CASE NOTE - NEW SOUTH WALES

Pollution - Riparian Rights And Nuisance

Van Son v Forestry Commission of New South Wales

Unreported, Supreme Court of NSW, Cohen J, 3 February 1995

The Facts

The plaintiff was the owner of a property adjoining the Mistake State Forest which came within the Urunga Management Area controlled by the defendant. The defendant was responsible for managing the Forest, and as part of that responsibility had determined to carry out logging operations in what was known as compartments 341 and 342 thereof. Compartment 341 contained the catchment area for Jasper's Creek as well as the boundary of the plaintiff's land bordered by the creek. The creek formed a pond which the plaintiff used as a source of water for domestic purposes, for gardening and for her stock of animals and from which she pumped water to a tank by way of a fixed pump line.

The logging operations carried out by the defendant were generally conducted according to a harvesting plan which required identification of the trees to be logged on the basis of set criteria. It also generally involved the construction of tracks cut by a bulldozer down a slope, known as "snig tracks", which necessitated the removal of topsoil.

In June 1993 when the logging operations commenced there was little rainfall, but from 9 July until 14 July there was heavy rainfall, after which the plaintiff observed that the pond from which she obtained her water supply had become extremely turbid and had a high level of yellow sediment.

It was on the basis of this disruption to her water supply that the plaintiff brought the proceedings claiming damages on two grounds; (1) for interference with her riparian rights; and (2) for nuisance.

The Decision

Cohen J, firstly, undertook an assessment of the evidence before him in relation to the logging operations and the cutting of the snig tracks and determined that the cause of the turbidity and sediment in Jaspers Creek and the pond was the carrying out of the work on the snig tracks and the resultant logging activity of the defendant; at p 15. Cohen J also considered whether the defendant had taken all appropriate and reasonable steps in planning and carrying out its logging operations, and concluded that the defendant had not sufficiently taken into account whether there was a reasonable expectation of erosion occurring where the snig tracks had been cut; at p. 16. Indeed, Cohen J further concluded that the failure to adequately provide

for, and guard against, erosion constituted an unreasonable use of the land by the defendant; at p 17.

Having made these findings of fact, Cohen J considered the two claims made by the plaintiff as follows.

1. Interference With Riparian Rights

Cohen J began by referring to the rights of riparian owners at common law which give entitlements to the undiminished flow of the stream and to the use of the waters thereof for domestic purposes, cleaning and washing, and for the supply of drinking water to cattle, as well as for any purpose, provided such use does not interfere with the rights of other riparian proprietors; see *H Jones & Co Pty Ltd v Kingsborough Corporation* (1950) 82 CLR 282 at 298 - 299, 342-344.

Cohen J then considered the statutory affectation of the rights of riparian owners in New South Wales. Cohen J concluded that the following propositions flowed from a consideration of that statutory matrix.

(a) The statutory alterations effected by Acts such as the *Water Rights Act* s 1896 and the *Water Administration Act* 1986 had vested in the Crown all waters in all rivers of the State.

(b) The *Water Administration Act* 1986 had extended such vesting by making it clear that waters of a river solely within one person's land were also vested in the Crown.

(c) The effect of these statutory provisions was to alter the rights of riparian owners at least in respect of their right to receive a flow of water from upstream riparian proprietors; see at p 28. That is, this right had been divested from riparian proprietors and precluded them from maintaining an action on the ground of right to the flow of a stream.

(d) However, due to exceptions contained in the various statutes, there had not been a total divestiture of riparian proprietors' rights. It had only effected a limited divestiture of riparian owners' rights as in (c) above:

(e) The right to the use of waters of a stream for domestic purposes, cleaning and washing, and supplying drinking water for cattle had not been vested in the Crown but remained rights of riparian proprietors; see at p 29-39. that is, these rights are separate from the flow of waters; they are entirely related to the use of waters, and to this extent constitute residual rights.

(f) Even if (d) was wrong, then the rights in (e) were nonetheless still available to riparian proprietors on the basis that they are rights "obtained by virtue of a grant by the statute"; at pa 30, 31.

