Bartier Perry LAWYERS

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Roads to recovery

This year has seen turbulent times for all our local council clients particularly following so closely from the devastating bushfires last summer. I have noted that local councils have worked tirelessly for their communities in lockdown, ensuring public facilities have the services and supplies they need, and that the day to day needs of their residents can be met. This is on top of changing guidelines for all council staff and ensuring, firstly, they are looked after so as in turn to look after the rest of the community.

As we approach the middle of what has been a year like no other, and look to the other side of the pandemic, what is forefront in my mind is that we work with our clients to find ways to come out stronger. At Bartier Perry it has never been more important for us to work side by side with you to keep the community in jobs and businesses in business.

I hope you will find this issue of Council Connect informative and interesting. What I see coming through each of the articles is that councils are being required to respond to rapidly changing guidelines and legislation and to adapt their resources accordingly.

As Terry Dodds, CEO of Tenterfield Shire Council and this issue's (video) interviewee points out, communication with both levels of government, with our advisors and with each other is critical. Thank you Terry for sharing what has been happening at Tenterfield Shire Council with us. I really encourage all our readers to view the interview to hear about the challenges the Tenterfield community has been dealing with and overcoming, and with such good will.

On another note, it will come as no surprise to you that it was necessary to cancel our planned Annual Local Council Conference. We will look to a new date for this once it is appropriate to do so. We welcome feedback on any issues you would like to see addressed either at the Conference or in future editions of Council Connect.

From all at Bartier Perry, we hope that you, your families and wider communities are safe. We thank you for the continuing support you give us as we too navigate the challenges of COVID-19. When we emerge from this period of uncertainty and look towards economic recovery, it will be critical to continue to keep our channels of communication open and to work together to identify and maximise opportunities for regeneration.

Riana Steyn
Chief Executive Officer
Bartier Perry

INTERVIEW WITH TERRY DODDS

CEO AT TENTERFIELD SHIRE COUNCIL

Welcome to our first video Council Connect interview. David Creais, head of our property, planning and construction team talks to Terry Dodds, CEO at Tenterfield Shire Council about what has been happening in his community and how the Council has been dealing with the challenges of drought, bushfires and now COVID-19.

Bald Rock, Tenterfield. Image reproduced by courtesy of Tenterfield Shire Council and Reichlyn Photography.

CAN WE GET OUR MONEY BACK?

RECOVERING COSTS OF A PROPERTY SALE WHEN THE PROPERTY HAS BEEN SOLD TO RECOVER LONG OVERDUE RATES

DAVID CREAIS AND JACK WILLIAMS

The economic downturn caused by the COVID-19 pandemic will no doubt continue to be felt for some time to come and we may see an increase in defaults on the payment of rates and charges on properties. Other than in cases of genuine hardship, and where all other avenues to reach agreement have been exhausted, councils will need to take steps to recover aged debts to assist in addressing significant losses of revenue to ensure that as the community enters the recovery phase of the pandemic, funds are available to direct to public projects and to inject into the local economy.

If a council is left with no option other than to sell a ratepayer's property to recover grossly overdue rates and charges, it can recover the expenses incurred in connection with the sale if there are enough funds remaining after payment of the outstanding rates and charges. These expenses may include real estate agent fees as well as legal costs.

This may be a lengthy process, and the legal costs of recovering possession will only be reimbursable if the contract for sale is conditional on the purchaser receiving vacant possession on completion.

In the case discussed in this article, it is worth noting that the process might have been shortened if default judgment had been sought when the defences were initially struck out, and if an application for a fixed sum for legal costs (a "lump sum cost order") had been made at that time.

The case

A recent Supreme Court decision, *Armidale Regional Council v Vorhauer*, has confirmed that the costs of obtaining possession of a property are payable from the proceeds of sale. However, it is important to always assess the most commercially sensible course of action as selling a ratepayer's property with the aim of recovering overdue rates and charges, and being reimbursed for the costs involved, can be problematic.

Background

During the period July 2012 to July 2018, Mrs Vorhauer failed to pay the rates and water charges levied on her property which she occupied with her two daughters.

As the charges had by that time been unpaid for at least 5 years, in April 2018 the Council passed a resolution to sell the property under section 713(2)(a) of the *Local Government Act 1993* (Act).

