Engaging Recent Property, Environmental & Planning Law Cases

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Thanks for the frogs! - Council's liability in nuisance to a downstream developer for inadequate action on upstream development & deliberately directing stormwater onto private land

Gales Holdings Pty Ltd v Tweed Shire Council [2013] NSWCA 382

- Gales Holdings owned a large site of undeveloped land in Kingscliff (**"the Site"**);
- the Council did not adequately control stormwater in developments upstream of the Site and also took action to direct stormwater through Council constructed stormwater infrastructure onto the Site;
- because of the above, there were increases in stormwater flow onto the Site and resultant ponding on the Site;
- the ponding helped create a habitat for the Wallum froglet - a threatened species of frog;


[Thanks to Wikipedia for this image of the Wallum froglet.]

- when development consent was obtained (via the Land & Environment Court) by Gales Holdings to develop the Site there was a condition imposed requiring it to separate part of the Site as a continuing habitat for the frogs;
- Gales Holdings commenced proceedings based on nuisance in the Supreme Court and claimed damages against the Council for loss of value caused by setting aside part of the Site, and additional costs involved in proposed construction work required to address the stormwater flows;
- Gales Holdings was partially successful with the Supreme Court finding the Council guilty of nuisance and liable for damages but those damages did not include any award for loss in value of the Site;
- the Council appealed, and Gales Holdings cross appealed. On appeal, the Court of Appeal held that:
    - the Council was guilty of nuisance;
    - the Council failed to properly address stormwater flows upstream from the Site and deliberately used the Site for stormwater runoff which prevented the Council from relying on a good faith defence;
    - failure to complain earlier did not mean the nuisance was tolerated; and,
    - foreseeability limits damages caused by nuisance - and in this case it was not foreseeable that the nuisance caused by the Council would result in the creation of a habitat for threatened frogs on the Site.

- the Council was successful in overturning the most substantial part of the damages awarded in the Supreme Court, that is, the damages for the proposed construction works, but was still liable in nuisance for certain costs directly related to the additional stormwater flows constituting the nuisance;
- the Court of Appeal was consistent with the Supreme Court in finding that the Council was not liable in damages because the establishment of a habitat for a threatened species such as the Wallum froglet and the consequent losses caused by the nuisance was not reasonably foreseeable.

The outcome seems particularly unfair given that the Council deliberately directed stormwater onto the Site without the owner's consent. However, without satisfaction of the test of foreseeability it was more a case of "bad luck" for Gales Holdings and "good luck" for the frogs, rather than a case that could be completely satisfied through Court action.

What not to do with asbestos... illegal dumping leads to safety risks and substantial penalties and costs

Kogarah City Council v Man Ho Wong [2013] NSW LEC187

- the Defendant removed cladding (containing asbestos) from his garage and then learnt from the Council's website that the Council would not collect this type of waste so he broke up the cladding into pieces and left it in several boxes at 4 separate locations on footpaths around Hurstville;
- a note identifying the registration number of the Defendant's van had been placed on one of the boxes left at one of the locations;
- the Council commenced proceedings against the Defendant seeking that penalties be imposed for offences under the Protection of the Environment Operations Act 1997 (NSW);
- the Court considered a number of factors including: the potential harm to the public; that the offence was committed intentionally; the volume of material was relatively small; that the Defendant gave himself up when he found out that the Council was making enquiries and he pleaded guilty at the first opportunity; and, that the Defendant was genuinely remorseful and accepted responsibility to pay for legal costs, investigation costs and clean up costs totalling approximately $17,000.00;
- each location constituted a separate offence but the totality principle was applied because each offence was part of a single enterprise and to treat each offence separately would result in a disproportionately large fine;
- a penalty of $20,000 was imposed by the Court.

Apart from exposing himself, and those around him, to a serious health risk the Defendant was also the subject of a substantial financial penalty plus the costs he agreed to pay.

