred in holding that the decision of the Commissioner to limit the duration of the consent to twelve months 'means that the Commissioner failed to consider an essential criteria pursuant to s79C of the Environmental Planning and Assessment Act 1979 by deferring adjudication of those matters for 12 months'."

44 Ground 6 is no longer relevant.

**Appellant's Submissions: Grounds 1-5**

- 45 In relation to Ground 1, the Appellant submitted that Talbot J was in error in finding that the Commissioner made errors of law. The Appellant submitted that the Commissioner gave careful consideration to the provisions of the DCP and that it was not correct for Talbot J to hold that the Commissioner failed to give proper, genuine and realistic consideration to the provisions of the DCP in light of the Commissioner's extensive and detailed consideration of the DCP provisions.
- 46 In relation to the requirement that a brothel should not be located within 200 metres walking distance of the uses stated, the Appellant placed reliance on the "NOTE" to the second of the standards to cl 4. The Appellant submitted that the Commissioner found that the objectives of the clause were satisfied.
- 47 The Appellant submitted that the way in which the Commissioner decided the issue before him was based on findings of fact and, accordingly, no appeal lay from them to the Land and Environment Court since s56A is limited to appeals on questions of law.
- 48 Grounds 2, 3, 4 and 5 were argued together under the general heading of "The Development Control Plan". The Appellant submitted that the Commissioner gave detailed consideration to the provisions of the DCP and that he correctly observed that the DCP itself "allows for variations to some of the standards, subject to providing reasons why the standards should be varied". This, it was submitted by the Appellant, was a correct approach and it was not the case that the Commissioner made the decision "to disregard the distance requirements of the DCP". The Appellant submitted that the Commissioner held that the exemption was applicable in this case and thus the distant standard was inapplicable "as a simple matter of construction of the DCP".
- 49 The Appellant also submitted that the distance criteria do not operate as prohibitions. In the Appellant's submission, the "structure and reasoning" of the Commissioner's judgment and his express conclusions, demonstrate that the Commissioner found "that the general objectives of the DCP were satisfied by the subject proposal". In particular, the Appellant placed reliance on the Commissioner's finding that the development was discrete, sensitively located and not prominent and also was located "at a reasonable distance from where people live and other sensitive uses". These factors were referable to the first two of the general objectives of the DCP.
- 50 The Appellant outlined a number of factual findings on which it was said the Commissioner's decision was based and, accordingly, not able to be disturbed by Talbot J. Most of these related to the evidence given. The Appellant placed reliance on the evidence of Mr Yellop which indicated that the specific problems he referred to were "not excessive in number or objectionable in nature". The Appellant submitted that in the circumstances, the Commissioner was correct in holding that the "locational criterion" did not prohibit the development. Moreover, it was submitted, the Commissioner's reasoning demonstrates that he did give "proper, genuine and realistic consideration" to the provisions of the DCP.
- 51 The Appellant submitted that Talbot J was in error in holding that the Commissioner accepted the view that no impact was "demonstrable" and that the evidence did not show sufficient severity to justify refusal, and that accordingly he could ignore the standard in the DCP. In the Appellant's submission, the Commissioner used the word "demonstrable" to distinguish between evidence of environmental impact and evidence that some people do not like the idea of brothels. Whereas the former would be a "demonstrable" effect and relevant to the consideration of the matter, the latter would not. The Appellant submitted that this is the approach which was taken by the Commissioner.
- 52 The Appellant further submitted in relation to "sufficient severity" that that was a summary by the Commissioner of the factual findings which he had earlier made and that that conclusion was available to be drawn from them.
- 53 The Appellant also submitted that the Commissioner was correct in accepting evidence concerning the fact that the brothel and the church were oriented with entrances away from each other. The Appellant submitted that Talbot J's finding at [33]-[34] and particularly the statement that the DCP says nothing about the orientation of a place for public worship except in relation to distance from a proposed brothel is in error. In the Appellant's submission the "NOTE" in cl 4 indicates that the DCP "contemplates any rational basis that might make it irrelevant to comply with the distance standard in an appropriate case". Accordingly, it was submitted, Talbot J erred in holding to the contrary and that the Commissioner's decision should not have been disturbed by Talbot J on the ground of failing to give any real consideration to the provisions of the DCP.

