DISCRETION - PRIVATE INTERESTS AND PUBLIC LAW
or
WHAT IS THIS THING CALLED DISCRETION?

*The Hon Justice Paul L Stein AM**

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When we think about discretion in legal decisions ...[1] Well, the fact is that we do not think about it overly much. It is too confronting. If we do, we may have to admit that the yearned-for objectivity is not, on many occasions, fulfilled. Facing the reality of discretionary legal decision-making challenges the pretence that we use rules to ensure that discretionary decisions are objective.

I was struck when I read a paper delivered to the last NSW Supreme Court Annual Conference by Professor David Wood. Discussing the role of judicial officers he said:

> Above all, it is required that judges be utterly impartial. They must be able to apply the law to the facts irrespective of their own personal beliefs and values. Of course, they have their own views on the matters before them - there would be something amiss if they did not. Judges are quite properly expected to be independently-minded and knowledgable about their society. What is of the utmost importance, however, is that they possess the temperament and strength of character to exclude, as far as possible, the influence of their own personal beliefs and values in their judgments and decisions. Judges are, quite simply, to apply the law, not their own values.[2]

This is all very well but when discretionary judgment comes into play, even with all of the integrity in the world, the going gets tough.

I am indebted to one of your members, Dr Steven Churches, for drawing my attention to a refreshing and illuminating article by Professor Steve Wexler - "*Discretion: the Unacknowledged Side of Law*" in the *Toronto Law Journal*.[3] Written over 20 years ago, it still resonates today. Part of his thesis is that you can make as many rules as you like, but you can never completely eliminate the subjective element. Wexler suggests that we would be far better off, and so would the litigants, if we stopped kidding ourselves and faced reality. Only then can we devise rules which will truly make discretionary decisions less subjective, and train lawyers and decision-makers in discretionary decision-making. Assuming that there are such things as right and wrong answers,[4] we should endeavour to make right ones more often. But in approaching the exercise of judicial discretion we should not retreat from reality into a fantasy world constructed of words and rules.

With this acknowledgment in mind I will turn to the exercise of discretion in public law to grant or withhold relief where private rights or interests are invariably involved. This judicial balancing act is nowhere more apparent than in environmental law. To keep tonight's topic within manageable proportions, I will deal, almost exclusively, with the discretion to grant third party applications.

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The nature of the discretion

The context of the exercise of discretion is important. Both New South Wales and Queensland have open standing provisions in their environmental law. Section 124 of the *Environmental Planning and Assessment Act 1979* ("EPA Act") provides that where a breach is proven or will, unless restrained, be committed, the court "may make such order as it thinks fit to remedy or restrain the breach". This inevitably leads to discretionary balancing acts.

It may be observed that there is not a great deal of difference between the discretion under section 124 and the scope of the discretion exercised pre-1979 in the equitable jurisdiction of the NSW Supreme Court. The existence of open standing and the concomitant development of environmental law has nonetheless highlighted the issue. The fact of the matter is that the Land and Environment Court is asked to exercise its discretion to withhold or grant relief on an almost daily basis.

The width of the discretion and its exercise is amply demonstrated by Street CJ in *Hannan v Electricity Commission of NSW [No 3]*.[5]

> The width of the powers and jurisdiction of the Land and Environment Court is apparent from the legislative provisions that I have mentioned. These need no elaboration. Likewise it is apparent that the court enjoys a wide discretionary range within which to consider the formulation of orders or to remedy or restrain breaches of the planning legislation. It by no means follows that the mere demonstration of a right that a party would be entitled to expect to have enforced by the ordinary civil courts will be afforded equivalent enforcement by the Land and Environment Court. It is the duty of that Court, in formulating "such order as it thinks fit", to have regard at all times to the pursuit of the objects of the *Environmental Planning and Assessment Act* as set out in s 5. This involves, in appropriate cases, the evaluation of matters extending beyond the mere determination of the rights and matters in dispute between the immediate parties. It involves due weight being given to the public interest and the interests of other affected persons in the overall context of the pursuit of the objects broadly set out in s 5. It is at this point that I revert to s 123 of the *Environmental Planning and Assessment Act*. Subsection (1) of that section provides:
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> > (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
>
> This provision read in the context of the objects of the Act as set down in s 5 makes it apparent that the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice *inter partes*. Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having a sufficient interest in the matters sought to be litigated. It is open to *any* person to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court. The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all of the factors falling within the purview of the dispute.

