PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
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PIKES & VEREKERS' NEWS

We welcome Kim Probert as a Partner in the firm. Kim is an Accredited Specialist in Property Law, who has been with the firm since 2008.

We also welcome Blair Jackson as a newly admitted Solicitor. He has been with the firm as a paralegal since August last year.

THIRD TIME UNLUCKY FOR DEVELOPER

***Radray Constructions Pty Ltd v Hornsby Shire Council* [2014] NSWLEC 1248**
14 February 2014 – NSW Land and Environment Court – Hussey and Dixon C

This was an appeal against the Council's refusal of a development application for construction of a seniors living development on flood prone land. Pikes & Verekers acted for the Council.

The Applicant had made two previous development applications for the construction of a seniors living development on the site which had both been refused by the Council, and on appeal by the Land and Environment Court.

The Site

The site was located at Epping. Under the *Hornsby Local Environmental Plan* 1994 ("the LEP") the site was defined as flood liable. In large storm events, the creek through the

central part of the site would overflow across the driveway to the street, impeding the only means of vehicular ingress and egress from the site for up to an hour.

The Proposal

The proposal was for two residential buildings containing a total of thirteen dwellings built over a basement car park.

The application had the following features in an attempt to deal with the flooding issue:

(i) The proposed units were elevated above the Probable Maximum Flood level ("PMF") so that residents could safely remain in their units during significant storm events;
(ii) The proposed basement carpark was designed with an elevated diversion hump along the access way to prevent inundation in a 1:100 year flood event;
(iii) Two substantially elevated pathways were proposed allowing residents to escape the site in a flood event;
(iv) Proposed stormwater basin in the Anthony Street front setback area; and
(v) Bollards along the Anthony Street frontage to protect against floating debris.

Flooding

The threshold issue in this matter concerned the flood risk to persons and property and whether the site was suitable for the proposed development. The risk arose due to the location of the site adjacent to the existing watercourse. The agreed flood modelling between the hydrologists indicated that:

(i) The site was subject to high hazard flooding risk (every 5-10 years);
(ii) In a 1:100 year flood event, 74% of the site would be inundated; and
(iii) 100% of the site would be inundated in the PMF.

To fully appreciate the magnitude of the flooding affecting the site, the Court was shown a video of a flood event in 1990 which depicted the rapid ingress of floodwaters onto the site and the destruction of property and vegetation in the path of the floodwaters.

The Applicant proposed that in significant flood events the residents should "stay in place" within their units, rather than evacuate. However, the hydrologist and social planner for the Council did not support this approach and both were of the opinion that it would not be possible to restrict all resident behaviour and require them to stay in place or choose a particular path of egress during a flood event. Part of the reasoning was the heightened vulnerability of the residents (aged and/or disabled persons) likely to occupy the development.

Findings

The Court found that consent should not be granted for the following reasons:

(a) The development was significantly impacted by the high hazard floodway;
(b) The development relied on significant modifications within the front setback area to construct a flood storage basin that would carry fast rising, high velocity flows in significant storm events;

(c) The velocity of flows in times of flood would significantly exceed the accepted maximum safe limit in circumstances where the likely occupants of the development were of a heightened vulnerability;
(d) The main communal open space areas were at ground level and were likely to be regularly subject to various degrees of inundation that would limit the use and incur maintenance costs in a manner undesirable for a seniors development; and
(e) The proposed stormwater basin and other structures, in the front setback area introduced foreign elements that would not enhance the existing streetscape.

For enquiries about this judgment, contact Peter Jackson or Blair Jackson.

COUNCIL NOT LIABLE FOR ESTABLISHMENT OF THREATENED SPECIES ON DEVELOPMENT SITE

***Gales Holdings Pty Limited v Tweed Shire Council* [2013] NSWCA 382**
18 November 2013 – NSW Court of Appeal – Emmett JA, Leeming JA and Sackville AJA

This case was an appeal from the determination of the Supreme Court in an action by Gales Holdings Pty Limited ("the owner"), the owner of land at Kingscliff in Northern New South Wales ("the land") against Tweed Shire Council ("Council") for nuisance.

The nuisance alleged was that since 1999, the Council had allowed stormwater runoff to discharge onto the land and had prevented stormwater runoff from flowing away from the land. This caused the substantial "wetting up" of the land, which in turn resulted in the development of a habitat for the *Wallum Froglet*, a protected species, which subsequently moved in and were granted permanent residency by a condition of development consent requiring the owner to set aside that part of the land as a perpetual habitat.

