

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION:

Byron Shire Council v Vaughan, Vaughan v Byron Shire Council [2009] NSWLEC 88

PARTIES:

APPLICANT (40344 of 2009)

Byron Shire Council

RESPONDENTS (40344 of 2009)

Mr and Mrs Vaughan

FILE NUMBER(S):

40342 of 2009, 40344 of 2009

CATCHWORDS:

INJUNCTIONS AND DECLARATIONS :- exercise of discretion to issue interlocutory injunction restraining work on public and private land

LEGISLATION CITED:

Byron Shire Council Development Control Plan No 16 – Exempt and Complying Development

Conveyancing Act 1919 s 177(8)

Environmental Planning and Assessment Act 1979 s 124

Roads Act 1993

State Emergency and Rescue Management Act 1989

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

CASES CITED:

Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148

Coco v The Queen (1994) 179 CLR 427

CORAM:

Pain J

DATES OF HEARING:

27 May 2009

28 May 2009

29 May 2009

EX TEMPORE DATE:

29 May 2009

LEGAL REPRESENTATIVES

APPLICANT (40344 of 2009)
Mr I Hemmings (27 May 2009)
Mr J Robertson SC with Mr J Lazarus (28 May 2009, 29 May 2009)
SOLICITORS
HWL Ebsworth

RESPONDENTS (40344 of 2009)
Mr A Galsso SC
SOLICITOR
Mallesons Stephen Jaques

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Pain J

29 May 2009

40342 of 2009 Byron Shire Council v Vaughan
40433 of 2009 Vaughan v Byron Shire Council

EX TEMPORE JUDGMENT

1 **Her Honour:** The Council seeks an urgent interlocutory injunction restraining the Respondents, Mr and Mrs Vaughan, from undertaking work on their own land and on the Manfred Street road reserve and on Crown land adjoining the Manfred Street road reserve, lot 37 Sec 2 DP 1623 and/or lots 11-14 in Sec 3 DP 1623 at Belongil Beach which fronts the Pacific Ocean. As a result of recent wave action occasioned by storms combined with elevated ocean water levels resulting from peak spring tides and storm surge on 23 to 25 May 2009, there has been substantial erosion of the beach front of the Respondents' land. That storm surge has largely dismantled the interim sandbag wall constructed by the Council at this location so that the Respondents' property is unprotected from further wave action.

2 The work undertaken so far by the Respondents' contractor which the Council seeks to injunct is the depositing of large rocks on a road reserve in anticipation of moving these along the beach to the in front of the Respondents' land as the first step in creating a barrier to prevent further erosion of the sand dune. This was done in accordance with a written advice of Greg Alderson and Associates, engineers, dated 25 May 2009 to the Respondents which identifies interim works including that rock rip rap be placed between the geobags that remain and the escarpment as eroded on the Respondents' land and that rocks should be placed as close to the sand escarpment as possible. The advice states that these works "need to be carried out today before high tide this evening".

Council's evidence

3 The affidavit of Mr Bertram, Council officer, dated 26 May 2009 attests to the work being commenced namely the depositing of rocks (it is not disputed that the work has been done). He considers the work requires development consent, the work is not exempt and complying development under the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (the SEPP) or the *Byron Shire Council Development Control Plan No 16 – Exempt and Complying Development* (the DCP). The Council is not intending to undertake any work in the area, if at all, until its engineers have undertaken a risk assessment of the area. Mr Bertram attests that the NSW Police Force has advised by letter dated 26 May 2009 that it is not intending to issue an order under the *State Emergency and Rescue Management Act 1989*.