The existence of the discretion had been acknowledged, at least since 1963, see *Cooney v Ku-ring-gai MC*.[6] In *Blacktown MC v Friend*[7] Mahoney J (as he then was) confirmed the existence of a general discretion unfettered by any principle limiting it to special cases. His Honour also said that it was undesirable to attempt to delineate the matters relevant to the exercise of the court's discretion.

A decade later, Wilson and Dawson JJ in *Norbis v Norbis*[8] reminded us that the genius of the common law was to be found in its case-by-case approach. They stated:

> [accumulated wisdom] ... does not lie in the abstract formulation of principles or guidelines designed to constrain judicial

> discretion within a predetermined framework ...

Sedevcic

Nonetheless, and partly because of the frequency of the discretion's exercise, the temptation was difficult to resist: *Warringah v Sedevcic*.[9] The judgment of Kirby P on discretion (at 339-340) has become required reading, not the least for judges of the NSW Land and Environment Court and the comparable courts in Queensland and South Australia. Keeping in mind the "salutary warning" of *Blacktown v Friend*,[10] the President set out some guidelines to the exercise of the discretion. It is instructive to examine them.

Having noted the undoubted width of the discretion (see for example *Associated Minerals Consolidated Ltd v Wyong SC*)[11] Kirby P reiterated that the discretion was not limited to special cases as had been outlined in *Friend*. Thereafter, he noted that a purely technical breach, which would be unnoticed other than by a person well versed in the law, was a relevant factor, *Parramatta CC v R A Motors Pty Ltd*.[12] Fairly obviously, delay by a claimant would be a material consideration. Any adverse effect of the breach on the environment or an amenity would also be relevant. In addition, the converse - that the breach may have actually had a beneficial effect.

The President made the important comment that the restraint sought was not the enforcement of a private right.[13] Rather it was the enforcement of a public duty imposed by an Act of Parliament. The Parliament had expressed itself on the public interest in the orderly development and use of land and the environment, *Attorney-General v BP (Australia) Ltd*.[14] The open standing provision in section 123 of the EPA Act was indicative of a legislative purpose of upholding the law.

Kirby P added:

> Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid.[15]

and:

> ... the obvious intention of the Act is that, normally, those concerned in development and use of the environment will comply with the terms of the legislation. Otherwise, if unlawful exceptions and exemptions became a frequent occurrence, condoned by the exercise of the discretion under s 124, the equal and orderly enforcement of the Act could be undermined. A sense of inequity could then be felt by those who complied with the requirements of the Act or who failed to secure the favourable exercise of the discretion in s 124.[16]

Where the enforcement action is by the Attorney-General or a local authority, a court may be less likely to deny relief than in private litigation between citizens: *Associated Minerals*. See also *Rowley v NSW Leather Trading Co*.[17]

Another "guideline" was whether the relief was sought in respect of a "static" development such as an erection of a building. If the breach could only be cured by excessive cost and inconvenience, the discretion may be more easily exercised than when there is a continuing breach which could be modified to bring it into compliance. But, as the President acknowledged, this was really no more than a reflection of the need to balance the public interest in equal compliance with the law and the degree of irremediability and expense of the law's enforcement. It was not a hard and fast exception.

Lastly, Kirby P adopted Menzies J's description of the wide discretion as "an adequate safeguard against abuse of a salutary procedure"[18] (see *Cooney v Kuring-gai MC*) by noting that the court could soften the relief so as not to produce an unjust result in a particular case. This could be done by postponing the effect of injunctive relief. His Honour returned to this "mollifying" aspect of the discretion in

Fatsel Pty Ltd v ACR Trading Pty Ltd [No. 3].[19]

He said:

> It permits, in appropriate cases, the refusal of injunctive relief where to grant such relief would work such an injustice as to be disproportionate to the ends secured by enforcement of the legislation including by injunction.