**Respondent's Submissions: Grounds 1-5**

- 54 The Respondent relied on the reasoning of Talbot J. It submitted that the Commissioner erred in finding that the distance standards within DCP 23 could not be read as prohibiting brothels within those distances and that to do so "would be to give DCP 23 greater power than LEP 148 in this regard". The Respondent submitted that that finding is inconsistent with the fact that the Commissioner went on to say that DCP 23 allows for variations to some of the standards.
- 55 The Respondent also submitted that the Commissioner's statement that there was a fundamental incompatibility between the brothel and the land uses set out in DCP 23 was inconsistent with the contention that the Commissioner was exercising the discretion provided in the DCP. The Respondent submitted that it is apparent for the reason given (that is that the distance standards within the DCP could not be read as prohibiting brothels within the distances) that the Commissioner had "set the controls on the DCP relating to distance from his mind" and as a consequence, "there was a failure to give the development control plan 'proper, genuine and realistic consideration'."
- 56 In relation to the Appellant's submissions concerning the factual findings of the Commissioner, the Respondent submitted that there was nothing to support the proposition that the Commissioner was applying the discretion that he identified.
- 57 The Respondent further submitted that neither *Croucher* nor *Lonza* involved controls imposed by development control plans. It was submitted that the Commissioner's conclusion that the proposals did not conflict with the general objectives of DCP 23 was an error in law given that the finding was made in the context of allowing the proposal to operate for twelve months "for a more detailed assessment of the operation and any impacts that may be generated by the brothel".
- 58 Finally, the Respondent placed reliance on the fact that no submission of the type contemplated in the "NOTE" after the distance standard to cl 4 of the DCP was provided either to the Council or to the Court.
- 59 The Respondent relied on *Ligon* and submitted that there was no relevant difference between what the Commissioner did in this case and what Bannon J did in *Ligon*.

#### The Development Control Plan

- 60 As noted above the jurisdiction of Talbot J was confined to "a question of law". Such a question arises where a decision maker fails to take into account relevant considerations. A development control plan was a relevant consideration by force of s79C(1)(a)(iii) of the *Environmental Planning and Assessment Act* which relevantly provides: "79C(1) In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development subject to the development application: (a) the provisions of: ... (iii) any development control plan ... that apply to the land to which the development application relates ..."
- 61 The provisions of DCP 23 as set out above are plainly relevant to the development application the subject of these proceedings. The obligation upon the decision maker was to "take into consideration" DCP 23.
- 62 The submissions in this Court proceeded on the basis that Talbot J had applied a proper test to determining whether or not as a matter of law the Commissioner had complied with the statutory obligations. The test was whether the Commissioner had given "proper, genuine and realistic consideration to the provisions of the DCP". This formulation is derived from the judgment of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (Gummow J, 11 December 1987, unreported) and see *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 at 483 per Gummow J. As indicated by this Court in *Ligon* (supra) at 28, this formulation was in substance the equivalent of the test of "real consideration" applied to the predecessor section of s79C of the *Environmental Planning and Assessment Act* in *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 331 and 335-336 and 339-339. See also *Bruce v Cole* (1998) 45 NSWLR 163 at 185-186. A number of equivalent formulations appear in the case law. (See Aronson & Dyer *Judicial Review of Administrative Action* (2nd ed) at 225). Care must be taken that this category of judicial review or appeal on question of law is not elided into a review on the merits or an appeal on the facts (*Bruce v Cole* supra at 186).
- 63 I do not understand these authorities to be suggesting that the plain words of a statutory formulation should be substituted by some other formulation. The issue remains: Did the Commissioner, as was his statutory duty, "take into consideration" DCP 23?
- 64 As the Appellant's submissions emphasised, the Commissioner's judgment is replete with references to DCP 23. However, mere advertence to a matter required to be taken into consideration is not sufficient (see e.g. *Parramatta City Council v Hale* at 339).
- 65 The Commissioner said: "While the Council's case was based, to a large extent on the non-compliance with DCP 23, it must be remembered that the distance standards within DCP 23 cannot be read as prohibiting brothels within these distances. To do so would be to give DCP 23 greater power than LEP 148 in this regard. DCP 23, correctly, allows for variations to some of these standards, subject to providing reasons why the standard should be varied."
- 66 The Commissioner then made reference to the decisions of *Croucher* and *Lonza* as set out above. He then added: "The general thrust of these decisions is that any impacts must be demonstrable. It is not enough to simply rely on a brothel's presence to justify its unacceptability, irrespective of its location and neighbours."

