INJUNCTION — INVALIDITY OF DEVELOPMENT CONSENT AND WATER PERMIT*

Donnelly and Anor v Capricornia Prospecting Pty Ltd & Ors
Land and Environment Court of New South Wales [2001] NSWLEC 225, 21 September 2001

Facts

This case involves an Aboriginal group's challenge to the pumping of water from Nelsons Creek to the site of the Timbarra Gold Mine for use in the processing of gold at Timbarra Plateau. The Applicants (who are Native Title Claimants to land and waters on Timbarra plateau representing the Wahlabul/Malerah Bundjalung Aborigines) submitted that the extraction of water from the creek is not permissible on the basis that:

(a) Development Consent granted by Tenterfield Shire Council (fourth Respondent) was invalid under the *Environmental Planning and Assessment Act* 1979 as unamended prior to 1 July 1998 (*EP&A Act*) and the Tenterfield Local Environmental Plan 1996 (LEP);

(b) the Water Permits under *Water Act* 1912 granted by the Water Administration Ministerial Corporation (fifth Respondent) were invalid;

(c) the proposed Water Licence was invalid under the *Water Act*;

(d) in the alternative, that there were breaches of conditions imposed by the grant of Development Consent and Water Permits; and

(e) a breach of the *National Parks and Wildlife Act* 1974 (*NP&W Act*).

They sought declaratory and mandatory injunctive relief against first to third Respondents who have benefited from the development consent and Water Permits, namely Capricornia Prospecting Pty Ltd, Ross Mining NL and Timbarra Gold Mines Pty Ltd, in the NSW Land and Environment Court.

The Decision

In this decision, Bignold J found that the duty imposed by Section 90(1) of the *EP&A Act* was not fulfilled by the fourth respondent, who failed to consider the impact of pumping water from the creek on the threatened species of frogs. Section 90(1) provides that a determining authority must consider the impact of the development on the environment and the effect on threatened species, populations or ecological communities or their habitats. The development consent was declared invalid due to the breach of this Act. The Water Permits were invalid under section 22BA (5) of the *Water Act* because the Section 22BA Order exceptions did not apply. Prohibitory and mandatory injunctions were granted as consequential relief flowing from the declaratory relief.

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The Reasoning

Validity of the Development Consent

The Applicants argued that the Development Consent was invalid because it was not supported by Species impact Statement as required by the *EP&A Act* section 77 (3)(d1) and manifestly unreasonable in terms of consideration required by *EP&A Act* sections 90(1)(a), (b), (c3) and (n). The fourth Respondent gave permission for laying the pipeline and construction of the pump rather than consent to pump water from the creek. Although the Development Application was made for the entire work, the approval given was limited to the infrastructure and expressly excluding the pump and water extraction.

As it was clear that the impact upon the threatened frog species of pumping water from Nelson Creek was not considered, Bignold J examined whether the fourth Respondent had fulfilled its duty in terms of *EP&A Act* section 90(1). Any considerations given to the impact of the development were clearly confined to the impact of the infrastructure and excluded effects on the threatened species of frogs. The fourth Respondent had understood that it was the separate responsibility of the Department of Land and Water Conservation to make that particular environmental assessment.

Bignold J dismissed the submission that the fourth Respondent did not have power to grant the Development consent, as he found it was "development of land". Accordingly, a development consent was required for the installation of the pump and extraction of water.

The principle of *Mison v Randwick City Council*[1] that the condition imposed altered the development consent so significantly that the consent is not a consent, can only be avoided if the development is staged development under Section 91AB. Bignold J found no documentary evidence to support that the fourth Respondent was exercising this power. Even if it was a staged development, the duty imposed by Section 90(1) still applies. The failure to consider the environmental impact on the threatened species constituted a material breach of Section 90(1) and as a result the development consent was invalid.

The Applicants submitted the development application was invalid because it was not with "*owner's consent*", as required by the *EP&A Act*, section 77(1)(b). This ground was not substantiated, as the lessee had given his consent as well as the Minister. A further submission made by the Applicants was invalidity because consent was granted in breach of Clause 9(3) of the LEP. However, it was held that the consent was not inconsistent with the objectives of the LEP.

Validity of the Water Permits

It was submitted by the Applicants that section 22BA of the *Water Act* renders the application for the Water Permits invalid. The first Water Permit could only be given under section 18G of the *Water Act*. The presumption that the Permit was regularly granted was displaced due to evidence to the contrary. The identity of the person eligible for such a permit is the "*occupier*" of that land, contrasted with the wider entitlement of a water licence. The leaseholder did not make the

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1 (1991) 23 NSWLR 734.

application for the Permit and the evidence did not indicate that his consent was given. As the second Respondent was not entitled to make the application, the Water Permit was invalid.

