



NEWSLETTER

PROPERTY LAW

Landlord Blasted for Contractor's negligence with Asbestos Roof

The cavalier attitude of a landlord and its repair contractor to an asbestos cement roof in Victoria has ended up costing the landlord over \$700,000. The case was *AF Textile Printers Pty Ltd v AF Nominees Pty Ltd* [2007] VSC 73.

The landlord owned a factory building with an asbestos cement sheeting roof. The property was leased to AF Textile, which conducted a textile printing business on the premises. Both the landlord and the tenant knew about the asbestos cement sheet roofing.

The condition of the roof was apparently somewhat suspect and, as well as the usual "covenant for quiet enjoyment", the lease contained a clause requiring the landlord to "ensure that the roof ... is kept watertight at all times and will maintain the roof structure in a satisfactory condition".

Notwithstanding this, the roof leaked. In about early July 2001, shortly before the term of the lease was due to end, the landlord decided it was an appropriate time to have the roof completely overhauled and repaired, undoubtedly motivated by the tenant saying that it would not sign a new lease until the roof was fixed.

The landlord engaged a contractor to carry out roof repairs and cleaning. The roof repairer advertised itself as an expert in this work and experienced with asbestos roofs.

The contractor provided a written proposal for the work which specifically included "fully high pressure clean[ing] complete roof cover".

This work was in direct breach of the *Occupational Health & Safety (Asbestos) Regulations) 1992* (Vic).

It was accepted by the Court that neither the landlord nor the contractor told the tenant precisely what work was going to be done and, in particular, the tenant was not told that the contractor was going to use a high pressure water cleaner on the roof.

When work commenced, water running off the roof from the high pressure water cleaner caused "sludge" and asbestos debris to infiltrate the factory and damage the printing machines. The tenant requested the contractor to stop the high pressure cleaning, but the contractor refused. The contractor only ceased when a member of the public threatened to call the EPA, Worksafe and police.

After an inspection of the roof, it was recommended that due to the friability of the residue left covering the factory, decontamination works be carried out by a class A asbestos removal contractor and that normal factory operations should not recommence

until these works were completed. On 8 August 2001 Worksafe issued a prohibition notice under s.44 of the *Occupational Health and Safety Act 1995* (Vic) prohibiting all normal factory operations which could disturb asbestos containing debris within the factory. The site was reported free of asbestos on 24 January 2002.

The tenant ended up unable to use the premises for approximately 6 months. The court accepted that the tenant had lost nearly \$700,000.

As is usual in cases such as this, the tenant attacked on multiple fronts.

Firstly, the tenant argued that the landlord had breached the "covenant for quiet enjoyment" in the lease: ie, the agreement to "give the tenant quiet enjoyment of the premises without any interruption by the landlord or anyone connected with the landlord as long as the tenant does what it must under this lease".

The court found that because the landlord expressly authorised the high pressure cleaning, the

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landlord caused the breach, even though its contractor carried out the work. In these circumstances (particularly where the landlord knew the roof was asbestos), the consequences of the high pressure cleaning were foreseeable. The court held that the landlord had breached the covenant for quiet enjoyment.

Secondly, the tenant alleged a breach of the roof covenant. This claim was also made out, given the covenant required the landlord to 'ensure' the roof was kept watertight at all times. The court found that the word 'ensure' gave rise to an absolute obligation on the landlord which it breached by engaging the contractor to carry out the high pressure cleaning.

Thirdly, the tenant brought a claim under the law of negligence. Whilst the court did not need to consider it, it also found that the landlord was liable under the law of negligence, although it would have reduced the damages recoverable under the law of negligence by 50%, on the basis of the tenant's contributory negligence through a failure to take an interest in the extent and nature of the work to be performed and to take reasonable care at the time to protect its property and business. Nonetheless, this ended up as not being relevant, because the court allowed full recovery of the tenant's losses under the claims for breaches of the terms of the lease.

Perils in Buying from Councils

A recent decision of the Land and Environment Court of NSW highlights a danger peculiar to buying from councils and potentially other authorities.