- 67 He then proceeded to apply this principle to the facts of the case noting, as I have set out above, that the evidence before him was "not of sufficient severity". He concluded: "*In my view the evidence presented to the Court could not justify the refusal of the application.*"
- 68 In my opinion the Commissioner misunderstood the decisions in *Croucher* and *Lonza* in the way, and for the reasons, set out by Talbot J.
- 69 Furthermore, I can see nothing in the reasons for judgment of Commissioner Brown that supports the Appellant's contention that he had implicitly applied the proviso to cl 4.0 in DCP 23. Neither he nor the Council received a written submission of the character required. Nor did the Commissioner apply a test of "relevance" either expressly or implicitly.
- 70 In order to "take into consideration" the particular provisions of DCP 23, the Commissioner was under an obligation to consider the fact that the DCP established a standard that a brothel should not be "located adjoining or within 200 metres walking distance of any place of worship" etc and that that standard was designed to serve the objective of ensuring that "Brothels are located at a reasonable distance from ... sensitive land uses". The statute required the Commissioner to consider that standard in conducting the evaluation under s79C(1).
- 71 The statutory power in s80 of the Act to "determine a development application" by granting or refusing consent does not confer an unfettered discretion. It is subject to the obligation to "take into consideration" the matters identified in s79C(1). This obligation is of a similar character to that which has been found to be imposed by a statutory obligation to "have regard to" identified matters.
- 72 In one such statutory context Mason J said: "*When subs (7) directs the Permanent Head to 'have regard to' the costs, it requires him to take those costs into account and to give weight to them as a fundamental element in making his determination.*" (*R v Hunt; ex parte Sean Investments Pty Ltd* (1979) 180 CLR 323 at 329 emphasis added).
- 73 In the case of a statute which empowered the court to make such order "as to it seems just and equitable having regard to: (a) ... and (b) ...", Gleeson CJ and McLelland CJ in Eq said: "... par (a) and par (b) prescribe the focal points by reference to which the discretionary judgment as to what seems just and equitable must be made. They are not merely two matters, or groups of matters, which take their place amongst any other relevant considerations." (*Evans v Marmont* (1997) 42 NSWLR 70 at 79-80 emphasis added).
- 74 A development control plan is not an "**environmental planning instrument**". (See definition in s4). Accordingly, the requirement in s80(2) that a consent authority "must refuse" an application that would "result in a contravention of" such an instrument does not apply to a development control plan. Furthermore, the proscription, by s76B, of any development prohibited by an environmental planning instrument, does not extend to a prohibition in a development control plan. Nor can such a plan contain a "non-discretionary development standard" which, if complied with, would take away a consent authority's discretion under s79C(2).
- 75 The consent authority has a wide ranging discretion - one of the matters required to be taken into account is 'the public interest' - but the discretion is not at large and is not unfettered. DCP 23 had to be considered as a "**fundamental element**" in or a "**focal point**" of the decision making process. A provision so directly pertinent to the application for consent before the Council as was cl 4.0 of DCP 23 was entitled to significant weight in the decision making process but was not, of course, determinative.
- 76 In my opinion, the Commissioner did not "take into consideration" the standard contained in cl 4.0 of DCP 23. Rather, he substituted for the statutory requirement a different approach. The Commissioner posed the "issue" for his determination to be: "The appropriateness of the location taking into account the proximity to the adjoining church, local schools and hotel". He resolved this issue on the basis that adverse impact upon land affected by the presence of a brothel had to be demonstrated in the legal proceedings before him. This approach could only be supported if the discretion was entirely at large, i.e. that there were no "standards" of any character which the decision maker had to take into account. By adopting this approach, the Commissioner, in my opinion, proceeded on an impermissible basis.
- 77 There was a relevant and applicable "standard" which he was obliged to "take into consideration". It ought to have served as a focal point for, or constituted a fundamental element in, his deliberations. The evidence, or rather the absence thereof, about actual effects, was not entitled to determinative weight, without regard to the presumptive "standard" in this way.
- 78 Grounds 1 to 5 should be dismissed.
- Time Limited Condition**
- 79 The order made by Talbot J was a remittal "for determination ... in accordance with the decision of the Court". That decision included the decision on the time limited condition which is the subject of Ground of Appeal 7. On remittal an issue may again arise as to whether or not a condition imposing a time limit on the use of the premises as a brothel is permissible. Accordingly, it is appropriate to consider Ground 7.
- 80 I do not accept Talbot J's characterisation of the Commissioner's decision as having "effectively postponed determination of an essential matter for one year". As I understand the Commissioner's decision, he was not satisfied that the likely impact was such that an unlimited consent should be given. He was satisfied that the likely impact during a period of twelve months was such that a consent for that period should be given. This involved an assessment of the merits which was open to him. There was no error of law in this respect.

