PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
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PIKES & VEREKERS' NEWS

Ryan Bennett and James Fan recently presented a paper, "Recent Cases on the Enforcement and Prosecution of Environmental and Planning Laws", at the Annual EDAP Conference in Penrith. That paper forms the basis of this legal update.

PROSECUTION FOR NON-COMPLIANCE WITH SECTION 121B ORDER – UNAUTHORISED BUILDING WORKS

Nguyen v Canterbury City Council [2015] NSWLEC 21 – Pain J

In these proceedings the two owners of a property were issued with an order under s121B which required them to remove unlawful building works as specified in the order as those works were contrary to the development consent.

The background to the issuing of the order was that the owners converted an approved dwelling by removing internal walls and altering the floor plan layout. The most concerning aspect was to alter a rumpus room of the dwelling to construct a new secondary dwelling on the upper floor.

The owners made no attempts to comply with the order (including appealing against the order or seeking retrospective approval of the unauthorised works) for a period of some nine months.

The Council issued a penalty notice to each owner ($1,500.00 each), who then elected to have the penalty

notices dealt with by the Local Court. The matter came before Burwood Local Court where the owners entered a written plea of guilty prior to the matter without appearing before the Court.

The Magistrate in the Local Court found that the breach was "objectively very serious", but noting that a guilty plea had been entered, fined the owners $82,000.00 each following a discount of 25% from $110,000.00 (being the maximum penalty in the Local Court).

The owners appealed against the severity of the sentence to the Land and Environment Court.

In re-sentencing the owners on appeal, the Court found that there was a substantial and unexplained delay in complying with the Council's order. Despite the work being largely internal at the premises and relatively limited in scope, the unauthorised works were nevertheless unlawful and an order issued must be complied with if the planning regime was to properly function.

Ultimately, the Court found that the offence was at the lower end of objective seriousness but not at the lowest end. The Court reduced the penalties to $10,000.00 against each of the owners.

For enquiries about this judgment, please contact Alistair Knox or Peter Jackson.

PROSECUTION FOR UNAUTHORISED USE AS HORSE TRANSPORT BUSINESS

Liverpool City Council v Maller Holdings Pty Ltd (No 2) [2015] NSWLEC 48 – Pain J

The defendant was charged with a contravention of s76B(1) of the Environmental and Planning Assessment Act for carrying out development prohibited by the Liverpool LEP 2008. That development involved the use of land for the purpose of a horse transport business, being a prohibited use.

The defendant was originally found not guilty of the offence in the Land and Environment Court. On appeal to the Court of Criminal Appeal that decision was overturned, the defendant was found guilty and the matter was referred back to the Land and Environment Court for sentencing.

The defendant did not appear at the sentencing hearing and was not represented. The matter proceeded in his absence.

The evidence of a number of neighbours was used to prove the harmfulness of the offence. Video evidence from the window of one neighbour's property was also adduced in the original hearing to prove the unlawful use of land.

Her Honour found that the evidence demonstrated that the commission of the offence by the defendant over a lengthy period had a profound, adverse effect on a vulnerable, elderly woman. The unlawful use also involved intrusive and offensive conduct by persons using the land. It was heard that on one occasion a man exposed his buttocks to the elderly neighbour.

It was also found that despite clear notification by the Council that the land use was unlawful and must cease, the use continued for over a year.

The factors that Her Honour considered on sentence included:

(a) offence committed for commercial gain;
(b) high foreseeability of harm;

(c) no measures taken to minimise impact;
(d) defendant's full control; and
(e) substantial injury caused by the offence.

These factors led Her Honour to conclude that the offence was at the high to very high end of the spectrum of objective seriousness.

A maximum penalty of $1.1 million with an additional daily penalty of $110,000 was available for this offence. Her Honour found that a daily penalty would not be appropriate as the offence was continued for 2 years and the resulting penalty would be disproportionate. The ongoing nature of the offence was instead considered as an aggravating factor.

A penalty of $500,000 was imposed to reflect the high objective seriousness of the offence.
For enquiries about this judgment, please contact Blair Jackson or Gary Green.

INJUNCTION PROCEEDINGS – DANCE PARTY

Coffs Harbour City Council v Rabbits Eat Lettuce Pty Ltd [2015] NSWLEC 2 – Sheahan J

In these proceedings, the Council sought an urgent order seeking to restrain persons from holding a dance party for a twenty four hour period in January which was advertised as being "a taster" for a three day event over the Easter Holiday.

A dance party, being a use of land that requires development consent or a temporary use approval, would have been a breach of the *Environmental Planning and Assessment Act* 1979.

The Council adduced evidence from its internal staff and the Police to satisfy the Court that:

- The promoters of the dance party and the owner of the subject site were well aware of the requirement to obtain development consent; and
- The proposed event posed serious threats to public safety due to a flood risk, threat to water quality and koala habitats, fire risk, poor emergency access and evacuation arrangements and likely amenity impacts on neighbours.

