

Short form

LITIGATION REPORT

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Introduction

The last 10 years has seen a number of coastal protection issues the subject of proceedings in the Land and Environment Court of NSW and the Supreme Court of NSW.

The regulation and governance of our coast line is a complex interaction of geophysical processes and a regulatory and legislative regime administered by local government and state government officers. The Coastal Panel has had specific statutory functions.

Overseeing all that activity sits the Land and Environment Court and the Supreme Court of NSW. The major decisions in the last 10 years show clearly that the Courts will intervene, and in the case of the Supreme Court of NSW award damages, in circumstances where those responsible for administering our coastline make unlawful administrative decisions or breach common law duties rights or obligations.

At the conference, we will discuss major decisions over the last 10 years in each of these Courts. A summary of the factual background and outcome in a number of decisions is below. These cases will be the subject of further analysis in our presentation.

SECTION 1 - PLANNING LAW DECISIONS

Land and Environment Court Decisions

The Land and Environment Court has particular jurisdiction conferred on it by legislation. The Court sits as a planning authority in respect of appeals from development applications and exercises judicial functions in relation to the enforcement of Development Consents and judicial review of planning instruments such as a coastal zone management plan.

In this paper we focus on four decisions which illustrate these various roles of the Land and Environment Court.

G&L Newton v Great Lakes Council Case No. 10605 of 2013

These proceedings concerned a proposed development at Jimmy's Beach which had been identified as particularly vulnerable to erosion. The beach had suffered severe storm erosion in the past and had required extensive sand replenishment as a consequence of storm surges. The Council was concerned about the impact of sea level rise and the potential consequential risk of damage to buildings.

The Council granted Development Consent for the erection of a new dwelling on the site. The proposed house was broadly consistent with the adjacent dwellings on the street and the general set back pattern in the vicinity.

The Council imposed 2 particular conditions on the Development Consent and the case concerned the reasonableness of those conditions. Those conditions were:

(i) (7) *Time Limited Consent*

The Council imposed a time limit so that the development consent was limited to a period of 20 years which would expire on 9 July 2033.

(ii) (8) *Structural Details for Sea Level Rise Conditions*

Council imposed particular standards in relation to footings and foundations intended to ensure continued support of the building structure consistent with 2033 sea level rise conditions.

The Court rejected Condition 7 concluding that it was unreasonable to impose a time limited consent of the nature proposed by the Council.

Condition 8, which imposed new additional requirements in relation to the structural requirements, was maintained the Court. The Court said that having rejected the time limited consent, it was reasonable to assume continued occupation of the dwelling after 2033. In those circumstances, the Court held it would be “completely irresponsible” not to incorporate reasonable precautionary measures at the time of construction and the Condition 8 was maintained.

Dunford v Gosford City Council [2015] NSW LEC 1016

This case concerned a development application for the demolition of an existing dwelling in the construction of a new dwelling and basement car park at 23B Ocean View Drive, Wamberal Beach.

This application had been entirely refused by the Council. In the Court, Gosford City Council maintained that the application should be refused for reasons including:

- the construction of the dwelling did not sufficiently avoid or minimise the potential risk of coastal and erosion; and
- the construction of the dwelling was not in the public interest as it would be impacted by coastal hazard processes resulting in property damage and loss.

The Court overturned the refusal of the Council to allow development.

A revetment wall had been a consistent and ongoing solution in the Council documents concerning protection at Wamberal Beach from erosion.

The Court found that lack of funding for the rock wall was not a sufficient reason to adopt the approach suggested by the Council because there did not appear to be any other practical way of dealing with the long term issues of beach erosion at Wamberal Beach.

The Court allowed the appeal and gave development approval for the demolition of the existing dwelling and the construction of a new dwelling and basement car park.

Furthermore, the Court made a cost order against the Council requiring it to pay the cost of Mrs Dunford. In making that cost order, the Court found that the Council’s conduct was unreasonable conduct leading to the commencement of and in the conduct of the proceedings in respect of the continued defence of those proceedings.

