PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
October 2014

In this issue:

PIKES & VEREKERS' NEWS

We are pleased to announce that Joshua Palmer has achieved Specialist Accreditation in Local Government and Planning Law through the New South Wales Law Society. He joins our other Accredited Specialists Stephen Griffiths, Julie Walsh and Roslyn McCulloch (Local Government and Planning Law), David Baxter and Kim Probert (Property Law) and Robert Tassell (Commercial Litigation).

CLARIFICATION OF "SHOP TOP HOUSING" IN THE STANDARD INSTRUMENT

***Hrsto v Canterbury City Council (No 2)* [2014] NSWLEC 121**
14 August 2014 – NSW Land and Environment Court - Sheahan J

In these Class 1 proceedings the applicant sought consent to demolish existing structures and construct a 5-6 storey mixed use development comprising 224 residential apartments, communal facilities, basement car parking and ground floor retail/commercial units.

The Question of Law

The Court was asked to determine:

> *Whether the development seeks consent for "residential development" which cannot be characterised as "shop top housing" and is therefore prohibited on land within Zone B2 Local Centre pursuant to the provisions of the Canterbury Local Environmental Plan 2012 ("the LEP").*

The Proposal

The development comprised 5 buildings with the following facilities on the ground floor and upper ground floor levels:

Building	**B**	**C**	**F**	**L**	**N**
Ground Floor	2 retails units – 192m^2 2 x 1 bed + 3 x 2 bed dwellings	12 x 1 bed dwellings	retail unit, gym and common facilities – 266m^2	5 x 1 bed + 4 x 2 bed + 1 x 3 bed dwellings	5 x 1 bed + 7 x 2 bed dwellings
Upper Ground Floor	1 x 1 bed + 6 x 2 bed + 1 x 3 bed dwellings	12 office units 12 x 1 bed dwellings	3 retail units – 203m^2 1 x 1 bed + 3 x 2 bed dwellings	6 x 1 bed + 5 x 2 bed dwellings	5 x 1 bed + 7 x 2 bed dwellings

The Court noted that the area of ground floor designated for residential use far exceeded that proposed for retail/commercial use.

The LEP

The LEP was in the standard instrument format. "Residential accommodation" with the exception of "shop top housing" and "boarding house" was prohibited in the B2 zone. "Shop top housing" was defined as "one or more dwellings located above ground floor retail premises or business premises". The terms "one", "more" or "above" were not further defined in the LEP.

The Council argued that the dwellings on the ground floor level could not be characterised as "shop top housing".

The Findings

The Court held that to qualify as "shop top housing", "the relevant part of the building must be truly 'above' the relevant retail or commercial parts". The Court accepted the Council's submissions which referred to the Macquarie Dictionary definition of "above" to mean "in or to a higher place; overhead". The Council did not contend that the dwellings needed to be directly or immediately above ground floor retail or business premises.

Sheahan J held that while much of the development was for "shop top housing" properly so described, the dwellings on the ground floor were:

- not properly characterised as "shop top housing";
- prohibited;
- not severable from the balance of the development;
- not ancillary or subservient to ancillary development.

The question of law was answered in the affirmative and costs were reserved.

For enquiries about this judgment, contact Ryan Bennett or Roslyn McCulloch.

PROSECUTION INVESTIGATION COSTS

***EPA v Ashmore (No 2)* [2014] NSWLEC 142**
5 September 2014 – NSW Land and Environment Court - Craig, J

Part 8.3 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") allows the Court when finding an offence proved, to make further orders such as:

(i) requiring publication of the offence and the penalty imposed by the Court;
(ii) requiring the restoration or remediation of the environment;
(iii) the payment of compensation to a person or public authority where loss or damage has occurred as a result of the offence as well as costs and expenses to control or mitigate harm; and
(iv) the payment of costs and expenses reasonably incurred during the investigation of the offence.

In these proceedings before the Land and Environment Court, the defendant had earlier pleaded guilty to an offence of transporting waste to a place that could not lawfully be used as a waste facility for that waste.

The prosecuting authority, the Environment Protection Authority, then sought to obtain an order from the Court, pursuant to s 248(1) of the POEO Act, that the defendant pay its investigation costs said to be related to the stability of a dam wall, upstream of where the unauthorised materials were deposited. It was said that the dam wall's stability affected the ability of the EPA's officers to safely conduct an investigation of the downstream area where fill was deposited.