4 In the affidavit of Mr Bertram dated 27 May 2009 he states that no road approval under the *Roads Act 1993* has been given for work on the road reserve. The Council has a policy of planned retreat whereby in certain coastal areas the type of development is restricted within certain distances of the erosion escarpment. Development is to be relocatable so that as erosion moves landward, development can be removed, rather than development being prevented at all times. Planned retreat maximises the limited use of land until such time as coastal hazards are realised and only once land becomes too threatened by coastal processes is development meant to be removed and further use of the land for residential purposes prevented. That policy has been in place since 1988 and is found in the DCP which was adopted in its current form in 2002. There are presently discussions with state government experts in the development of a draft coastline management plan based on a planned retreat policy for Belongil Beach. This will be on public exhibition in the next few months. This evidence is relevant to where the balance of convenience in granting any injunction lies in this case.

5 In relation to the rocks already deposited on the road reserve by the Respondents' contractor, the Council is not seeking their removal as it is potentially unsafe to do so. Mr Bertram's affidavit attests to a conversation with Mr Watson, senior coastal engineer with the Coastal Unit of the NSW Department of Environment and Climate Change, who states that the placement of unengineered dumped rocks is unsafe, that such rocks are at heightened risk of displacement under wave attack, and that any rocks displaced under wave attack have the potential to create additional erosion to construct any form of erosion protection works.

6 An affidavit of Mr Watson dated 29 May 2009 was handed up in Court today which states that there is a likelihood that the Respondents' proposed works would provide significant comparable protection to the subject area but this would occur with significant environmental impacts, degradation of beach amenity and loss of public access to the beach. A continuation of rock protection structures of varying design will add to and exacerbate the existing cumulative downdrift erosion impact into unprotected properties further downdrift along Belongil Spit.

Respondents' evidence/submissions

7 The Respondents read an affidavit of Mr David O'Donnell, solicitor, dated 28 May 2009. That refers to a development consent granted by the Council to itself in 2001 which resulted in interim coastal protection works consisting of a sand bank and sandbag wall being built by the Council on the Respondents' land and adjoining land.

8 The Respondents submit that this work has since failed. The consent operates in rem and can enable the work sought to be undertaken by the Respondents to be undertaken legally. No development consent under the EP&A Act is therefore required for the proposed work to be carried out.

9 Interim coastal protection works constructed by the Council have failed in front of the Respondents' house. Photographs tendered in evidence show substantial erosion has occurred with a greater than 5m dune scarp recession in a landward direction according to Dr Goodwin, coastal geoscientist and climatologist at Macquarie University. Dr Goodwin swore an affidavit in these proceedings dated 28 May 2009. In his opinion urgent work is needed to prevent further erosion occurring and the interim geotextile bag wall as constructed failed to protect the foredune from storm water erosion on 23 May 2009. Dr Goodwin provides an explanation as to why he considers this area has suffered erosion due to end wall effects as a contiguous terminal seawall which was constructed in the 1970s ends nearby. He also considers a contributing factor is a long term sand deficit created by the interruption of natural sand transport by the Jonson Street headland structure built in the 1960s and 1970s. He considers this section of coast is misaligned and the gap in the existing terminal seawall makes it vulnerable to accelerated erosion and there is a foredune recession risk.

10 A further affidavit of Dr Goodwin dated 29 May 2009 comments on what the position would be if the Respondents could only access the dune scarp to the seaward edge of their property in order to carry out protection works across their own land. The use of heavy machinery in this area would create a moderate level of risk that further dune slumping, instability and land loss could occur. It is preferable for construction to be installed on the beachside. If interim protection works are able to be installed in front of the Respondents' property but nothing is done in relation to the beach at Manfred Street and the two lots owned by the Council adjoining the Respondents' land, then dune scarp recession along the Manfred Street frontage will continue unabated during each major storm wave/surge event, cause erosion and land loss of the Respondents' property along the eastern side of lots 11-14 and on lots 3-5 which adjoin Manfred Street and threaten the dwellings on these lots.

Respondents' summons

11 The Respondents have filed in Court today a summons which seeks orders purporting to enforce the development consent issued by the Council to itself in 2001 which included undertaking works on the Respondents' land and adjoining properties. Mandatory interlocutory relief is sought so that if the Council will not do the work the subject of the 2001 consent then the Respondents wish to undertake the work, which requires access to public land as well as the Respondents' own land. It is submitted that the Council also has a duty to abate a nuisance which it has caused on its land due to the poor construction of the sandbag wall which has now failed.