After complying with all the relevant advertising and notice requirements, the property was put up for public auction. The property didn't sell at auction and was subsequently listed for sale by private treaty, as allowed by the Act.

In November 2018, the Council entered into a contract for sale of the property with the property to be sold with vacant possession.

Accordingly, Council served a notice to vacate on Mrs Vorhauer and her daughters, requiring the property to be vacated by 10 December 2018. Mrs Vorhauer and her daughters failed to comply with the notice to vacate and on 13 December 2018 Council commenced proceedings for an order for possession of the property, to enable settlement of the sale to take place.

The details

The defendants, Mrs Vorhauer and her daughters, filed defences, but because they had no arguable basis for resisting the Council's claim they were struck out.

Prior to the final hearing in February 2020, at which the defendants did not appear, Council filed affidavits which satisfied the Court that:

- Council had resolved to sell the property by public auction
- The total amount owing by Mrs Vorhauer to the Council as at 6 November 2018 was $70,645.11
- The amount that was outstanding for a period greater than five years at that date was $50,033.01
- The outstanding rates and charges had been properly certified by the chief executive officer of the Council
- The notices required to be given were properly given and
- The Council had entered into a contract of sale on 6 November 2018, and that on settlement of the contract vacant possession of the property had to be given by the Council.

The Court determined that the Council was entitled to possession of the property, and that a writ of execution should be issued and executed immediately.

Recovering the costs

As the property's sale price exceeded the amount outstanding for rates and charges, the Council also sought an order that any surplus from the sale proceeds after the unpaid rates had been paid be used to pay the costs of the proceedings. The Court agreed that the costs were expenses that the Council had incurred in connection with the sale and that they would be recoverable.

However it was unlikely that the legal costs would be calculated at the time of settlement of the sale, because in accordance with the usual court processes, they would have to be determined either by agreement, assessment or by a lump sum cost order, all of which could take some time to finalise.

The surplus of the purchase price remaining after the overdue rates, legal costs and other expenses of sale had been deducted would therefore not be known at the time of completion of the sale.

The Court observed that although under the Act, the balance is required to be held in trust for those having an estate or interest in the land immediately before the sale (the ratepayer), a council is not required to pay the balance within any stipulated time, and may pay it in parts.

Council was therefore entitled to retain part or all of the balance of the purchase price after payment of the outstanding rates and charges to pay its legal costs when they were finally ascertained, and only then account for any remaining surplus.

> "Councils will need to take steps to recover aged debts to assist in addressing significant losses of revenue..."

RESILIENCE OF HUMAN RESOURCES TO LEAD FROM CRISIS TO RECOVERY

DARREN GARDNER

COVID-19 restrictions have impacted our way of life enormously, with immense strain on many aspects of local council operations, including human resources teams and industrial relations management.

Closely following debilitating drought and a season of horrific bushfires, the challenges presented by the current pandemic has councils being called upon to support their communities and staff in many unforeseen ways.

Legislative assistance to councils has patched gaps as they emerged ad hoc, providing some financial and operational reassurance in the short term. But councils have many more industrial, human resources and work safety challenges ahead on the road to recovery.

Resilience planning

Physical and mental health resilience will continue to be tested as life and work starts to resume – but not as we knew it.

Council work recovery plans will need to consider new ways of ensuring staff health, welfare and safety against the invisible threat of a second, or subsequent, wave of infection risk. Employees and their union representatives will be seeking more certain assurances that all reasonably practicable steps have been taken to prevent risk of infection in the course of performing work, whether that be at an employer's place or employee's place of work.

In time of pandemic risk management though it is important to remember that duties of care are reciprocal. Staff will need to be reminded that they have personal obligations and duties of care. This includes looking after not only their own health and safety, but also the health and safety of others whilst at work, or travelling to and from work.

There are many questions about what a return to work will look like and much will be dependent on government guidelines on return to work arrangements. Is it reasonably practicable to expect employees to wear face masks and eye protection, including in transit to and from work? Is more specialised personal protective equipment necessary for certain council roles? How should personal hygiene, including sufficient hand washing, and social distancing be reasonably enforced, especially for outdoor staff?

Risk management measures will likely need to extend beyond infection control.