Justice Craig found that the relevant test was that "*there must be a relevant nexus between the facts that pertain to the charges to which a plea of guilty has been entered and the claim for costs sought to be recovered*": see [10].

The Court found that, whilst it was appropriate for the prosecutor's investigators to inspect various aspects of the land, the entitlement to claim the costs of site investigations upstream required the prosecutor to establish that those investigations were occasioned by the depositing of waste: see [12].

The Court here found that those investigation costs did not arise from waste being deposited on or in the vicinity of the dam wall. Accordingly, the Court did not make an order pursuant to s 248(1).

For enquiries about this judgment, contact Peter Jackson or James Fan.

PROSECUTION PUBLICATION ORDERS

***Harris v Harrison* [2014] NSWCCA 84**
5 February 2014 - NSW Court of Criminal Appeal – Simpson J, Hall J, Schmidt J

In the past, the Land and Environment Court has, in applying its powers to make publication orders, made vastly differing orders with respect to the wording of the publication and the scope and reach of the publication. Usually, the wording of the publication requires specific reference to the identity of the defendant.

In the prosecution of a widely publicised pollution offence against Orica Australia, the Court required that the defendant publicise the offence in four prominent broadsheet newspapers, as well as a prominent industry and trade magazine: *Environment Protection Authority v Orica Australia Pty Ltd* [2014] NSWLEC 103.

In the prosecution of lesser known events or offenders, the Court regularly makes no such publication order, or may simply require publication within a smaller and localised publication, thereby reducing the cost burden of carrying out the publication. However, the scale of the breach and the offender's operations will dictate the scope and breadth of such requirements: see *Environment Protection Authority v Shoalhaven Starches Pty Ltd* [2006] NSWLEC 685 at [50].

The *Water Management Act* 2000, similar to the POEO Act, also provides for the making of an order against an offender to take action to publicise an offence and the consequences of that offence: see s 353G(1).

Here, the appellant was convicted with a sentence imposed by the Land and Environment Court that included a fine of $78,000.00 as well as additional orders including requirements for publication of the offence.

The Criminal Court of Appeal reduced the penalty but also varied the publication order and stated at [128] that:

> *The provision for publication orders has, in my opinion, a significant educative and deterrent function.* ***It is important that others who may be minded to commit offences against the Water Management Act be made aware of the possible consequences of such offences.*** *On behalf of the appellant it was argued that the publication order ought to be set aside, primarily because the offence was "trivial" or "technical". I do not accept these descriptions. However, the publication order in the terms specified by Pepper J cannot stand in the light of what I have said above. In my opinion, it will be sufficient to order the appellant to publish, in one locally circulating newspaper, a notice drawing attention to the plea of guilty, the conviction, and the maximum fine available. It is not necessary to identify the appellant. The terms of the notice I propose are attached.*
> *(emphasis* added)

It should be noted that failure to comply with a publication order in full constitutes contempt of Court.

For enquiries about this judgment, contact Robert Tassell or Jennifer Hold.

THE OWNER MUST BE JOINED IN CIVIL ENFORCEMENT PROCEEDINGS

***Ross v Lane Cove Council* [2014] NSWCA 50**
13 March 2014 – NSW Court of Appeal - Meagher JA, Leeming JA, Tobias AJA

Raymond Ross made alterations and additions to a Northwood property contrary to a development consent granted by the Council. The Council sought and obtained orders from the Land and Environment Court that Mr Ross demolish unauthorised additions and reinstate the property in accordance with the consent.

However, during the proceedings in the Land and Environment Court, it became apparent that Mr Ross was no longer the registered proprietor of the property. There were suggestions that the transfer to the subsequent owner was a sham to divert responsibility, but the Court did not agree.

The Land and Environment Court then proceeded to make final orders against Mr Ross.

The Court of Appeal held that the orders placed a mandatory obligation on Mr Ross to demolish, rebuild and reinstate the property. He was rightly the person to be ordered to do so as he had caused the unauthorised works. However, permission to access the land to carry out those works would be required.

Further, the new owner would be directly affected by the Court's orders, and they needed to be afforded the chance to make their views known in relation to the orders sought by the Council.

It is therefore essential that a property owner be joined to any civil enforcement proceedings where a statutory authority is seeking orders for remedial work or the like that requires access to land. If owners change, the proceedings need to reflect that.

