

MISFEASANCE IN PUBLIC OFFICE

- 1 The action of misfeasance in public office has been recognised for more than 200 years. The modern authorities continue to emphasise that the precise limits of this action have still not been conclusively defined. This action allows the victims of the misuse of public authority to claim damages from public officers.
- 2 One of the seminal authorities in this area concerns a case about coastal protection. It is a decision in England in the English Court of Appeal in 1828. It is called *Henly v The Mayor and Burgesses of Lyme* (“*Henly*”) (1828) 130 E.R. 995; (1828) 5 Bing 91. This decision continues to be cited regularly both in England and the Australian courts as a “celebrated” and seminal authority. It has been cited with approval recently in decisions of the NSW Court of Appeal in 2009, the Queensland Supreme Court in 2015 and the NSW Supreme Court in 2015.

Negligence is a separate action

- 3 An action for misfeasance is distinct and separate from an action for damages in negligence. A statutory authority, including councils, can be liable for negligence in the exercise of or the failure to exercise a statutory power.
- 4 The cases in this area include liability for negligence in coastal or flood protection works.
- 5 An early example of a statutory authority being held liable for negligence in the erection and maintenance of flood protection works is *Nitro-Phosphate & Odam’s Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 Ch. D. 503.
- 6 The orders made by the Supreme Court of NSW in 2016 in the two sets of proceedings begun by the residents of Byron Bay are modern illustrations of the applications of that principle. (Actions 2010/363913 and 2010/426976).
- 7 In the action brought by Mr & Mrs Vaughan against Byron Shire Council, the claim was based on a failure by the Council to:
 - (a) construct the geo-bag wall being built as interim coastal protection in accordance with the design specifications and criteria set out in the Development Consent;
 - (b) maintain the geo-bag wall – also as required by that Development Consent.
- 8 The second action in the Supreme Court of NSW by Byron residents led to the award of an injunction and damages. That action was based on a failure by the Council to protect from the erosion created by the protection walls which had been built by the council to protect the Byron Bay township.

The nature of a misfeasance action

- 9 The actions of misfeasance is based upon a different set of legal principles. The legal rationale of this action involves the basic tenets that:
 - (a) our legal system which is based on the rule of law;

- (b) executive or administrative power may be exercised only for the public good – not for ulterior or improper purposes;
 - (c) no man is above the law.
- 10 In an action for misfeasance both individual public officers and authorities can be found liable in damages.

The facts in *Henly* – failure to repair a Sea-Wall

- 11 The facts of *Henly* concerned a failure by a local authority to undertake the coastal protection works which it was bound to undertake.
- 12 This case concern the grant from King Charles I of England 10 years after his reign commenced in 1625. The King granted the town and borough of Lyme Regis to the mayor and burgesses of Lyme Regis and their successors. The Crown Grant was subject to a direction that the mayor and burgesses “to well and sufficiently repair, maintain and support as often as it should be necessary or expedient” the sea wall.
- 13 The length of time of the condition was “henceforth from time to time forever” – quite a lengthy commitment. When this case came before the court in 1828 the condition had been in existence for about 200 years. The Mayor and Burgesses had ceased to comply with this obligation.
- 14 The walls were found to be “prostrate, ruinous and in decay”. As a result houses which ought to have been protected by a properly maintained wall suffered damage. The property owners sued the Mayor and burgesses for the failure to comply with the conditions in the Crown Grant.
- 15 There were a number of defences which failed:
- (a) First Defence - no available funds? – the defendants said that they did not have any funds to do the repairs. The Court in rejecting the defence held as follows:

“it would be a most dangerous thing to allow a corporation which takes land under circumstances in which this corporation has taken lands, to say, that “although we have taken these lands cum onere, subject to these repairs, we have not funds wherewith to repair and, therefore, we cannot do it.” In such a case the Court would have to go into an enquiry how the funds had been employed, and it would be extremely improper to impose the necessity of such an enquiry on any court. The learned Judge who tried the cause did perfectly right in rejecting evidence to such a point. The public have ... nothing to do with that. The Plaintiff has nothing to do with that: as one of the public, all he has to enquire into is, who are liable to repair. On these grounds, I am of the opinion that there is no reason for arresting the judgment”.
 - (b) Second Defence - private landowners have no standing to sue – it was argued that individual property owners could not maintain or bring in action for the damage which they had sustained. It was said that only the Crown could complain about the failure to comply with the conditions of the Grant. This defence was also rejected. The Court held that any individual who sustained injury was entitled to sue for damages in a civil action.

- (c) Third Defence - no liability for an omission – this defence was also rejected, the Court holding that the defendant was under an obligation to repair and could held liable for a failure to do so.
- (d) Fourth Defence - extraordinary high flood of the sea – the Court held that this could be a defence if the evidence showed that the extraordinary high tide or high flood was a cause of the damage. However, in this cause the evidence showed that the cause was the state of the walls – and thus the negligence of the defendants and not an Act of God.

What did the Court decide in *Henly*?

- 16 ***Henly*** is a very important legal precedent. The passage from the judgment which is much cited to this day is set out below where, Best C.J. in his judgment held:

"Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them. Then, what constitutes a public officer? In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer."

And after considering a number of specific examples his Lordship continued:

"It seems to me that all those cases establish the principle, that if a man takes a reward ... for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action."

- 17 In 1861 the law as stated in ***Henly*** was approved by the Queensland Supreme Court (subject only to a limitation that it did not apply to the exercise of judicial functions) in *Fitzgerald v Boyle* Q.S.C.R 19.
- 18 The case has been much cited and continues to be cited with approval in Australia and England to this very day. It was described by Lord Denning M.R. in *Ministry of Housing and Local Government v Sharpe* [1970] 2 Q.B. 223 as "celebrated".