Extended periods of pandemic resilience foreseeably contribute to mental health risks. Those with pre-existing mental health conditions may be at heightened risk.

Simple examples include self-isolation regimes, reinforced beliefs of those who have agoraphobic tendencies as well as public and employer reinforced messages about frequent hand-washing, all serve to justify and amplify obsessive compulsive disorders.

We are seeing clients asking questions relating to what extent an employer might be liable for mental health conditions resulting from extended periods of self-isolation, imposed on the workforce not by employer direction but government order. How can employers have control, or even know, if the risk of infection is from the workplace or from private social interaction outside work?

These are all issues that will be addressed and no doubt resolved in the coming months. As your advisers we will be keeping you up to date with best practice advice and legislation updates as they are put in place. In the meantime, communicating regularly with your staff and ensuring they feel valued and safe is where we all need to start.

Recovery and reassessment in the 'new normal'

When life is said to return to a new normal, employees who have been infected, or just affected by pandemic-imposed change, may also be questioning their legal position. They will likely ask themselves, or their advisers:

- Did my employer do enough during the public health crisis?
- Could more have been done?
- How did my council's crisis management rate compare to other employers?

This may prompt questioning of the perceived fairness of arrangements to use up accrued leave entitlements, to work less hours and to have had reductions in pay.

There will likely be new union expectations on consultation and COVID-19 risk managed change. Local Government (State) Award obligations on consultation

> "We are seeing clients asking questions relating to what extent an employer might be liable for mental health conditions resulting from extended periods of self-isolation..."

are framed around councils making a definite decision before implementing major change. These consultation obligations are not well suited to changes imposed on council employers that may only be applicable whilst dealing with COVID-19, or which may change at short notice according to ever shifting government restrictions.

In our experience representing councils facing union consultation claims already, the NSW Industrial Relations Commission (IRC) appears to be expecting parties to engage in genuine consultations before making any COVID-19 related changes. This is despite the sudden need for local councils to anticipate or respond to COVID-19 close downs and public isolation orders.

As much as we hope it is not the case, if the road to recovery is hampered by a sudden recurrence of infection, and options to assist workers to access accumulated or special leave arrangements have dried up, what then? As a last resort, councils may need to

consider applying to the IRC stand-down orders under s126 of the *Industrial Relations Act 1996*. It is not certain how the IRC will treat such stand-down applications. The provisions are framed on industrial relations concepts and 'break-down of machinery' conditions. councils will need to try and fit pandemic restrictions into the category of "any other act or omission, for which the employer or employers concerned are not responsible" and will likely need to have demonstrated that all other available workplace change options have been exhausted before seeking stand-down orders.

New opportunities and the importance of HR and IR led change

Given the inevitable challenges, the recovery stage will also be an opportunity to correct or reassess pandemic risk management plans.

No doubt there will be a lot of reflecting taking place over how this period unfolded and lessons should be documented and viewed as an opportunity for improvement. Considerations will include how key staff performed under pressure and whether staff properly adhered to the plan. How well did senior staff exercise all due diligence to ensure council WHS compliance? What could be done differently next time to improve work productivity and work health safety outcomes?

Successful pandemic management processes should also identify productivity and work efficiencies. Working differently in the interests of public health has driven rapid acceptance of flexible work practices and better use of technology to communicate, meet and collaborate.

One unexpected consequence has been a recalibration of the perceived seriousness of some workplace disputes. With the new perspective of passing on a potentially deadly virus to a work mate, disagreements over industrial grievance processes or failure to strictly adhere to policy, seem to now be less important.

In resolving disputes for councils during the COVID-19 crisis, we have already noticed a new willingness to reframe workplace issues and concerns for constructive solution, rather than to be immediately packaged up as a dispute for conflict resolution.

We have also noticed that COVID-19 delays in the courts and tribunals have encouraged industrial parties to look to alternate dispute resolution avenues for agreement. Such ADR options don't rely on adversarial concepts of 'winner takes all' for now, and 'loser comes back later to fight again another day'. Without the limitations of legislative remedies, a new wave of technology enhanced mediation encourages parties to think more creatively about less costly and more mutually satisfying solutions to past industrial relations problems.