Accordingly Cohen J held that the plaintiff's riparian rights to the use of the waters had been unreasonably interfered with.

2. Nuisance

Having referred to the case law and general principles necessary to establish the tort of private nuisance, Cohen J determined that "there was interference with the plaintiff's rights sufficient to justify a claim of nuisance", subject to defences raised by the defendant.

The first defence raised was one of statutory immunity. The defendant contended that it was simply acting in accordance with its statutory rights deriving from the scheme of forest

management pursuant to the Forestry Act 1916. Cohen J dismissed this defence on the basis that although it was correct as a matter of law that:

> *"the proper carrying out of these operations with some resulting damage would not create a liability in the (Forestry) Commission....That is not to say, however, that the Act gives to the Commission the right to carry out the prescribed work in a manner which is unreasonable and which causes damage to a neighbour" at p 36.*

The second defence was based on s733 of the Local Government Act 1993 which provides that a council does not incur any liability in respect of anything done or omitted to be done in good faith in so far as it related to the likelihood of land being flooded or the nature and extent of any such flooding. Cohen J thought it a "substantial jump" to suggest that the guiding of snig tracks could relate to the likelihood of land being flooded, especially given the ordinary meaning of the word flood with the result that s733 was of no relevance and thus no defence.

Accordingly, Cohen J was compelled to find that the plaintiff had made good her cause of action in nuisance. However, when it came to assessment of damages, Cohen J, whilst clearly of the view that the plaintiff had suffered damage, considered that there was a lack of evidence supporting a proper assessment of damages. Furthermore, the plaintiff had mitigated her loss considerably by the installation of guttering and piping from the roof of a newly built house, which effectively reduced her reliance on the water from the pond. Cohen J thus concluded:

"Except for the unquantified expense of cleaning silt from the bottom of the tank, (the) damage has all been in ...loss of enjoyment....there has been a loss of enjoyment of the use of the land without any physical damage That means that damage are at large. Because of the considerably reduced reliance on that water for normal domestic purposes, it seems to me that the damages can only be of a modest nature and I would assess them in the sum of $3000"; at pp 42-43

Comment

This decision is important for a number of reasons. Firstly, the formulation by Cohen J of a body of residual riparian rights based on use of waters as opposed to the flow of waters, presents a new basis for recovery for plaintiffs with such riparian rights. Secondly, it is a timely reminder that common law remedies, such as private nuisance, are still alive and well and can be useful for private individuals who suffer loss from environmental harm caused by others. However, it also highlights that, subject to proper proof of substantial interference with use, the task of assessing damages may well be a difficult one for the court, resulting in minimal awards of compensation.

Note: An appeal has been lodged to the New South Wales Court of Appeal.

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CASE NOTE - NEW SOUTH WALES

Land Use Planning -- A Continuing Saga

Coffs Harbour Environment Centre Inc v Coffs Harbour City Council and the Minister for Planning

Unreported, Land and Environment Court (NSW), Bignold J, 31 January 1995

As Bignold J observed in the opening remarks of this judgment, the proceedings before him were "the latest chapter in an escalating history of litigation". The litigation between the parties essentially concerns an area known as the "Look-at-me-now Headland" and the proposed development of that area by the Council for the provision of underground pipes and tanks as part of a sewerage treatment program for the northern beaches of New South Wales. (Readers should refer to the December No 4/1994 issue for a discussion of earlier aspects of this litigation.)

The Decision

Bignold J was called upon to determine two issues:

1) Whether the proposed development was prohibited by the Coffs Harbour Local Environmental Plan (the LEP); and

2) Whether the development consent granted by the Minister for Planning was void

Issue 1; Was the proposed development prohibited?