In *F & D Bonaccorso Pty Ltd v City of Canada Bay City Council* [2007] NSWLEC 159, despite the long-standing principle of

"indefeasibility" of the title of the registered proprietor of land conferred by the *Real Property Act 1900 (NSW) (RPA)*, the Court ordered rectification of the title register, following the unlawful sale by Council of a public reserve in breach of the *Local Government Act 1993 (NSW) (LGA)*. The purchaser ended up losing the land it had bought and paid for.

The case arose from a dispute over the validity of a sale by the Council to a developer of two adjoining lots, known as Chapman Reserve. This is an area of open space that was, before the commencement of the LGA, a public park. However, when the LGA came into force in 1994, the Council purported to exercise rights provided by savings and transitional provisions in the LGA to classify the Chapman Reserve as "operational land". Unlike land classified as "community land", the LGA permits land classified as operational land to be sold. Classification as operational land, however, was not possible under those savings and transitional provisions, where the relevant land comprised a "public reserve" or was otherwise designated as open space.

Although the proceedings were commenced before the sale of Chapman Reserve was completed, the completion of the transfer was finalised before the hearing of the matter. Once the transfer was completed, notwithstanding that the Court proceedings were then on foot, the new owner had the transfer stamped and registered. The Court observed that the registration of the transfer was presumably an attempt by the new owner of the land to gain the protection of the principle of indefeasibility of title.

The Court found that at the time of the purported classification, Chapman Reserve was in fact a public reserve and that accordingly

the resolution of the Council was ineffective, so that Chapman Reserve remained community land at the time of its sale.

The Court held that the Council's breach of its obligations under the LGA gave rise to circumstances which formed an exception to the principle of indefeasibility. In exercise of the discretion conferred on the Court by the RPA, Biscoe J ordered that the Register under the RPA be rectified to show the Council as the registered proprietor of Chapman Reserve. The decision of Biscoe J is now on appeal to the NSW Court of Appeal, with the appeal presently scheduled to heard on 26 September.

The case illustrates a specific risk of buying land from councils and emphasises the importance in such cases of checking that the land has been properly classified as operational. More generally, the case also highlights the fact that exceptions to the general principle of indefeasibility of the title conferred by the Register may occur, based on statutes other than the RPA. As a general matter, in purchases of land from public authorities, the purchaser's due diligence should extend to a proper (and not superficial) review of the authority's power to sell the land, in the context of any statutory limitations imposed.

New Contaminated Groundwater Guidelines in NSW

The NSW Department of Environment and Climate Change (**DECC**) has recently released guidelines for the assessment and management of groundwater contamination. Under the *Contaminated Land Management*

Act 1979 (NSW) (CLM Act) DECC must take these guidelines into consideration in exercising its functions, whenever the guidelines are relevant. Similarly accredited site auditors must also consider the guidelines.

Accordingly, the new guidelines are likely to be central to any decisions on whether groundwater needs to be remediated and, if so, how it is to be done.

The guidelines deal with how to assess groundwater contamination, manage it (including identifying what remediation is needed) and clean it up.

Interesting aspects of the new guidelines include the following:

- Acute risks (such as the possible accumulation of explosive vapours in subsurface utilities), must be immediately managed.
- Whilst ideally, contaminated groundwater should be restored as much as practicable to its natural background quality, the guidelines recognise that in practice, cleaning up to this level can be technically difficult and extremely costly. The guidelines recognise that where it is not practicable to restore background quality, an “interim” clean-up goal can be based on protecting environmental values and preventing potential risks to human and ecological health. Whilst the long term remedial objective should remain restoring water quality to its natural background state, it may well be that this can be achieved by natural attenuation (natural reduction in the contamination over time), without further intervention, other than monitoring.
- Sometimes, monitored natural attenuation, without any active intervention, can be an acceptable remediation strategy.

- In deciding whether to accept limited clean-up (ie where the proponent is arguing more extensive clean-up is impracticable), DECC will look at factors such as technical capability to achieve the clean-up, clean-up costs, the value of the groundwater resource and the threats the contamination poses to human or ecological health. Proposed clean-up measures should correlate with the value of the groundwater resource and the severity of the contamination. Generally in such cases, DECC envisages that the proponent would retain responsibility for ongoing management of the residual contamination and that the possibility of further cleaning up should be periodically reassessed to account for emerging technologies.