It is important to stress, as did Kirby P, that the so-called "guidelines" are no more than indicators or parameters. Indeed, subject to establishing some relevance to the subject matter, it may be fair to say that almost any circumstance may be a discretionary factor. The question, of course, is the weight to give to each factor and the balancing of all of the relevant considerations.

Identity and interest of applicant for relief

The identity and motive of the moving party may be relevant. It seems, however, that with the introduction of liberal standing provisions the identity of the applicant assumes less significance, since the court is focussing primarily on the breach and its consequences. The applicant, of course, may have no motive other than to see that the law is observed. The primacy given to the Attorney-General or local authority seeking enforcement also appears to have diminished. Nonetheless, there is still a distinction between a private litigant seeking to enforce a public right and the role of a public authority. However, the width of the discretion to withhold relief is still available, except that a court may be less likely to deny relief at the suit of an agency, *Sedevcic* at 340 and see also *NRMCA (Q) v Andrews* in the Queensland Court of Appeal.[20]

There are, naturally, circumstances where the relationship of the applicant to the respondent developer will be relevant. For example, when the claimant is a business competitor of the developer who is in receipt of the "consent" from the public agency. There may be circumstances where the litigation is brought for an ulterior commercial purpose. But even where this is not the situation, the fact that the applicant is a business competitor and stands to benefit from the litigation is a relevant factor. See *R v Monopolies and Mergers Commission, ex parte Argyle Group Inc.*[21] and *Waiheke Shipping Co Ltd v Auckland RC*[22] quoted by Gillian Macmillan in *Judicial Review, Competitors, and the Court's Discretion to Withhold a Remedy.*[23]

Conduct of the developer

By the same token the conduct of the developer may be relevant. Has it been the "innocent" party standing by while the decision-maker fumbled the ball? On the other hand, did the developer commit or contribute to the wrong-doing by its conduct or representations to the decision maker or collude in the unlawful decision. In other words, was the developer blameless?

Delay

Delay is pre-eminently a discretionary factor. Most environmental judicial review is time-limited, eg. section 104A EPA Act which prescribes a period of 3 months after publication of a consent to bring a challenge to validity (likewise section 35A for challenges to the validity of planning instruments). However, if the claimant is alleging a breach of consent, or development without consent, there is not time limitation.

Unreasonable delay has been held to be a significant factor in the refusal of relief. An example is *Liverpool CC v RTA.*[24] Cripps J found that the applicant council had established that the environmental impact statement ("EIS") for the M2 (tollway) had breached the law. However, he refused relief partly because, given the circumstances, there was no utility in doing so. His Honour found that the delay by the

applicant council in formulating its claim was not satisfactorily explained and was not the result of any conduct by the Road and Traffic Authority. Moreover, the council knew of the agency's proposals, knew the work was going ahead and that there was no supplementary EIS. Not only did it stand by, but it also conducted itself in such a fashion as to lead to the conclusion that it did not regard the breach as a matter of importance.[25]

Where undue delay is coupled with prejudice, it is likely to be an important discretionary factor to weigh in the balance, see for example *Auckland Casino Ltd v Casino Control Authority*[26] and the cases cited by Macmillan.[27]

Hardship and prejudice to the developer

Hardship to the respondent if the relief is granted is often relied on as a discretionary factor. The extent to which hardship will be a significant factor to be weighed in the balance will depend upon the particular circumstances. For example, the extent to which the hardship of the developer was contributed to by its own actions will be relevant. Another situation to be assessed is where the developer, in the face of the challenge, deliberately decides to incur expenditure on the project. In such circumstances a court may determine that it has proceeded at its own risk and be justified in disregarding or downplaying any resulting prejudice. Steps taken in reliance on the decision prior to any notice of the challenge can of course be relied on. An example of the former is *Wilson v Iron Gates Pty Ltd.*[28] In this matter a developer had built an access road to a subdivision in a position contrary to that required by the consent. It had spent $700,000 on the road which was 75-80% complete with only 6 weeks' construction left. However, the developer carried out the construction after the litigation had been commenced and at a time when it knew of the applicant's case. Nonetheless, it elected to continue and bear the risk of an adverse result in the litigation. This significantly diminished the degree of hardship *caused* by the grant of relief. Once the hardship is assessed it is of course necessary to weigh it in the balance of discretionary factors.