In the decision of the NSW Court of Appeal Kirby P had suggested that the terms of the LEP (as amended by the Coffs Harbour Local Environmental Plan 1988 (Amendment No 21)) may not expressly authorise the proposed development. The LEP (as amended) provided for a new Zone 6(d). The objectives of the zone were stated in clause 2 to be:

- **(a)** to enable the development of land within this zone for recreation purposes
- **(b)** to enable the development of land within this zone for purposes associated with recreation
- **(c)** to enable the development of land within this zone for other purposes where it can be demonstrated...

It was contended by the applicant that the words "other purposes" in clause 2(c) should take their colour from clauses 2(a) and (b) and so be interpreted as meaning "other purposes related to recreation". Bignold J rejected this contention on the basis that a proper reading of the text of the LEP relating to Zone 6(d) indicated that the word "other" inc clause 2(c) of Zone 6(d) must bear its ordinary meaning of "additional" or "further" purposes to those specified in clauses (a) and (b). In particular, Bignold J concluded that this must be so when

one had regard to the definitions of "public utility undertakings" and "utility installations" in clause 5(1) of the ALP, such matters being permissible with development consent under clause 4 of Zone 6(d). Thus Bignold J concluded that the proposed development was permissible with development consent; that is, it was not prohibited by the LEP which provided that a council when granting development consent "to the carrying out of development in accordance with subclause 3(b)" must be satisfied that the development is "generally consistent with one or more of the objectives of the zone within which the development is proposed to be carried out:. Since "public utility undertakings" and "utility installations" came within subclause 3(b), then clause 8(4) applied to the proposed development. However, Bignold J construed clause 8(4) as only applying at the time when a determining authority is exercising its function of determining a development application. That is,

"*Clause 8(4)* of the LEP operates, *not* to define categories of permissible development....but to *qualify and limit (by reference to the criterion of general consistency with any of the stated objectives for each zone) the power of the Council to grant development consent...*"(Emphasis in original).

Issue 2: Was the Minister's development consent void?

The Minister's development consent was alleged to be void on two grounds: (1) that he had failed to take into account relevant considerations under s 90 of the *Environmental Planning and Assessment Act* 1979; and (2) that it was unreasonable for the Minister to conclude that the proposed development would be "generally consistent" with any of the expressed objectives of Zone 6(d) as contemplated by clause 8(4) of the LEP.

The evidence which the applicant sought to adduce in support of ground (1) was expert opinion evidence which had come into existence after the Minister's decision had been made. Bignold J thus rejected ground (1) as having any merit on the basis that the duty imposed on an administrative decision-maker is to consider only those relevant matters and facts actually before the decision-maker at the time the decision is made, referring to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd (*1986) 162 CLR 24.

In respect of ground (2), the same evidence was relied upon by the applicant to indicate that the Minister had failed to exercise the duty imposed under clause 8(4) of the LEP. Bignold J again found reliance on such evidence and "insuperable obstacle" on the basis that the evidence was not relevant to the Minister's decision. As Bignold J had already concluded, clause 8(4) only applied at the time the Minister was determining the development application (see above) Consequently, evidence not before him at the time was irrelevant. The relevant question, according to Bignold J, was whether "it was reasonably open to the Minister to be satisfied that the carrying out of the prosed development would be generally consistent with objective 2(c)" on the material available to him at the time of making his decision. Bignold J then reviewed that material and concluded that the Minister's decision was reasonable and thus not void.

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CASE NOTE - NEW SOUTH WALES

Refusal of Application to Operate a Landfill

Pacific Waste Management Pty Limited - v - Penrith City Council & ORS

The appeal by Pacific Waste Management against Penrith City Council's deemed refusal of a development application to operate a putrescible landfill at " Elizabeth Drive, Badgerys Creek was - according to the Court's Registry staff - the longest and most complex case ever heard by the Land and Environment Court. The hearing before Mr Justice Talbot extended over nearly 9 1/2 weeks with some 41 expert witnesses called by the parties. The hearing produced nearly 3,000 pages of transcript and 204 exhibits were tendered. Eight objectors, including the Federal Airports Corporation, the Civil Aviation Authority and community interest groups, applied for leave to be heard as parties pursuant to Section 98(2) of the *Environmental Planning and Assessment Act,* 1979. The Minister for Planning intervened pursuant to Section 64(2) of the Land and Environment Court Act.