Councils can be liable for misfeasance

- 19 Court decisions in Australia make it clear that councils and other statutory authorities can be liable for misfeasance. An early modern example is the decision in *Dunlop v Woollahra Municipal Council [No 2]* (1978) 40 LGERA 218 in 1978. This was a decision of Yeldham J in the Supreme Court of NSW. An appeal directly to the Privy Council (which was available at that time) was dismissed.
- 20 In that case the Council had purported to use powers under section 308 and 309 of the *Local Government Act* to pass resolutions to fix building lines. The resolutions regulated the number of stories of any apartment buildings on three particular properties and specified setbacks between 35 and 60 feet to apply to these properties.

- 21 The Supreme Court of NSW found that the Council resolutions were invalid. Part of the resolutions were contrary to the applicable Ordinance and were found also to be vitiated by a lack of fairness, including a failure to give notice to the property owners who had appealed.
- 22 The property owner then brought an action for damages as a result of those invalid resolutions in misfeasance and negligence. The property owner claimed as damages the expenses that had been incurred from the purported passing of the resolutions until they were declared invalid. The cases illustrates the potential application of misfeasance to councils and the differences between an action in misfeasance and negligence.
- 23 Yeldham J considered the **Henly** decision and other authorities about misfeasance. The Judge proceeded on the basis that an action for misfeasance could apply to the Council. The Judge held that in this case the Council was not liable. This was because there was no suggestion that the Council was aware when it passed the resolutions that what it was doing was or might be invalid. Yeldham J held:

"...merely to pass resolutions which are void and of no effect, for whatever reasons, and without knowledge of their invalidity, does not constitute an action of abuse by a local authority in its office as such".

- 24 However, the Judge specifically left the door open to other actions, saying at page 235-6:

"Perhaps if a local authority declined to give consideration to a development application at all then (leaving aside questions of mandamus and rights of appeal) it could be said by its failure to discharge its duty to consider and give a decision upon it, to have committed a misfeasance, to have abused its office. So also if it deliberately passed a resolution which it knew to be invalid".

Thus, a consent authority who delays or fails to make a decision to a development application may be subject to a misfeasance action if the required elements are present.

- 25 The Privy Council dismissed the appeal from this decision. It held that, in the absence of malice, passing without knowledge of its invalidity an invalid resolution does not amount of itself to misfeasance.

Individual public officers can be liable

- 26 The action in misfeasance is available also against individuals. It has often been stated that for an individual to be liable they must hold public office or be a public officer. An example of individual liability can be seen in the decision of the Supreme Court of Victoria in *Farrington v Thomson and Bridgland* [1959] VR 286. The two individual defendants had exercised powers under the *Victorian Licensing Act 1928* to issue an order to the plaintiff to close a hotel and cease supplying liquor. The Court found that the two individual defendants knew that they did not have power to issue the order. They had intentionally purported to exercise a power which they knew that they did not have the power to issue. As a result, they each became personally liable for damages for misfeasance in their public office.

Misfeasance in Recommendations

- 27 Sometimes a public officer will not have the power or duty to act – but the obligation or ability to make a recommendation to the decision maker. Can this level of conduct attract an action for misfeasance?
- 28 This question came before the Queensland Supreme Court in 2014 and judgement was handed down into 2015 *Pro-Teeth Whitening (Aust) Pty Ltd v Commonwealth of Australia [2015] QSC 175 and as 2970 of 2013*. In that case, conduct in issuing a recommendation in favour of a compulsory recall was subject to a misfeasance action. It was alleged that the defendant had included in the recommendation which he had made information which he knew was erroneous with the intention of harming the plaintiff and intending an acceptance of the recommendation would cause harm to the plaintiff.
- 29 In defence, it was argued that the officer did not more than make an internal recommendation, report or advice. The mere making of a report was not a relevant exercise of power authority by the officer which could attract liability in damages for misfeasance.
- 30 The Queensland Judge found that the action in misfeasance is not restricted to situations involving the exercise of statutory power. The Judge pointed out that **Henly** itself was not about statutory powers but the failure to maintain the seawall in accordance with the conditions of the Grant. The Court cited this statement:

“any act or omission done or made by a public official in purported performance of the functions of office can found in action for misfeasance in public office.”

- 31 The Queensland Court noted that the House of Lords in England was also inclined to the view that acts of a council as landowner could also come within misfeasance. The Queensland Court allowed the action based on a recommendation to proceed.

The good faith defence

- 32 There are a number of statutory provisions which provide a good faith defence to councils, statutory authorities and individual officers. An example is Section 733(2) of the Local Government Act 1993 is in the following terms:

“A council does not incur any liability in respect of:

- (a) *any advice furnished in good faith by the council relating to the likelihood of any land in the coast zone being affected by a coastline hazard (as described in a manual referred to in subsection (5)(b)) or the nature or extent of any such hazard,*
- (b) *anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being so affected.”*

- 33 It is clear that these type of sections will **not** provide defence to an action in misfeasance. This interaction was considered in the Tasmanian case of *Holloway v State of Tasmania [2005] TASSC 90*. The court found that whilst the words “in good faith” are often used in statutes they are rarely defined. The Court found that the words “in good faith” at the very least required that their act or omission in question be done or made honestly. The tort of misfeasance can only be established by proving that the conduct was otherwise an honest

attempt to perform the functions of office. Such conduct could not be in good faith. It follows that if a misfeasance is established the statutory defence of good faith will be of no avail and will not be available.

Damages

- 34 The Australian courts have confirmed that exemplary damages may be awarded to punish the public officer for his misconduct, mark disapproval of the abuse of a position and to deter others from similar conduct

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October 2017