Mr and Mrs Vaughan v Byron Shire Council 40342/40344 of 2009

These proceedings in the form that they proceeded to final hearing concerned a dispute about the validity of a Development Consent which the Council had granted to itself for the building of an interim geobag wall at various points of Belongil Beach in Bryon Shire and, also, the enforcement against the Council of the conditions it had imposed on itself in the Development Consent.

In February 2010 the proceedings then part heard, were subject to joint application for final orders.

In those orders, the Court:

- declared that the Development Consent which the Council had granted to itself on 8 November 2001 was a valid and subsisting development consent which provided for interim beach stabilisation works.
- declared that the Council was pursuant to the terms of that Development Consent obliged to maintain, monitor and repair the interim beach stabilisation works.
- the Court then ordered the Council:
 - to maintain the existing geobag wall at the heights specified in the Development Consent;
 - complete the re-establishment of the sand dune behind the existing geobag wall again in accordance with the terms of the Development Consent.

This case is an interesting example of the enforcement role of the Land and Environment Court. The Council had tried to argue that it now had a policy of "planned retreat". However, the orders and declarations made by the Court reflect that having a new "policy" was no answer to strict compliance with the terms of a subsisting Development Consent.

These proceedings were specifically concluded on the basis that it would be open to Mr and Mrs Vaughan to sue for damages in respect of the conduct of the Council and we will return to that issue later in this paper.

Challenging a draft coastal zone management plan (Case No: 11/40068)

The next case in the Land and Environment Court to which we make specific reference, as illustrative of the various roles of the Court is the challenge made by various residents at Belongil Beach, Byron Bay in respect of draft coastal zone management plan which the Council unconditionally and later Minister Sartor conditionally had approved.

That draft coastal zone management plan reflected Council's then policy of planned retreat. Specifically, it provided that even the existing protection which the beachfront properties had, and needed in times of storm erosion, was to be removed. If that policy were maintained, it seemed almost certain that the houses would be lost in a major storm event.

Controversy surrounded such a policy particularly because Council had received over decades many reports advising that the structure it had built to protect the town, the Jonson Street structure, had a significant impact in causing the erosion along Belongil

Beach. Council did not appear to be taking that into account at all in formulating its policy of planned retreat or the terms of its draft coastal zone management plan.

Proceedings were commenced by the residents in the Land and Environment Court challenging the validity of the draft coastal zone management plan and the resolutions made by the Council and the decision made by Minister Sartor to approve that draft plan.

The Council elected to withdraw this draft plan and this matter did not proceed to final judgment.

Positive Change for Marine Life Inc v Byron Shire Council [2015] NSWLEC 157

This action proceeded urgently in the Land and Environment Court in September 2015. Byron Shire Council had resolved in June 2015 to build an interim rock wall along the beachfront at a site known as Manfred Street. This site has been identified as particularly vulnerable to coastal erosion and without adequate protection. The Council was wishing to move to protect that position.

On the Friday before work was due to commence a community action group, itself not directly affected in any way by the interim beach protection works, commenced proceedings in the Land and Environment Court and on the following Monday moved for an interlocutory injunction to restrain Council going ahead and undertaking construction of this interim beach protection. The essence of the case of the applicant was that the Review of Environmental Factors was not sufficient and the Council should have, in accordance with its statutory requirements, obtained a full environmental impact statement. An interim injunction was sought to prevent the Council starting work on the wall until a full environmental impact statement could be undertaken.

The case was heard urgently over that week concluding on Thursday, 10 September with judgment handed down on Friday, 11 September. Owners of two neighbouring properties intervened in the proceedings and made submissions.

The Court found that any environmental harm that may have resulted by construction of the wall was outweighed by the potential environmental harm to the public and private domain if the injunction were granted and a major storm occurred causing further beach erosion. The interim injunction was refused.

SECTION 2 - Common Law cases

Aside from and completely separate from the planning issues that we have been examining in section 2, there are a variety of circumstances which can give rise to duties of care on both local authorities and other professionals in connection with coastal protection activities.