The section 22BA Order exception, relating to entitlement for purposes "*where annual water use will not exceed 5 megalitres per year*" did not apply because there was nothing in the terms of the Permit which limits the quantity of water use. The Respondents submitted that the Order did not apply because the Permit was validly granted in that it "*would merely replace an existing entitlement*" (section 22BA(4) of the *Water Act*). Although the existing Water Licence was within the meaning of an "*existing entitlement*", there was no evidence to suggest that the Permit was an entitlement that would replace the existing Licence. The first Respondent was the holder of the existing licence rather than the second Respondent and this lack of identicality supported the invalidity of the permit under Section 22BA.

Also in dispute was whether the section 22BA Order applied to the application of the second Water Permit. The meaning of section 22BA(4) was contested as applying to "*part replacement*" of the existing entitlement. However, in the opinion of Bignold J, the plain and unambiguous meaning in the context of section 22BA, is that the new entitlement must wholly replace the existing entitlement. Based on this interpretation, this Water Permit was also invalid.

It was found that the declarations that both Permits were invalid was justiciable in this Court under section 235 of the *Protection of the Environment Operations Act 1997* (*PEO Act*) in that these breaches of the *Water Act* "*are causing or likely to cause harm to the environment*".

Validity of the Proposed Water Licence

The validity of the proposed Water Licence was not determined in this decision; as Bignold J found it more appropriate for this application to be dealt with the Class 3 proceedings in which the fifth Respondent participated.

Breaches of Conditions of Development Consent and/or Water Permit

There can be in law no breach of conditions of the Development Consent and Water Permits as they were found to be invalid. Nevertheless, Bignold J considered the claims by the Applicants. The allegations of a breach of Condition 1, Condition 3 and Condition 7 of the Development Consent was not substantiated. Although there was evidence that indicated the infrastructure had been installed before the Water Permit was granted, considerable doubt about the evidence meant that a breach of Condition 2 was not established.

The obligation imposed by Condition 6 was that an assessment be prepared of Aboriginal heritage values "*in consultation with the Aboriginal community*". Whether or not adequate consultation was undertaken, as a copy of the report was not provided to National Parks and Wildlife Service before the site was disturbed, there would have been a technical breach of this requirement.

Condition 7 of the Water Permit Conditions required notice to be given to the National Parks and Wildlife Service by the Respondents. This condition was satisfied even though the work did not cease, because the Respondents notified the Service. Therefore the breach of this Condition and Condition 8 of the Water Permit were not substantiated by the Applicants.

Breach of *NP&W Act*

There was insufficient evidence that there was "*harm*" to a threatened species under Section 118A(1) of the *NP&W Act* for declaratory relief to be granted.

Relief Granted

Declarations were made that the Development Consent and Water Permits were invalid. Also, consequential relief in the form of prohibitory and mandatory injunctions was granted which restrained the water pumping and required the removal of the pump and pipeline infrastructure and the rehabilitation or restoration of the land.

It should be noted that by the time this judgement was delivered, the Water Permits had expired and the Development Consent was not being acted upon because pumping of water from Nelsons Creek to the Timbarra Gold Mine had ceased (in June 2000). But it was considered appropriate to grant the above relief given that the Respondents vigorously defended the proceedings.

NSW COAL COMPENSATION REVIEW TRIBUNAL DECISION — CONSEQUENTIAL LOSS FOR CAPITAL GAINS TAX*

Inglebrae Coal Pty Limited v Coal Compensation Board CCRT 2001/19

In the appeal by Inglebrae Coal Pty Limited against the determination of the Coal Compensation Board, the Tribunal considered whether a claim for consequential loss of capital gains tax (CGT) should be allowed pursuant to Clause 7 of the Coal Acquisition (Re-acquisition Arrangements) Order 1997. The Board had found that Inglebrae's liability to pay CGT was not within the meaning of a consequential loss, as it was a tax to be paid on the profit component of the compensation on realisation of an asset. The Tribunal did not agree that the decision by Mrs Reynolds, the previous owner of the coal, to transfer the assets to Inglebrae was directly attributable to liability to pay CGT. The Tribunal found it was the act of compulsory acquisition which caused the liability for CGT to arise. As this additional taxation did not arise until after the compulsory re-acquisition, it was consequential pecuniary loss attributable to the operation of section 5A of the *Coal Acquisition Act*.

The meaning of "directly attributable" is described in *Coal Compensation Board v NSW Coal Compensation Review Tribunal and Bloomfield Colleries Pty Limited* NSW Court of Appeal as "a causal connection but this need not be the sole or even dominant cause". According to the Tribunal, Clause 7 applies because there is a direct causal link between the compulsory acquisition of the asset and liability for CGT. In the Tribunal's view, although taxation arising from the compensation was dealt with under Clause 6, the CGT is a separate and substantial form of further taxation. Inglebrae was deprived of any opportunity to negotiate the value of its asset when the coal vested in the Crown, therefore in accordance with the intention of the legislation, the amount of compensation for loss of future income should not be substantially reduced. In the meaning of

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