Here is a link to the NSW EPA's site concerning how to safely, and legally, dispose of asbestos: http://www.epa.nsw.gov.au/waste/asbestos/index.htm

Compulsory acquisition & compensation - going to Court may not be the best option

Marroun v Roads and Maritime Services [2013] NSWCA 358

- in 2009 the Marrouns received an offer to buy their land in Liverpool for $4.2 million but the offer did not proceed, partly because of the proposed acquisition of that land;
- the land had development consent for an office building but it was not economically viable to build the office building;
- the RTA acquired the Marrouns' land in 2010;
- the RTA offered compensation of $1,620,765 (market value of $1,525,000 plus $95,765.00 for disturbance);
- the Marrouns commenced Class 3 proceedings in the Land & Environment Court (**"L&E Court"**) challenging the amount offered and seeking $4.2 million as compensation (market value of $1,725,000 plus economic loss of $1,475,000);
- the L&E Court assessed compensation payable as $1,374,792.57 ($1,270,000.00 market value plus $104,792.57)
- on appeal the Marrouns argued that the L&E Court failed to give weight to the offer of $4.2 million in 2010 and failed to accept the evidence of the RTA's valuer that the existence of the development consent would result in an up to 10% premium on the market value.
- the Court of Appeal rejected the appeal on the basis that the appeal did not concern any alleged error of law and the L&E Court was entitled not to give any weight to the offer and the valuer's opinion concerning a possible premium.

It seems that substantially more compensation would have been paid if the Marrouns had accepted the offer made by the RTA rather than commencing Class 3 proceedings in the Land & Environment Court (**"L&E Court"**). The costs of the proceedings and the adverse costs orders in the Court of Appeal proceedings were likely to also have had a substantial financial impact.

While it is easy to say in hindsight the offer from the RTA should have been accepted, in cases like these there are likely to be a myriad of relevant factors that led to the outcome. In particular, the relevant Courts did not doubt that the offer of $4.2 million made a year prior to the acquisition was genuine even though that offer did not proceed to a negotiated contract. In those circumstances it would be difficult for any owner to stomach accepting compensation of substantially less than half the amount of that offer.

This case illustrates that in compulsory acquisition cases it is important to keep an objective view of the circumstances and the categories of compensation that are claimable under the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

Consistency between a construction certificate and development consent - is consistency on the fundamental elements enough?

Burwood Council v Ralan Pty Limited [2013] NSWLEC 173

- this case involved 6 construction certificates (**"CCs"**) issued by a private certifier in relation to a mixed use development which included 268 dwellings in 3 towers plus retail shops and commercial spaces;
- the Council commenced Class 4 proceedings in the Land & Environment Court (**"the L&E Court"**) seeking declarations of invalidity in relation to the CCs issued on the basis that they were inconsistent with the development consent as required by clause 145(2) of the Environmental Planning & Assessment Regulation 2000;
- there were several inconsistencies alleged, however the more significant ones related to the external appearance of the building - the absence of the louvres; the change in form and colour of the windows; and, the removal of an upper storey cantilever in favour of street level columns;
- the consequences of inconsistent and potentially invalid CCs can be serious, including the invalidity of certificates issued relying on the CCs and allowing occupation of, and completion of sales within, the development;
- the Court found that, despite the changes, there was no wrongdoing on the part of the developer and what was important in relation to the CCs was that the fundamental elements of the project were consistent as they were in this case;
- the Council was unsuccessful, the CCs were not found to be inconsistent with the development consent and therefore complied with clause 145(2).

It is probably the exception rather than the rule that developments, once completed, look *exactly* like the plans and images provided in the development application process. That does not necessarily lead to an inconsistency in breach of clause 145(2), or an inconsistency that would lead to invalidity of a CC. Often there are BCA matters or other particular design constraints that are examined at the CC application stage that were not examined in close detail prior to that time.

So how far can the boundaries of a development consent be pushed? What changes are likely to be consistent and what are likely to be inconsistent?

In our view, if there are significant changes that *could* be considered inconsistent, to avoid the risk, it would be best to seek approval for the change by applying for a section 96 modification application for the development consent.

Councils would almost certainly appreciate that minor changes do inevitably arise for valid reasons, and perhaps councils don't particularly want to assess minor changes, especially on a large scale project where there would possibly be hundreds of minor, insignificant changes. There is a degree of common sense and perspective that must be applied by both councils, certifiers and developers in considering these matters.

The consequences of a developer getting it wrong are serious: where there is an inconsistency that would constitute a breach of clause 145(2) and potential invalidity of a CC then there would then be

a real risk, not only of court proceedings, but also the possible delay or setting aside of an occupation certificate, and even demolition of any inconsistent works.

Eakin McCaffery Cox Lawyers can help by advising you through the development process as well as acting as your legal representatives in the L&E Court on a cost effective basis.

Please **Eakin McCaffery Cox Lawyers on (02) 9265 3000** for advice and action on planning, Council and the Land & Environment Court matters.

This paper is a summary providing general information and should not be construed as specific legal advice. Each matter requires subjective assessment before legal advice may be provided.

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