Hopefully a new-found resilience during the COVID-19 pandemic crisis, and opportunities to reassess planning outcomes in recovery will foster a more collaborative, caring and innovative approach to solving workplace problems and disputes. If so, we will reluctantly be thanking a ferocious enemy virus for restoring the significance "human" and "relations" in HR and IR management.

WHEN PERFORMANCE OF CONSTRUCTION CONTRACTS IS INFECTED BY CORONAVIRUS

MARK GLYNN

COVID-19 has thrown the Australian economy into meltdown over the past 3 months and despite Australians successfully flattening the curve, how we proceed through the pandemic recovery phase is not yet clear.

Councils, like all businesses, have no doubt had to review all aspects of their operations, including their contractual commitments with construction contractors.

Whilst the effects of COVID-19 are not as immediately severe as in other industries such as travel and retail, the construction industry is not immune and will continue to feel the effects.

Whilst construction activities are still allowed, and in fact hours have been extended to allow sites to operate on weekends and public holidays, performance under a construction project is challenging and may become increasingly difficult.

Supply chains under stress

The most predominant impact is the shortage of building materials and products. These shortages are felt by businesses of all sizes, from those awaiting significant products such as curtain wall and vertical transportation units to smaller trades who source product from trade suppliers such as Bunnings and other construction retail suppliers.

Due to internal and international bans on general contact, travel and movement and supply chain restrictions (especially in and from China), there is a shortage of labour, materials and transportation to deliver building projects. This brings into doubt a contractor's ability to reach practical completion by the contracted date.

Brian Seidler, executive director of the NSW Master Builders Association is quoted recently as saying:

'We don't want to be alarmist, but we are finding that contractors are starting to experience a lack of supply of materials like paint, glass and building cladding which are all manufactured in China."

James Cameron, Executive Director of the Australian Construction Industry Forum, recently noted that more than 60 per cent of $6 billion worth of construction-related materials is sourced from China. This represents a massive challenge for the industry if supplies continue to be affected.

As manufacturing in China slowly resumes, Bartier Perry is hearing of significant delays at the Chinese ports as the backlog of materials and products builds, with a corresponding 3-fold increase in the cost of airfreight due to the shortage of commercial air transport.

The impact on those councils and their project managers tasked with delivering construction projects include:

- Delay
- Liquidated damages
- Cost overruns
- Changes to scope
- Changes to scheduling of works.

A solution in the contract?

This great uncertainty has seen councils looking to their contracts for direction on how to mitigate any such impacts.

Construction contracts define the rights and obligations of the parties and allocate risk between them. Most construction contracts for the delivery of current projects for or on behalf of councils were entered into at a time when the COVID-19 risk could not have been anticipated. Contractual provisions relating to time and cost relief under the contract were negotiated when the risk of a viral pandemic was not reasonably contemplated.

As parties review their contractual obligations, Bartier Perry has seen an increase in requests for assistance from both public and private clients in relation to issues including:

- Extension of time and delay damages claims from construction contractors
- Non-delivery of materials and equipment from overseas manufacturers and suppliers
- Supplier insolvencies resulting in not only lost payments made on account in anticipation of the supply but loss of supply options
- Recourse to rights of suspension and
- Application of rise and fall provisions in anticipation of increased costs.

In particular, parties are looking to understand the legal and contractual consequences and applications of force majeure clauses and the legal doctrine of frustration. We explore this further below, together with other options that might be considered.

Force majeure clauses

Also known as an 'act of God' provision, a force majeure clause is a provision enlivened by the occurrence of a defined event which can excuse a party, or both parties, from further performance of obligations under the construction contract, either permanently or temporarily.

Under Australian law a force majeure clause cannot be implied into a contract where the contract is silent on the matter. It must be express.

The clause will advise whether the contract is terminated because of the occurrence of the defined event or whether performance of the contract is suspended until it can be resumed by the parties.

Common examples of force majeure events that our team sees in construction contracts include:

- Floods, storms and bushfires
- War and acts of terrorism and
- Workers strikes and declared states of emergency.

None of these would presently cover the COVID-19 pandemic as a state of emergency has not been declared, as it was during the bushfires of Christmas/ New Year 2019/20.

It is also worth noting that the party that relies on the force majeure event generally has the burden of proof that the event falls within the clause and has actually occurred.