Do you really need to submit an SEE with your DA? Cranky complainants learn the hard way ...

It is a well known requirement of the NSW Environmental Planning and Assessment Regulations 2000 (**Regulations**) that a development application (**DA**) for development that is not designated must be accompanied by a Statement of Environmental Effects (**SEE**). Despite this requirement, however, the Court of Appeal recently held in *Cranky Rock Road Action Group v Cowra Shire Council* [2006] NSWCA 339 that the failure to include an SEE with a DA will not necessarily invalidate it.

The case involved a DA for the subdivision of sizeable tract of land in Canowindra, to which the Council had granted consent. The Cranky Rock Road Action Group challenged the consent, on the ground that the DA was not accompanied by an SEE.

The Court held that the structure of the *Environmental Planning and Assessment Act 1979 (NSW) (EPA Act)* and the Regulations drew a distinction between DAs for development that was designated or likely to have significant environmental effect on the one hand, and non-designated development on the other. While the requirements for an EIS or SIS to accompany a designated development DA are set out in the EPA Act itself, the obligation to provide an SEE for non-designated development is set out only in the Regulations.

Although the Court acknowledged that an applicant who fails to comply with the obligation to provide an SEE runs the risk that the Council may choose to reject the DA outright or delay the process by requesting more information, the Court ultimately did not consider that the legislation intended to invalidate a DA lodged without an SEE or any other document that was required by the Regulations to accompany a DA for non-designated development.



Rights of way providing access to several properties: the importance of careful drafting

The decision of the NSW Court of Appeal in *Perpetual Trustee Company Limited v Westfield Management Limited* [2006] NSWCA 337 highlights the importance of properly recording the intentions of the parties when drafting an easement.

The proceedings centred on a vehicle right of way easement between the Skygarden and Glasshouse buildings in Sydney, and whether the right of way extended to allow vehicles delivering goods to the Skygarden to pass through the Glasshouse to the adjoining properties, the Imperial Arcade and Centrepoint.

Perpetual owned the Glasshouse, which was subject to an easement in favour of the Skygarden, owned by Westfield. The easement allowed the owner of the Skygarden and every person authorised by it to access Skygarden across the Glasshouse. Westfield also owned the two adjoining properties, Imperial Arcade and Centrepoint. At the time the easement was granted, there was evidence that the then owner of the Glasshouse was amenable to using the easement to allow access to the Imperial Arcade and Centrepoint.

In the first instance, Westfield was successful in seeking a declaration that the right of way extended to permit them to authorise people to use the right of way to access Skygarden and then proceed to the Imperial Arcade and Centrepoint.

Unfortunately for Westfield, the Court of Appeal did not agree with the primary judge's findings. On appeal, the Court found that the easement did not extend to permit Westfield to authorise persons with vehicles to use the right of way to access Skygarden and then proceed to the other properties. Perpetual were successful in arguing that the primary judge had incorrectly considered the purpose of the structures on the properties rather than the purpose of the easement. The Court of Appeal held that in construing an easement, the facts and circumstances commonly understood and/or communicated between the parties are the key ingredients when determining the proper construction of an easement. It is not sufficient to look at the subjective intention of a party.

The Court considered an extensive list of cases and found that the real question in this case was whether the parties intended for there to be access to a remoter property (i.e. Imperial Arcade and Centrepoint). The Court rejected Westfield's arguments that there was an objective intention towards this goal. The Court found that there was nothing in the wording of the easement that indicated that the easement could be used to benefit remoter premises. Whilst the easement did not strictly prohibit

access to remoter premises, if it had been intended that others should have access across the servient (Glasshouse) and dominant (Skygarden) tenements, then the terms of the easement could easily have included words such as "and across".

The decision highlights the importance of drafting an easement so that it correctly records the common intention of the parties, and does not just adopt standard easement language.

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