The owner alleged that the condition resulted in a significant diminution in value of the land, and made other complaints of damage.

The Proceedings Below

At first instance the primary judge found the Council had created a nuisance from 2004, declined to grant an injunction restraining the Council from continuing to allow stormwater runoff but awarded the owner damages of $600,000.00 for the installation of a drainage system to abate the nuisance and $150,000.00 for the costs of expert advice and assistance in respect of a table drain installed on the land in 2004.

The owner appealed her Honour's finding that the nuisance was actionable from 2004 and not 1999, and from the Court's refusal to award damages for loss allegedly sustained "by reason of ecological changes" to the land. The Council cross-appealed against the rejection of the statutory defences it sought to rely upon at first instance.

The primary judge found that as a result of the Council's actions in carrying out road works and other works in the vicinity of the land between 1974 and 2009, the stormwater runoff onto the land was increased and concentrated substantially.

The primary judge further found that, at least from March 2003, the Council was aware that the owner was alleging that there was unlawful discharge of stormwater onto the land and that after receipt of correspondence from the owner in 2004, the Council must have been aware

that the owner was alleging that there was an unreasonable interference with its enjoyment of the land. In so finding her Honour rejected an argument from the Council that there was no such interference as the land was a "dormant development site" and was not being using for a specific purpose.

Her Honour considered that if the Council knew or ought to have known of the nuisance and the real risk of reasonable foreseeable consequential damage to the owner, it was obliged to take such positive action as a reasonable person in its position would consider necessary to eliminate the nuisance.

Her Honour concluded that the stormwater runoff constituted an actionable nuisance from May 2004 when the owner first wrote to the Council, and that the nuisance continued.

Her Honour found that, although the wetting up of the land had allowed a situation to develop where *Wallum Froglet* habitat had become established, she did not accept that the prospect of an invasion of a colony of *Wallum Froglets* would have been in the mind of the Council when it carried out the works which lead to the increased stormwater over the land, therefore the requirement of foreseeability had not been established to support a wider scope of damages to be awarded.

Her Honour concluded that the land's drainage problems would be solved by construction of augmentation works which were planned by the Council, yet to be carried out. Her Honour declined to grant an injunction but awarded the owner damaged in the sum of $600,000.00 as an amount that would enable the owner to install a drainage system on the land that would abate the nuisance.

The owner was also awarded $150,000.00 for the costs of expert advice and assistance in respect of the table drain installed on the land in 2004.

Court of Appeal Decision

On appeal, the Court of Appeal largely agreed with the Court below that the Council was guilty of nuisance in directing the flow of stormwater runoff onto the land, noting that the stormwater runoff was channelled onto the land in greater quantities and volumes than the natural flow. However, the Court of Appeal was not prepared to accept, as her Honour did, that the owner's toleration of the nuisance prior to 2004 meant that no action for the nuisance lay prior to 2004 when the owner wrote to the Council. Importantly the Court observed:

> *"…A plaintiff's failure to inform a defendant as to a change in approach or attitude might found an estoppel, as a defence to a nuisance claim, but only if the defendant relied to its detriment upon the lack of complaint…"*

Moreover, the Court noted that during its "tolerance" of the Council's actions, the owner did not have adequate information, available to the Council, of the extent of the nuisance and impact on the land.

The Court of Appeal overturned the primary judge's finding and held that the actionable nuisance 'began before 19 October 1999' and continued.

Turning to statutory defences relied upon by the Council, the Council argued that it was protected from any liability by the statutory defences contained in section 528A(1)(b) of the *Local Government Act* 1919 and section 733(1)(b) of the *Local Government Act* 1993.

Those sections provide that the Council will not incur any liability in respect of anything it does or omits to do in good faith insofar as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.

The Court found that in the particular factual circumstances of this case, the Council, which did not inform the owner that the Northern drain had been filled and then had sought to impose the bulk of the burden of paying for the resulting drainage requirements on the owner, had not acted in good faith.

The Council also raised as a statutory defence sections 45 and 43A of the *Civil Liability Act*. Section 45 limits liability for, in particular circumstances, for work carried out by a roads authority.

The Court agreed with the primary judge and held that the works complained of were not "road works" within the meaning of the *Roads Act* and were actions in the performance of its separate functions as a drainage authority.

The Court also rejected the Council's ability to rely upon defence to nuisance based on section 43A of the *Civil Liability Act* 2002*,* which limits the liability of a Council in circumstances where it is exercising or fails to exercise a special statutory power. The Court held that in the circumstances, the Council was not exercising a special statutory power and therefore the defence failed.