- 81 Talbot J based his decision on the time limited condition on s79C(1)(b) and (c) of the Act, pursuant to which the Commissioner was obliged to take into consideration "likely impacts of (the) development" and "suitability of the site for the development".
- 82 As Talbot J pointed out, pursuant to s80A(1)(d) of the *Environmental Planning and Assessment Act*, a consent authority may impose a condition on a development consent which limits the period during which the development may be carried out. It was common ground that a twelve month time period is a permissible condition.
- 83 I do not see any necessary incompatibility between the imposition of a condition limiting a proposed use to a probationary or trial period and the statutory requirement that the decision maker "take into consideration" both the "likely impact of the development" and "the suitability of the site for the development". It is possible to "take into consideration" matters even though their full significance cannot be known with precision.
- 84 Where, as in this case, the nature of the development application is for the "use" of existing premises - and, accordingly, adverse effects are readily reversible - a probationary or trial period may be an appropriate exercise of the statutory discretion.
- 85 The implications of the approach adopted by Talbot J would unnecessarily limit the statutory power to permit development for a specific period where the full implications of the development are not known or cannot be stated with sufficient certainty. In any such case, the "likely impact" or "suitability" will never be capable of complete assessment. Indeed, that is the very purpose of the probationary or trial period. The scope and purpose of the Act is better served by permitting experimentation, at least in circumstances where adverse effects will cease if the development consent were not, in the event, extended. The focus is then on "likely impact" during the probationary period.
- 86 In submissions supporting the conclusion of Talbot J with respect to Ground 7, counsel for the Respondent relied on what he submitted was a finding by the Commissioner that there was no evidence before him on the subject of "likely impact" of the development. Counsel invoked by way of analogy the case law on what is sometimes called "the finality principle". This case law has recently been reviewed in this Court. (See *Winn v Director General of National Parks and Wildlife* [2001] NSWCA 17 at [9]-[19], [120]-[126], [206]-[212]. However, on the view of the case which I take, it is not necessary to determine whether this is an apt analogy.
- 87 Counsel based this submission on the following sentence in the Commissioner's reasons: "*I am also mindful that no evidence on the past and future operation of the brothel was produced at the hearing.*"
- 88 However, in the next sentence the Commissioner went on to say: "*The absence of any evidence on number of clients, peak times and particular operating conditions, places great doubt on any reliance on the previous operation to support the current proposal.*"
- 89 The Appellant submitted that the Commissioner clearly had before him evidence relating to the likely impact of the proposal. In particular, it was said that evidence about the operations of the premises during which the present Appellant had operated the brothel was available. Moreover, the Appellant submitted that the Commissioner took into consideration the evidence of the Council's town planner as to the future operation of the brothel and that the reference to the absence of evidence in this regard related to the lack of evidence to support the Council's contention that the future impact would be greater than the current operation. Accordingly, it was submitted, Talbot J erred in finding that the Commissioner failed to take into consideration the likely impacts of the development and the suitability of the site for the development as required by ss79C(1)(b) and (c) of the *Environmental Planning and Assessment Act*.
- 90 Talbot J commenced his consideration of the appeal with respect to the time limit with a reference to the Commissioner's finding about "the absence of any evidence on the number of clients, peak times and particular operating conditions and the doubt about relying on the previous operations to support the current proposal. ...".
- 91 As I read his Honour's judgment, Talbot J did not determine the matter on the basis of there being no evidence of "likely impact". Nor do I understand that Commissioner Brown made any such finding.
- 92 Talbot J did not express his reasons in terms of "no evidence", but in terms of the sufficiency of evidence when he said: "*If there was insufficient evidence to justify the grant of an unlimited consent, as the Commissioner found, then the only option to him was to dismiss the appeal.*" (at [42])
- 93 There was a considerable body of evidence before the Commissioner as to the actual effect that the operation of the brothel had on the locality over a period of time prior to the trial. The Commissioner made a number of express findings pertinent to this issue, including findings about the number of clients attending the brothel and the limited degree of awareness about the fact that a brothel was being conducted.
- 94 The Respondent's submission in this Court should be rejected. There was no finding of no evidence of "likely impact". The Commissioner made a finding that there was insufficient evidence of the "likely impact" to approve the use without a condition limiting its duration. This was implicit in the finding by the Commissioner, in a passage appearing shortly before the passage relied upon by the Respondents, where he referred to: "*... the unreliability of relying on the previous history of the site to justify its unlimited ongoing use.*"
- 95 In his conclusion the Commissioner said: "*The 12 month limit will allow the opportunity for a more detailed assessment of the operation and any impacts that may be generated by the brothel.*"