These concepts are not new.

As long as ago as 1877 the issue of liability for a negligent failure to maintain protection works came before the English Court of Appeal. In the decision of ***Nitro-Phosphate Co v London Docks*** (1877) 9 CH. D505 the defendants were required by a statutory authority to maintain a wall in front of their land "at a height of 4 feet 2 inches above Trinity high water mark". The defendants allowed the bank which they built to be at one point several inches below the level of 4 feet. In November 1875 there was an extraordinarily high tide which rose to 4 feet 5 inches above the Trinity high water mark. This caused the tide to overflow the defendant's bank and damage the plaintiff's

adjoining land. The Court found that the tide had never been known to rise so high before. In an action for damages the defendants submitted that they were not liable because the extraordinary high tide was an Act of God and in any event they should not be liable for the whole damage caused by the tide which would have overflowed even if the defendants had maintained the wall at the required height.

The trial judge found that:

“though the unprecedented high tide might be the Act of God, yet no man who has a duty cast on him, and who does not perform it, can rely upon the Act of God as any excuse at all”.

On appeal the Court of Appeal held that the defendants were bound at common law to maintain the bank to the required height of 4 feet 2 inches and were liable in negligence for not doing so. The Court of Appeal found that there had to be an apportionment between the damage which was caused by the negligence and that which would have been sustained in any event.

There have been many relevant decisions since then. By way of example, the NSW Court of Appeal in ***Egger v Gosford Shire Council*** 1989 67LGRA 304 clearly recognised that a coastal council could come under positive duties to act finding that a council could be liable *“if the authority creates a danger and fails to take steps to remove or reduce that danger ...”* (page 343)

Two actions arising out of the situation at Byron Bay illustrate the modern application of tortious liability to coastal protection issues.

Supreme Court Proceedings – Duty to Protect (2010/426979)

As mentioned earlier, Byron Shire Council has for many decades been the recipient of reports advising it that the Jonson Street structure has had a significant impact in causing erosion along Belongil Beach.

In late 2010 a group of property owners along Belongil Beach commenced proceedings in the Supreme Court of New South Wales claiming damages and other relief against the Council on the basis of its construction and maintenance of this structure.

Expert evidence was filed on behalf of the residents confirming the impact of the Jonson Street structure. The experts who prepared these reports for the residents were Angus Jackson of International Coastal Management, and Associate Professor Ian Goodwin from Macquarie University.

The matter was set down for determination at a four week trial in October 2016. However, in August 2016 on a joint application, without admission, the Court made final orders in this matter being:

- a permanent injunction restraining from the Council from removing the existing protection works which the plaintiffs had in place;
- a regime for making application for repair of those walls to which the injunction would also attach;
- damages awarded of \$2.75m.

Supreme Court Proceedings – Damages for Negligent Protection (2010/363913)

In a separate action, 2 of the residents, Mr & Mrs Vaughan had sued following the events referred to above in the Land and Environment Court. The case for damages pursued by Mr & Mrs Vaughan was based on allegations that:

- Council had assumed responsibility to build interim protection pending its preparation of a coastal zone management plan;
- Council had negligently designed that interim protection which was not suitable for the conditions it faced;
- In any event, Council had failed to construct the interim geobag protection in accordance with its own design in significant ways which meant that the geobag wall was not effective as it would have been;
- The Council failed to maintain the wall at any point from 2000 to 2009 even though the Development Consent specifically required maintenance.

In May 2009, a very large storm came into Byron Bay and the geobag wall failed at Manfred Street and caused considerable damage to the property of Mr & Mrs Vaughan. The award made by the Court for damages in negligence in relation to the matters set out above, on a joint application and again without admission, was an award of \$1.6m in damages.

Both these cases illustrate that the common law rights and obligations over arch the administration by government officials of their duties and responsibilities. A failure to discharge those responsibilities with the requisite degree of care required by the common law can lead to significant liability in damages.