Having established that the Council was liable in nuisance from October 1999 the Court turned to consider whether such nuisance should result in an order for damages. The Court upheld the primary judge's finding that the damages awarded against the Council were limited to damages that were reasonably foreseeable as a result of the actions giving rise to nuisance.

Whilst the establishment of the habitat had a direct casual link to the stormwater discharge, this liability did not extend to the loss in land value occasioned by the requirement to maintain a perpetual habitat for the *Wallum Froglet* because the establishment of such habitat was not held to be a reasonably foreseeable consequence of the continuing nuisance. Therefore, although the owner suffered loss in land value, in the absence of foreseeability the Council could not be required to compensate the owner notwithstanding its liability in nuisance had been established.

The Court found that to foresee the establishment of the habitat would require a complex consideration of matters such as habitat requirements of the *Wallum Froglet*. Further, Council's own planning reports at the time highlighted the possibility of invasive species such as cane toads and that there were no other flora and fauna species on the land to be protected. On that basis the owner's claim for damages for diminution in the value of the land and costs for treating stormwater because of the condition requiring it to maintain the squatter's habitat failed.

Further, the Court of Appeal found that the prior award of $600,000.00 to the owner for an alternative drainage scheme on the basis of an assumption if certain works did not take place, could not remain. Instead the Court observed that more appropriate relief would have been to

order the Council to pay any actual increased drainage costs of the owner. However, since the original proceedings, the Council had carried out the rectification works. This meant that the order for this head of damages was unnecessary.

The Court allowed the remaining amount of $150,000.00 for damages awarded by the primary judge for expert input required by the owner.

For enquiries about this case, contact Julie Walsh or Jennifer Hold.

WHEN ARE SERVICES PROVIDED NOT "PROFESSIONAL SERVICES" IN THE CONSTRUCTION INDUSTRY?

***470 St Kilda Road Pty Limited v Robinson; Robinson v Chubb Insurance Company of Australia Limited* [2013] FCA 1420**
20 December 2013 – Federal Court of Australia – Kenny J

As a consequence of legislation in various States that seek to enhance the rights of builders and their subcontractors to payment for their services rendered and goods provided, a practice has developed in the building industry of requiring building contractors to certify that subcontractors and their workers have been paid for their work and services provided to the builder, as a precondition to the developer paying the builder's monthly progress claims. This is usually done by provision of a statutory declaration.

In this case (in which we acted for Mr Robinson), Kenny J ruled that the provision of such a statutory declaration was not an actual or alleged act or omission "in the rendering of… any professional services to a third party" within the meaning of a Directors' and Officers' (D&O) insurance policy.

This ruling has potentially wide implications for the construction industry, in particular in regard to two types of insurance often taken out by building companies: professional indemnity insurance and D&O liability insurance.

Mr Robinson was the Chief Operating Officer of a building company engaged in large construction contracts. In December 2011 he completed a statutory declaration in support of a progress claim by the builder to a developer. The builder subsequently became insolvent and the developer subsequently claimed that the statutory declaration was misleading and deceptive in that it claimed that all of the subcontractors on the building job had been paid up to date at the time the statutory declaration was made.

Mr Robinson denied the developer's claim and sought to claim on a D & O Policy issued to the building company by Chubb. Chubb declined cover on the basis that the provision of the statutory declaration was the rendering of a professional service, which was excluded by the policy.

Mr Robinson cross-claimed against Chubb and the parties agreed that the sole issue on the cross-claim was whether the statutory declaration was an actual or alleged act or omission in the rendering of professional services within the meaning of the D & O Policy.

Kenny J found that:

- The submission of the statutory declaration was the rendering of a "service" by the building company; but
- It was not an act or omission in the rendering of "professional services" within the meaning of the insurance policy.

In coming to this conclusion, her Honour rejected Chubb's submission that the provision of the statutory declaration was part of the project management services required by the contract and further that in any case project management (at least in the context of the policy) was not a discipline which fell within the terms "profession" or "professional".

Finally, her Honour ultimately found that what Mr Robinson did was an act in the provision of information as a prerequisite to payment of the builder.
The decision may have far-reaching implications for the construction industry and relevant insurances because:

- D & O style policies are common throughout the construction industry;
- There have been a number of building company failures over the last few years which may lead to claims against their officers similar to that made against Mr Robinson;

Chubb has lodged an appeal against the decision, which will be heard 8 May 2014.

For enquiries about this judgment, contact Robert Tassell or Brian Walton.

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