*In the interim, I do not see that the proposal conflicts with the general objectives of DCP 23. The location is discrete and not prominent in that there is nothing to distinguish the site as a brothel if a person was walking down Hill Lane without any specific knowledge of the use.* (Emphasis added)

- 96 The Commissioner's reference to the twelve month period, by the use of the words "In the interim", indicates that he was satisfied that a time limited consent should be granted, having regard to his assessment of the "likely impact" of the use of the premises as a brothel during that period of twelve months. It was open to the Commissioner to make such a finding.
- 97 Indeed DCP 23, on which the Respondent relies, includes in cl 8.0 provision for "Standard Conditions for all Brothel Approvals". One of those conditions is: *"In the public interest, approval will be limited for a period of twelve (12) months after which Council will review effects of the use on the amenity of the area and the desirability of issuing a further limited approval and the length of time of any such approval."*
- 98 In my opinion, Ground 7 should be upheld. The orders I propose are:  
1 Appeal allowed in part.  
2 Decision of the Commissioner set aside and the proceedings remitted to the Commissioner to be determined in accordance with the judgment of this Court.  
3 Each party bear its own costs of the appeal.
- 99 **MEAGHER JA:** I agree with Spigelman CJ.
- 100 **BEAZLEY JA:** I agree with Spigelman CJ.

P Larkin (Appellant) instructed by Steven Klinger  
W R Davison SC (Respondent) instructed by Pike Pike & Fenwick