Frustration

'Frustration' of a contract occurs where neither party is in default of the contract, but an intervening event has occurred which prevents the contract from being performed as originally intended. The consequence of frustration is that the contract is automatically terminated.

Under the doctrine of frustration, further performance of the contract must be impossible, illegal or significantly different to what was originally intended.

Performance that is harder or more expensive than anticipated, or temporarily impossible, is unlikely to give rise to valid termination for frustration.

The fact that a construction project will take much longer than anticipated, or cost more money to complete, or become less profitable, or be unable to be performed for a short period of time; is unlikely to result in the contract being considered 'frustrated'. The event must radically impact future performance.

Circumstances where frustration would result in a contract being terminated might include:

- Performance under the contract is rendered illegal by a change of legislation
- Performance of the contract becomes impossible to perform or
- Where the subject matter of the contract, such as a building that was being upgraded, ceases to exist.

Whilst some clients are enquiring as to their rights under force majeure clauses and frustration, the reality is that in these current circumstances they most likely will not apply.

Other options to adjust contractual terms

Many of our clients have advised us that they do not actually want to terminate their contracts but rather want to put them on hold during these difficult times.

Contracts may include a right to suspend but often this right is dependent on default of the contract by the other party. In our experience, only very occasionally, and almost never in construction contracts, does one party have the right to suspend for its convenience (i.e. without the other party being in default).

In the present circumstances a negotiated extension of the program or complete suspension of the works may be the best outcome. In such cases, the parties will need to consider and agree on the term of the suspension, which party would bear the costs of things such as demobilisation, preliminaries or the cost of maintaining the tower crane which is to remain on site for use when the work resumes, and the cost of making safe and the protection of the site during the period of suspension.

The best option is always to talk

Most of our government and business clients involved in contracts of all types are strong and regular communicators and negotiators.

The best option in our view is to try to negotiate a commercial arrangement with the other party. This option is almost always more efficient and preserves an otherwise good relationship that can be resumed when normality and stability is restored.

> "Councils, like all businesses, have no doubt had to review all aspects of their operations, including their contractual commitments with construction contractors."

WHEN TWO WRONGS DON'T MAKE A RIGHT

DENNIS LOETHER

Clause 4.6 variation requests are under the spotlight again. We look at recent case law which considers when a development standard is taken to have been abandoned, and how you deal with the issue of 'desired future character'.

In recent years, there have been numerous judgments which have considered clause 4.6 variation requests.

We explore here the recent decision of *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020]* NSWLEC 1112 in which the Land and Environment Court has provided further direction when it comes to dealing with the test of establishing whether a development standard has been abandoned as justification for a clause 4.6 variation request. This decision also considered the impacts of existing nearby developments in determining the 'desired future character' of a neighbourhood.

The Proposal

SJD DB2 Pty Ltd (the Applicant) sought consent for the demolition of existing buildings and the construction of a six-storey shop top housing development, with retail on the ground floor, twenty-one residential apartments above, and two levels of basement parking for thirty-six cars and four motorbikes.

The proposed development had a height of 21.21m and a floor space ratio (FSR) of 3.54:1. Pursuant to the height and FSR controls under the applicable Woollahra Local Environmental Plan 2014 (WLEP), this is an exceedance of approximately 44% in relation to height and 41% in FSR.

Importantly, adjacent to the subject site to the east are two approved developments under construction, each to become six storey buildings of a very similar height and floor space to the proposed development. The proposed development was designed with the intention of continuing the line of development from adjoining sites to the east, adopting the same height and general form.

The clause 4.6 variation request submitted by the Applicant put forward the argument that the approval of these adjacent developments to the east amounted to the abandonment of the development standards for the area, and also provided an indication of the desired future character of the neighbourhood.

The Decision

The subject development application was recommended for approval by Council staff however was ultimately refused by the Sydney Eastern City Planning Panel (the Panel), who determined that the clause 4.6 variation request was unsatisfactory, and that the approval of the developments to the east did not amount to an abandonment of the Council's development standards.

The Applicant sought a review pursuant to s 8.2 of the *Environmental Planning and Assessment Act 1979*, which resulted in the Panel again refusing the application on essentially the same grounds.

The determination was appealed in the Land and Environment Court. Acting Commissioner Clay upheld the appeal. Of particular interest to us are his findings in respect of desired future character and his acceptance of the clause 4.6 variation request, which we examine below.