The reasoning here does not affect reasoning in the oft cited decision of *Wilkie v Blacktown City Council* [2002] NSWCA 284; (2002) 121 LGERA 444, where it was held at [36], that the EPA Act allows the Court to make orders against only "*persons who are in breach of or who have breached*" the Act. It was also held in *Wilkie* at [60] that s 124 of the EPA Act did not contemplate common criminal activities such as "*aiding or abetting*" or "*involvement in the contravention*".

This type of issue may also arise in situations of rubbish dumpers, hoarders, or any other unauthorised building works.

For enquiries about this judgment, contact Stephen Griffiths or Colleen Schofield.

WITHDRAWAL OF GUILTY PLEA

***Pittwater Council v Brown Brothers Waste Contractors (No 2)* [2013] NSWLEC 219**
20 December 2013 – NSW Land and Environment Court - Pepper J

The respondents to a charge of contempt, being Brown Brothers Waste Contractors Pty Ltd ("BBWC"), and its only directors, Wayne Brown and Gary Brown, sought the leave of the Court to withdraw pleas of guilty entered by way of a notice of motion.

The charges arose from a failure to comply with consent orders made between BBWC and the Council on 9 August 2007 ("the 2007 consent orders").

In earlier and related contempt proceedings that took place in 2009, where only BBWC was being charged, a plea of guilty was entered to the effect that the respondents had breached the 2007 consent orders. As a guilty plea was entered, the Court was not asked to construe the 2007 consent orders at that time, and BBWC was fined a total of $45,000.00.

The reason for the withdrawal was that, having regard to the proper construction of the 2007 consent orders underpinning the contempt charge, the respondents were in fact allowed to undertake the very activity purportedly giving rise to the breach as the orders conflicted with their rights pursuant to the development consent.

In refusing leave to withdraw the guilty pleas, Pepper J gave a detailed decision on the effect of a guilty plea. However, in doing so, she also traversed matters that turned the tenor of hearing of the motion into a mini hearing on contempt.

The Court considered the withdrawal of the plea, having regard to these principles:

1. A Court has a discretion to permit a change of plea at any time prior to sentence.
2. Whether a plea is allowed to be withdrawn is entirely a matter for the discretion of the Court.
3. Courts have emphasised that such applications must be approached with caution given the public interest in the finality of litigation.
4. There is no exhaustive statement of the circumstances in which pleas of guilty may be set aside. Each application will turn on its own facts.
5. A broad test is whether a miscarriage of justice will result.

Further, the Court noted that:

> *[96]… leave should be granted where the plea has been entered pursuant to some material mistake or where the integrity of the plea is otherwise questionable or would lead to a miscarriage of justice.*
>
> …
>
> *[101] Thus it is necessary for an applicant seeking to withdraw a plea of guilty to advert to circumstances that created a doubt about his or her guilt, as well as circumstances that raise a doubt about his or her own perception, at the time the plea was entered, of his or her guilt. Put another way, what is important is an elaboration of the circumstances that might justify a conclusion that a plea of guilty was not attributable to a genuine consciousness of guilt.*

Applying those principles, the Court summarised its reasons for refusing to grant leave at [125] as follows:

> *(a) first, the terms of the 2007 consent orders do not permit, upon their proper construction, the storage of non-putrescible waste on the property. It is a breach of the 2007 consent orders that has given rise to the contempt charge and it is the interpretation of the terms of the 2007 consent orders, not the 1995 consent, that is determinative;*
>
> *(b) second, to grant the leave sought would in all the circumstances impermissibly impinge upon the principle of the finality of litigation; and*
>
> *(c) third, as the evidence discloses, the respondents were aware of the possibility that the 1995 consent and thus the 2007 consent orders contained a potential ambiguity and with this knowledge they nevertheless pleaded guilty to the charges both in 2009 and, relevantly, in 2011.*

In concluding on the potential miscarriage of justice, Her Honour found that it was not a case where the respondents "*did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence*".

For enquiries about this judgment, contact Gary Green or Blair Jackson.

Pikes & Verekers Lawyers
Level 2
50 King Street
SYDNEY NSW 2000

DX 521 Sydney
T 02 9262 6188
F 02 9262 6175

E info@pvlaw.com.au
W www.pvlaw.com.au