The Applicant presently operates a landfill at Elizabeth Drive for non-putrescible waste. The site is located on the Cumberland Plain and the property is generally situated between Badgerys Creek to the west and South Creek to the east. To the north is an area of wetland and property owned by Meridian Investment Trust, one of the Second Respondents. A short distance to the south west is the proposed site of Sydney West Airport.

The Applicant's development proposal involved the continued extraction of materials from the site, the back filling of the site with solid waste, including putrescible waste, and the final rehabilitation of the site. The final landform would reach up to 70 metres above existing ground level and was to be higher than the existing highest point in the vicinity, Mt Vernon. The filling operation would extend over a period of 25 years and the site was to be monitored for a further 30 years or until biodegradation was complete.

The Applicant proposed a number of engineering solutions to address the perceived environmental impacts of the development. A gas collection system would be installed to collect up to 60% of the volume of gas, including gas containing toxins, generated by the landfill. The landfill was to be a containment structure with the waste sealed by the construction of a base liner, side liner, cap and final cover. The integrity of the landform would be maintained by the installation of a drainage system and a leachate collection system. A leachate collection system was proposed to be installed to prevent contamination of ground and surface waters. The final landform would be vegetated and monitored. No final end use for the landform was proposed.

It was obvious to all parties from an early stage that the case was going to be a lengthy one but as so often happens, the final hearing time was well beyond the estimates of all concerned. In addition to call-overs and issues conferences before the Registrar and Assistant Registrar, pre-trial direction hearings also took place before Mr Justice Talbot.

In addition to the large number of merit issues, two parties, Federal Airports Corporation and Meridian Investment Trust, raised issues as to whether or not the proposal was permissible. Ultimately both those parties submitted that the proposal was prohibited as one or more an industry offensive or hazardous industry or as commercial premises. The Court rejected those submissions finding that, notwithstanding that a waste disposal operation might be

categorised as commercial premises, an industry, a junkyard or an offensive and hazardous industry, the development was permissible by virtue of a special provision in the applicable local environmental plan which provided:

> *"Notwithstanding any other provision of this plan, extractive industries are permissible with the consent of the Council on those sites identified in Schedule 1 to Sydney Regional Environmental Plan No 9 - (Extractive Industry)."*

The Court then proceeded to deal with the merits of the matter. Essentially the decision, despite the complexity of the matter itself, was one on the merits. Nevertheless, some aspects of the decision of Mr Justice Talbot warrant some comment.

The Court was able to find some aims and/or objectives of relevant planning instruments with which the proposal was not antipathetic - as is often the case.

In the case of Sydney Regional Environmental Plan No 20 - Hawkesbury-Nepean River, the Court found that the degree of compliance with general and specific aims of the plan was "marginal". One reason why planning instruments often contain detailed statements of aims and objectives is because a basic philosophy of the system of flexible planning, whereby there is a generally broad range of permissible uses - is to require the consent authority to undertake a thorough examination of the extent to which development does or does not satisfy stated aims and objectives. However like so many cases before it the judgment in Pacific Waste, whilst containing a recitation of relevant aims and objectives, did not contain any real analysis of the extent to which the proposal either satisfied or failed to meet relevant and important objectives.