Desired Future Character

In considering the question of character, Acting Commissioner Clay focused on the question of "what is the desired future character and is the proposal consistent/compatible with that desired future character?"

The subject site is zoned B2 (Local Centre) under the WLEP, a zone in which shop top housing is permissible with consent. One of the objectives of the B2 zone is to 'ensure that development is of a height and scale that achieves the desired future character of the neighbourhood'.

The Applicant pointed at the approvals to the east of the subject site as a demonstration of the fact that the proposed development is in line with the desired future character of the area.

Central to its case was the argument that continuing the form of the developments to the east (which are under construction and have proposed heights of 21.21m and 20.75m respectively) would be a better planning outcome than a development on the subject site that strictly complied with the controls, which would be 'discordant'.

In contrast, the Council looked at the character issue more broadly, considering the whole of the Double Bay Centre as opposed to the block of buildings focused on by the Applicant, and argued that "the approvals to the east of the subject site do not reflect the existing and desired future character of this part of Cross Street when considered in the wider context and having regard to the LEP controls."

Acting Commissioner Clay agreed with the Applicant on this point, stating that when considering character, the focus should be on the more immediate context of the subject site.

Importantly, the Acting Commissioner made the distinction that this was not a scenario in which an adjacent development had been approved and constructed many years ago, sitting as an anomaly in the street, but rather these developments reflect the recently expressed attitude of the Council to such development. They were approved by Council under effectively the same controls as present, notwithstanding the fact that they exceed the height and floor space ratio controls.

So, with the character being dictated by the adjacent developments to the east, the proposal (being of the approximate same height and form) was found to be consistent with that character, although significantly in breach of the applicable development standards.

The Court's findings on character are relevant to the way in which it considered the clause 4.6 variation requests. The Acting Commissioner was satisfied that the proposal met:

a) *objective (a) of cl 4.3 (height standard) in that it was consistent with the desired future character of the neighbourhood;*

b) *objective (b) of cl 4.4 (FSR standard) in that it was compatible with the desired future character of the area in terms of bulk and scale; and*

c) *the seventh objective of the B2 zone in that it was of a height and scale that achieves the desired future character of the neighbourhood.*

Abandonment of the Development Standards

As established by Preston CJ in *Wehbe v Pittwater Council [2007]* 156 LGERA 446, one of the five most common ways to demonstrate that the application of standards is unreasonable or unnecessary in a particular scenario is to show that the standard has been abandoned.

In this case, the Court concluded that the development meets the objectives of the development standards notwithstanding the breaches. That said, the Acting Commissioner still stated that when considering whether the relevant development standards had been abandoned, the Court had to again consider whether to look at the recent approvals to the east of the subject site in their immediate context or in the broader context of the Double Bay Centre.

The Council argued that the controls had not been abandoned, as it was only two non-compliant developments that had been approved, and as such the controls that apply to the Double Bay Centre had not been abandoned and should apply to the subject site.

However, the Applicant again argued that the planning controls had clearly been abandoned in this specific area of the Centre, as shown by the approval of the two developments adjacent to the east.

So the question was, how far do you look? Do you confine yourself to the recent approvals in the immediate context of the subject site, or do you adopt a broader approach and consider the wider Double Bay centre area.

The Acting Commissioner agreed with the Applicant, stating "The Council deliberately and knowingly decided that larger buildings were appropriate in the block of which the site forms part. That, in my view, amounts to an abandonment of the controls for this part of Double Bay."

So the Court, if asked to determine the matter on this issue, adopted the position that the concept of abandoning a control can apply to a part of an area that is the subject of that control, albeit subject to the circumstances of the case.

Learnings for councils

This decision highlights two key considerations for councils.

Firstly, the question of desired future character inevitably will have regard to existing character. When assessing development applications that significantly breach controls, the implications extend to the assessment of future development applications for adjoining land. The "two wrongs don't make a right" argument in this case was not persuasive in the Court's eyes.

Secondly, when considering, as a ground to demonstrate that compliance with a development standard is unreasonable or unnecessary, that that standard has been abandoned, it is possible to approach the issue more narrowly. While each case will be assessed on its own merits and circumstances, it is possible to consider a part of an area the subject of the control.