The Court was satisfied on the balance of convenience that the Council should be granted an order to restrain the upcoming dance party. Also, there was a serious issue to be tried which was of vital consideration on the question of granting urgent relief.

Further, as the proceedings sought an urgent order which was in the public interest, the Council was not required to give an undertaking as to damages incurred by the respondents as a result of the orders imposed by the Court.
For enquiries about this judgment, please contact Joshua Palmer or Stephen Griffiths.

PROSECUTION FOR UNAUTHORISED DEMOLITION OF RURAL HOMESTEAD

Cowra Shire Council v Fuller [2015] NSWLEC 13 – Pain J

The defendant, Greg Fuller, pleaded guilty to a charge that he carried out development without development consent. In particular, Mr Fuller carried out demolition of a building known as "Shiel Homestead", being a grand rural style dwelling-house of late Victorian design.

The agreed facts of the offence noted that the defendant was well aware of the requirement to obtain development consent for the demolition of the dwelling house as he had attended a meeting with Council to discuss an application for development consent to erect multiple sheds for the stud and sales complex on his land. In those meetings, he also explored the possibility of demolishing the existing dwelling and the construction of a new dwelling house in its place.

Shortly after that meeting, a heritage consultant on behalf of the Council undertook a preliminary assessment of the Shiel Homestead for the purposes of listing it as a heritage item under the relevant Local Environmental Plan.

Several months after the meeting between the defendant and the Council, the Council's Director of Environmental Services was driving past the Shiel Homestead when he noticed a large amount of dust and a yellow excavator filling a prime mover and tipper trailer with the rubble from the site where the homestead formerly stood.

In sentencing the defendant, the Judge found that the offence was serious given that the defendant was well aware of the obligation to lodge a development application for the demolition of the dwelling house. The Court found that he simply chose not to abide by the requirement for development consent and there was nothing inadvertent or accidental about his actions giving rise to the offence. In fact, the Court found that there was considerable evidence that there was a measure of premeditation, being an aggravating factor for the purposes of sentencing.

Further aggravating factors included the failure to allow the Council to consider public safety in that the building was not assessed for asbestos, as well as the harm caused due to the lost opportunity to recognise and protect the homestead as an item of environmental heritage.

The fact that the dwelling was possibly in a state of general disrepair did not lessen the seriousness of the offence as there was evidence that the structural integrity of the dwelling was sound.

The Court rejected several arguments put forward on behalf of the defendant, such as his ill wife and frustration with the planning process for construction of the sheds, as being matters of mitigation.

Taking into account the factors of seriousness in the proceedings, the Court found that a penalty of $250,000.00 would have been appropriate. Nevertheless, a reduction for an early guilty plea meant a penalty of $175,000.00 was imposed.

For enquiries about this judgment, please contact James Fan or Ryan Bennett.

PROSECUTION FOR UNAUTHORISED DEMOLITION IN A HERITAGE CONSERVATION AREA

Leichhardt Council v Geitonia Pty Ltd (No 6) [2015] NSWLEC 51 – Biscoe J

The Council prosecuted several parties in the Land and Environment Court in relation to the demolition of the façade of a Victorian style building contrary to development consent where the Council argued that the consent required the retention of the façade.

The defendants were:

(a) Geitonia Pty Ltd, the land owner/developer and beneficiary of the consent;

(b) Bill Gertos, the sole shareholder and director of Geitonia; and

(c) GRC Projects Pty Ltd, the project manager for the development (a company which Mr Gertos was formerly a director of but not at the time of the demolition) which was placed into administration soon after the prosecution was commenced.

The development consent granted for the site permitted the construction of a multi-storey mixed commercial and residential development over a basement carpark, but required retention of the front façade.

The DA was controversial, relating to the redevelopment of the Paddington Bowling Club for a 120 place child care centre.

In a three week trial before Justice Biscoe, the three main issues were:

(a) was it possible to interpret the consent as allowing the demolition?;

(b) who is liable for the demolition/should the conduct of the demolisher be attributed to the defendants?; and

(c) was there a defence of necessity?

Council commenced the prosecution proceedings after a lengthy and detailed investigation that revealed the following:

- in seeking a construction certificate for the demolition of the existing building and excavation, the PCA refused to certify plans that showed a façade treatment different to what the consent authorised;
- revised plans were submitted to the PCA for the construction certificate which gave details as to the preservation of the façade during demolition;
- Bill Gertos instructed GRC Projects to engage a demolition company to demolish the existing building, including the façade;
- the façade was demolished as part of a contract that was negotiated between the demolishers and the project manager, indicating that the parties knew exactly what work was to be carried out;

- when Council began investigating the demolition, GRC Projects issued a revised contract to the demolishers, indicating that the demolition was not part of work requested; and

- whilst all consultants and contractors were formally engaged by GRC Projects, they all knew they were working for Mr Gertos.

Did the consent permit the demolition?

The consent granted stated that the development was for:

> "*Retention of part of the existing building, including the majority of its front and side facades…*"

The defendants argued that the word "majority" should be interpreted qualitatively not quantitatively. This submission was rejected by the Judge.