Finding

12 The initial issue that arises in relation to the Respondents' summons is whether the Court has jurisdiction to consider the summons at all as it is not immediately apparent that there is a breach of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) which can found the Court's jurisdiction under s 124 of that Act. The further issue raised by the Council in relation to the summons is that the orders sought will not enforce the development consent granted in 2001 as the work required includes work on public land. Consent under the Roads Act is required for work on the road reserve, for example, and has not been issued. In the absence of that consent the work for the Respondents' contractor is a trespass and creates a potential public nuisance. *Coco v The Queen* (1994) 179 CLR 427 per Mason CJ, Brennan, Gaudron and McHugh JJ at 437 is relied on to the effect that private rights are not abrogated by a statute unless clearly stated to do so.

13 In *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 Mason ACJ identified at 153 the issues that should be considered in deciding whether to grant an interlocutory injunction as sought by the Council or the mandatory interlocutory injunction sought by the Respondents.

14 In relation to the matters that arise in determining if the interlocutory injunction sought by the Council ought to be granted there is clearly a serious legal issue to be tried, in that there is a real legal issue which arises in relation to the Council's summons concerning the operation of the EP&A Act, meaning that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief. In relation to the Respondents' summons there are also legal issues raised, the most obvious of which initially is whether this Court has jurisdiction to entertain the orders sought in the summons or whether the appropriate remedies are common law in nature. A further issue is whether any nuisance claim can arise in light of s 177(8) of the *Conveyancing Act 1919* which abolishes claims for nuisance in relation to removal of support provided to supported land. These issues suggest that there is no legal basis on which the consent can be enforced as the Respondents seek.

15 The Council has proffered an undertaking as to damages to the Court although I note that the Respondents' view is that damages are not an adequate compensation.

16 The difficult issue to resolve is where the balance of convenience lies in this matter in terms of maintaining the status quo. The Council is seeking to enforce a public law, the EP&A Act. The Respondents argue the status quo is to allow them to erect the sandbag wall as built by the Council which previously existed on the Respondents' land. The Council argues that due to circumstances beyond the Council's control in relation to recent extreme and unpredictable weather events the situation has fundamentally altered and it does not

follow that the sandbag wall as previously constructed should be erected. The wall was constructed in accordance with the 2001 consent and has now been effectively destroyed. No further action can be taken in reliance on that development consent as the situation is now different from when the consent was granted. Further, there is likely to be environmental harm resulting if that work occurs.

17 I agree with the Council in relation to the balance of convenience. There are differing engineering views expressed in the evidence before me as to the wisdom or otherwise of causing any work to be done on the Respondents' land in conformity with the consent that existed previously. The affidavit of Mr Watson dated 28 May 2009 stresses at par 16 that to do any work in isolation on the Respondents' land will result in potentially adverse impacts elsewhere. This is in fact supported by the second affidavit of Dr Goodwin which states at par 4 that in the event that work was undertaken in front of the Respondents' land in the absence of work being done on the beach in front of neighbouring land, further damage will occur at other properties. All this evidence reinforces my view that work done in isolation on one property is likely to have adverse impacts on neighbouring properties in the immediate vicinity and more generally along the Belongil spit.

Conclusion

18 The Court finds that an injunctive order restraining work by the Second Respondent ought be made as follows:

Until further order, the Respondents by themselves, their servants or agents are restrained from carrying out, causing, suffering or permitting to be carried out development on the subject land (Lot 37 Sec 2 DP 1623, Lots 11-14 in Sec 3 DP 1623, the Manfred Street road reserve and/or Crown land adjoining the Manfred Street road reserve, Lot 37 Sec 2 DP 1623 and/or lots 11-14 in Sec 3 DP 1623) namely placement of rock or other materials to form or construct erosion protection works.

19 The Court does not consider the mandatory interlocutory injunction sought by the Respondents ought be made at present.