Finally, it is worth noting that the level of exceedance of the standards in this case is a reminder that there is no maximum percentage by which a development standard may be varied. The subject proposal exceeded the standard significantly with the height control by 44% and the FSR control by 41%.

Stay tuned for the next decision that considers clause 4.6 variation requests.

> "This decision considered the impacts of existing nearby developments in determining the 'desired future character' of a neighbourhood"

UNALLOCATED FUNDS ARE NOW FAIR GO FOR NEGLIGENCE CLAIMS AGAINST COUNCILS

KATHERINE RUSCHEN

Defences to negligence claims against local councils: a shift in the application of section 42 of the *Civil Liability Act (NSW) 2002*.

Local councils, as a public authority, are able to call on a number of statutory defences against negligence claims. One defence allowing a council to avoid liability is contained in s42 of the *Civil Liability Act* (the Act) which allows a defence if there were budgetary and resourcing constraints.

This section provides that councils will not be liable for negligence where:

- its functions are limited by the financial and other resources available to it and
- there were insufficient funds allocated to the particular council activity to pay for the costs of taking the precautions which should have been taken to prevent the risk of injury.

The general allocation of resources by a council is not open to challenge in a claim of negligence. In other words, a plaintiff cannot contend that more resources should have been allocated to a particular activity to ensure sufficient funds were available to pay for the precautions that should have been taken. The cases have previously focused on whether allocated funds have been exhausted, overlooking any unallocated funds that might have been available.

In this article we look at a recent case where unallocated funds were called into question. The implications for councils include that they may now need to prove not only that the relevant financial allocation for a particular activity has been exhausted but also that there were no unallocated funds available that could have been used to take precautions.

Councils will need to have evidence of their available financial and other resources and the general allocation of those resources, if relying on a defence under s42. Councils should be able to produce proof of:

- their budgets and assets
- budgetary allocations
- expenditure in the relevant year
- the predicted costs of taking the precautions that would have avoided the risk of harm.

Key will be their ability to show not only that there were insufficient funds in the relevant area but also that there were insufficient unallocated funds available to pay for the necessary precautions.

The case in question

The Court of Appeal recently examined s42 in *Weber v Greater Hume Shire Council [2019]* NSWCA 74. (Weber).

This case involved a class action by property owners against Greater Hume Shire Council for fire damage after a fire started in a council operated tip and spread to their properties.

By way of background, in December 2009, a fire ignited at a tip in the southern NSW town of Walla Walla. The fire quickly spread to the nearby town of Gerogery and destroyed a number of homes including a property owned by Susan Weber. In December 2015, Susan Weber brought proceedings against the Greater Hume Shire Council for damages suffered by her and other property owners as a result of the fire. The property owners claimed the Council failed to take reasonable steps to prevent the fire from spreading. The risk of harm identified was the risk of fire igniting in the waste site and escaping from it. They claimed the Council failed to:

- have a fire management plan
- create and maintain an effective fire break
- consolidate deposited waste in appropriate areas
- remove fuel to prevent dangerous build ups
- have adequate firefighting equipment on hand.

> “Looking ahead, councils should take steps to ensure their financial documentation is in order and is clear and unambiguous.”

The trial judge held the Council owed a duty of care to the property owners and that the Council had breached that duty by failing to take precautions to prevent the fire from spreading.

The Council raised a defence under s42 contending it had insufficient resources available to pay for the precautions. The defence failed on the basis the trial judge held there were reserve waste management funds, which could have been spent on precautions to prevent the spread of the fire.

As it turned out, the property owners' claim failed in any event as the property owners could not prove that the Council's failure to take precautions actually caused the damage to their properties.

This case went on to be successfully appealed by the property owners in 2019. As part of the appeal, the Court of Appeal scrutinised the inter-relationship between the general negligence provisions in the Act and s42.

It looked at issues including how far the council should have gone in obtaining costs relating to fire risk, the link between the cause and the damage as well as the intention of s42.

The Court found that the Council should have taken reasonable steps to prevent unintended fires at the tip and to prevent any spread of fire. The Court also found that the Council should have implemented a fire management plan, created and maintained an effective fire break and consolidated the waste in appropriate areas. They decided that had these precautions been taken by the Council, it was likely that the fire at the tip would not have spread and caused the resulting property damage.