His Honour concluded that there was no ambiguity in the development consent's requirement for retention of the façade. The Court said that even if there was, it would be dispelled by an advisory statement in the development consent, which provided that the consent would be invalidated and a new DA would need to be lodged if the façade of the existing building was demolished.

Which defendants are liable?

This part of the case turned on a coffee shop meeting between Mr Gertos and the demolishers. During this meeting, a demolition contract was orally negotiated and agreed. The only evidence of this conversation was given by a director of the demolition company. The defendants did not call any witnesses to the contrary. The evidence was that Gertos did the majority of talking at the meeting and is quoted as asking, "*Are we going to demolish this thing or what*?"

A price was agreed after negotiations and a written contract was signed by GRC Projects after additions were requested by the demolishers.

The Court heard that an engineer for GRC Projects told the demolishers how to demolish the building.

After work was commenced it was discovered that the condition of the façade was poor. The structural engineer for the defendants prepared a structural report which expressed the opinion that the walls had deteriorated beyond repair. This report was sent to the certifier for guidance as to "*whether a s96 will be required*". The certifier responded that:

> *"The description in the development consent is very clear that the majority of the front and side facades were to be retained and repaired where necessary. This is a matter that has been discussed in length by this office and I am sorry but we cannot approve the total removal of the façade without prior advice from Council."*

A letter from Geitonia signed by Mr Gertos was hand delivered to Council. It stated that the façade had structurally failed and expressed an intention to commence removal of the façade.

The Council then commenced an investigation into a complaint that the façade had been removed. Mr Gertos was interviewed twice. In response to a question on whether Mr Gertos believed the demolition was authorised, Mr Gertos said to Council's officers:

> *"It's costing triple the money to rebuild… Under the circumstances, we did not want to remove and rebuild the façade as it is more expensive and a time delay."*

After the demolition had taken place, three documents were sent by GRC Projects to the demolishers which the demolishers had never seen before. They were a false demolition contract, a false site instruction and a chronology with a false entry. These documents created a false impression that the demolition contract excluded demolition of the façade, that there was then a site instruction for its demolition because of its dangerous condition, and that its demolition was consequential thereafter.

This became evidence that, at a time when Council was investigating the incident, GRC Projects attempted to mislead the investigation. That was said by the Court to be evidence of consciousness of guilt.

In a case such as this, a company may be liable directly for the conduct of a person who is the embodiment of the company or its directing mind and will (and vice versa). The issue before the Court was whether Geitonia and Gertos were vicariously liable for the actions of GRC Projects (as the project manager) and, in some circumstances, independent contractors.

Geitonia was found to be directly liable for the conduct of Mr Gertos as he was the embodiment of Geitonia, being its sole director and shareholder. Geitonia was also vicariously liable for the conduct of the demolishers as Mr Gertos had personally negotiated the contract both in his personal capacity and in his capacity as representative of Geitonia. The coffee shop meeting was the crucial evidence in proving that Mr Gertos negotiated the demolition on behalf of Geitonia.

Mr Gertos was found separately liable for his own conduct. This was because the demolition of the façade was the necessary consequence of his instructions to the demolishers.

The Court went on to explain that although motive for committing an offence is not an element of the offence, it can be an explanation. In this case, the evidence suggested that the motive was saving money.

GRC Projects was liable for the demolition as the demolishers only did the work under its contract.

Necessity

The Court rejected the defence of necessity. This defence will only be available in extreme and strictly limited situations. An extremely high benchmark was set in *The Queen v Dudley and Stephens* (1884) 14 QBD 273 (the cannibalism case).

In most offences, the defence of necessity is inherent within the legislation. For example, in tree removal cases, most LEPs/TPOs state that it is possible to remove or prune trees that are a risk to life or property.

Although the defence is available to offences in Planning and Environmental Law, the test is very strict and the circumstances in this case fell short on all of the elements.

Conclusion

Council here was successful due to the detailed evidence that was presented to the Court, including that of the demolishers. This could only have happened based on early investigations that identified those who carried out the works (as opposed to the beneficiaries of the work carried out).

Most importantly, a strategic decision was made as to who would be prosecuted. In addition to deciding that the owner and the project manager ought to be prosecuted, Council issued "letters of comfort" to the demolishers, which essentially informed them that they would not be prosecuted if they gave a full and truthful account of the matter.

Finally, Councils should still carefully consider the correct entity to prosecute. In this case, the charge against Mr Gertos was only successful as he was integral to the directions and negotiations with contractors to carry out the unlawful works. In many circumstances it remains the more prudent course to prosecute a company as distinct from its directors. Only in cases of having very strong evidence to justify doing so would a Court "go behind the corporate veil".

Postscript

The Court imposed the following sentences on 14 May 2015:

- Geitonia Pty Ltd - $50,000.00;
- GRC Projects Pty Ltd - $50,000.00; and
- Bill Gertos - $200,000.00.

The Court also ordered the Defendants to each pay one third of the Council's costs.

For enquiries about this judgment, please contact Roslyn McCulloch or Julie Walsh.

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