As noted earlier the subject property was located close to the site of proposed Sydney West Airport. Evidence was given that the Commonwealth has spent in the order of $150 million on land acquisitions and infrastructure work relating to the airport. It was accepted by all parties that the airport would proceed. Evidence was given by both Federal Airports Corporation and Civil Aviation Authority that a putrescible waste depot should not be permitted on this location, having regard to the potential threat to aircraft safety from bird strike. The Applicant's response to this evidence - apart from presenting its own evidence on the matter - was to submit to the Court that, in the circumstances, the Applicant should be given the opportunity, before the airport became operational, to demonstrate that the measures proposed by it to reduce or eliminate the bird strike problem would work. In this regard it should be noted that Clause 96 of the Civil Aviation Regulations empowers the Authority, in effect, to prohibit the tipping of waste foodstuffs on land to which Clause 96 is by Gazette notification declared to apply. The Applicant's bird control measures included, at the suggestion of its expert consultant, Mr Tom Caithness, a New Zealand ornithologist, employing two persons to be armed with shotguns to frighten away or kill any birds that attempted to feed at the site. The Applicant's submissions found favour with His Honour who determined that any limitation upon the success of the proposed bird control measures *"could be determined by trial and error before the airport becomes operations"*. One would be interested in any comments that the Federal Airports Corporation and Civil Aviation Authority may have upon His Honour's statement.

Notwithstanding that the finished landform would be the highest landform for some considerable distance around, the Court did not show concern that the finished development would have an adverse effect upon the appearance of or detract from the surrounding landscape. Admitting that the proposed hill will be a new landform, the Court found that properly treated with landscaping it can be made to blend into the existing landform.

However, the difficulty not resolved by the Applicant was that during the construction or operational phase of the development it was not possible to screen what in effect would be a very large intensive industrial activity.

The evidence was that the proposal would impact upon its immediate environment - and beyond - as a result of noise, dust, odour, traffic, landfill gas, visually and otherwise. His Honour found that many environmental safeguard issues were able to be resolved by the imposition of appropriate conditions. This was despite His Honour finding that the Applicant's present approved development "appears not to be capable of being carried out in compliance with the conditions of the present development consent applicable to the site. This applies particularly in regard to the required measures for dust and noise suppression. This is not withstanding an operation of significantly smaller scale".

As is so often the case in maters relating to designated development, there were many changes to the proposal brought forth by the Applicant during the hearing. Naturally there was debate as to whether the changes were as to matters of detail or whether they had resulted in a fundamentally different proposal from that the subject of the public exhibition processes. The Court found:

> *"Most of these changes have been made in response to suggestions that the structure cannot be engineered to achieve what is claimed for it. While recognising that many aspects of landfill engineering are still undergoing experimentation, it is nevertheless important for the Court to be satisfied that the development, from an engineering viewpoint, has been the subject of mature reflection, close scrutiny and formulated as a definite proposal".*

The Court expressed "major concern" with the capacity of the property and the extent to which the surface will be almost totally taken up by the landfill itself - leaving no realistic margin to provide an effective buffer or protection against engineering failure. His Honour was not satisfied that the design had been developed to a point where there can be an acceptable degree of confidence that the site can accommodate a major engineering setback or failure. Of considerable importance in this regard was that the Court found that it was not appropriate in the circumstances to provide a safeguard against such eventuality by relying upon a performance bond as proposed by the Applicant. The bond was offered to cover the cost of remedial work which may need to be carried out both during the landfill operation and by others after the end of the proposed post-development monitoring period.

There was considerable evidence given in the matter about the capacity of the existing Sydney Region's putrescible waste depots. The Applicant argued that there was little as five years' capacity whilst evidence from an officer of the Waste Recycling and Processing Service, on behalf of the Council, was that there was in excess of eight years' capacity. At the end of the day the Court did not believe that the difference mattered greatly, finding that Sydney was clearing approaching a critical point in regard to its capacity to dispose of putrescible waste. His Honour commented:

> *"....the importance of finding an early solution to the problem of waste disposal cannot be underestimated."*

The Court found that the character of the development was such that it would set the parameters for future development in the immediate vicinity. Having regard to the state of planning within the South Creek Valley Sector, and the potential uncertainty associated with the development of the airport, it was not appropriate to approve the development in the present planning context.

Despite the decision of the Court to refuse consent the public response of the Applicant to the decision has been an optimistic one. Although the Court expressed reservations about the adequacy of the site and certain engineering aspects of the proposal the Court found that *"....given an appropriate planning context, there is no inherent reason why this site could not be ultimately developed as a landfill for waste disposal including putrescible waste".*

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