The Court was not persuaded by the Council's s42 defence and looked at the availability of their unallocated funds. The Council's financial statements indicated it had unallocated funds available at the relevant time in an amount sufficient to undertake the precautions which would have reduced the risk of the spread of fire from waste disposal sites.

Lessons learned

The challenges of 2020 including disastrous bushfires in NSW, COVID-19 and the financial crisis that follows such events are likely to result in a spike in negligence claims. In these difficult times, councils should consider the viability of s42 defences in light of the Weber decision. A claim may not be defensible, even though the specific allocation of funds has been exhausted, where there are unallocated funds that could have been used.

Importantly, when estimating the costs of taking relevant precautions, councils cannot argue the Court should consider the costs of taking such precautions across all of their council owned or occupied land so as to establish it would be too expensive. In Weber, the Court said it is only necessary to consider the single risk of harm, which was the risk of a fire igniting in a Council owned waste disposal site (there were 11 such sites). Whilst there is always a risk of fire spreading from any property once ignited, the expert evidence established there was a particular risk of a fire igniting on a waste disposal site because of activities unique to these sites. Accordingly, it was only relevant to assess the costs of taking precautions at the 11 waste disposal sites owned by the Council.

The Weber decision also confirms that in claims of negligence, a direct link between the cause and the damage is not always necessary.

Looking ahead, councils should take steps to ensure their financial documentation is in order and is clear and unambiguous. The documents should be capable of showing unequivocally not only that there were insufficient funds allocated to an activity but also that there were insufficient unallocated funds available to be able to take the precautions.

WOULD YOU LIKE TO KNOW MORE?

Our dedicated team has a wealth of knowledge and expertise from working with local government clients across NSW over a long time.

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VALUE ADDED SERVICES

We understand the importance of assisting councils outside of just providing legal advice. In responding to feedback on what is important to you and how we can assist you to perform your role, we have put in place value added services that include:

Information

We distribute electronic articles on a weekly basis which detail legislative and case law changes and industry developments as they occur, and often before they occur. We encourage our clients to re-publish our articles across their internal communication platforms, as appropriate.

Support of industry and community

Educating and being involved with our relevant industries is important both to us and to councils. It means together we are always current in an often-changing environment – not only with the law but with industry experts, current trends and broader industry information. We work with the various players in the industry to ensure we bring value back to councils. Bartier Perry regularly sponsors and provides speakers to council-related conferences, including the LGNSW Property Professionals Conference, LGNSW Human Resources Conference and the Australian Property Institute (API) Public Sector Conference. Bartier Perry also sponsors, attends and hosts training events for Urban Development Institute of Australia (UDIA), Australian Institute of Urban Studies (AIUS) and Master Builders Association (MBA).

CLE, training and education

We provide councils with tailored seminars, workshops and executive briefings for senior management on current legislative changes and regulatory issues. Recent seminars we've held include:

- Discrimination in the workplace: where to now?
- Whistleblowers laws: how to handle a protected disclosure

COVID-19 web resource

- To assist our clients navigate the COVID-19 environment, we have established a resources webpage with up to date information, links and tips.

At present all our seminars are delivered by webinar and recordings added to our Insights webpage.

For any enquiries, feel free to contact us at LocalCouncilTeam@bartier.com.au

All articles, upcoming events and past videos can be found under the Insights tab at – www.bartier.com.au

ABOUT BARTIER PERRY

Based in Sydney's CBD, Bartier Perry is an established and respected mid-tier law firm which has been providing expert legal services for over 75 years.

Our practice has appointments to all levels of government including statutory bodies, and has corporate clients from a wide range of industry sectors.

With over 70 lawyers, we offer personalised legal services delivered within the following divisional practice groups:

- Corporate & Commercial and Financial Services
- Dispute Resolution & Advisory
- Estate Planning & Litigation, Taxation and Business Succession
- Insurance Litigation
- Property, Environment & Planning
- Workplace Law & Culture

YOUR THOUGHTS AND FEEDBACK

Thank you for taking the time to read our Council Connect publication. We hope you found it informative.

If you have any comments on this issue, or suggestions for our next issue, we'd love to hear from you.

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