The public interest factor

The *public interest* in the obedience to law is an important discretionary factor. As Kirby P said in *Sedevcic*, it was the obvious intention of the Parliament that developers (including, if I may say, state agencies and local authorities) will comply with the law. If breaches of the law are frequently condoned by the exercise of the discretion, the law is undermined. This, in turn, will lead to a sense of inequity by those who have complied or who have failed to secure an exercise of discretion in their favour.[29] In assessing the importance to be attached to the public interest, the conduct of the developer may be relevant. If the breach is flagrant - a deliberate flouting of the law - the public interest in securing obedience to the rule of law may assume a greater importance. This may be particularly so where the development is the subject of high public controversy. The impact of the breach on the environment, and its remediability, will be an important factor particularly if the breach is a substantial one.

On the other hand, if harm to the environment is absent or minimal, the development is supported by the community and of long standing, the breach may be overlooked. This may be especially so if the breach is a mere technical one.

Concluding comments

This brief review suggests some of the key factors to be accounted for in the exercise of the discretion. It is apparent that the extent of the breach (and its remediability) weighed against the prejudice and hardship to the respondent, are significant factors. Of more importance in some cases, is the overarching public interest in the obedience to laws which affect the public generally

and impose duties. In determining the appropriate order to make, the court *may* need to look beyond the immediate interests of the parties to the litigation. However, it must be stressed once again, as have Justices Mahoney and Kirby, that it is undesirable to draw upon past decisions, even in similar factual contexts, to attempt to catalogue all of the circumstances which will allow the discretion to be exercised, given its width and unfettered nature. As Kirby P said in *Sodovcic*, "[the discretion] should not be unduly circumscribed by a gloss of cases".[30]

However, if I may return to where I started. In my opinion, we should accept that with the best will in the world, judges of the highest integrity will (even unconsciously) allow subjectivity to enter into the balancing act. Once we acknowledge this, we will be better able to make more just discretionary and more consistently "right" decisions.

Endnotes

1 Coke defined discretion in *Rooke's* case in 1598 as 'a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.'
2 *Judges and Community Involvement*, paper delivered to the Supreme Court of New South Wales Annual Conference, 13-14 June 1997.
3 (1975) 25 *University of Toronto Law Journal* 120.
4 de Smith, *Judicial Review of Administrative Action* 4th Ed 278 acknowledges that to say someone has a discretion presupposes that there is n uniquely right answer.
5 (1985) 66 LGRA 306 and 313.
6 (1964) 114 CLR 582.
7 (1974) 29 LGRA 192 at 197.
8 (1986) 161 CLR 513 at 533.
9 (1987) 10 NSWLR 335.
10 *Sedevcic* at 339E.
11 (1974) 2 NSWLR 681.
12 (1986) 59 LGRA 121.
13 *Sedevcic* at 339G.
14 (1964) 83 WN (Pt 1) NSW 80.
15 *Sodovcic* at 340B.
16 *Sedevcic* at 340C-D.
17 (1980) 46 LGRA 250.
18 *Sedevcic* at 341A.
19 (1987) 64 LGRA 127 at 192.
20 (1992) 75 LGRA 64 at 69.
21 (1986) 1 WLR 763 (C.A.)
22 Unreported High Court of New Zealand 14 October 1991 Wylie J.
23 1995 NZLR 192 at 211-212.
24 (1991) 74 LGRA 265.
25 *RTA* at 279.
26 (1995) 1 NZLR 142 (CA).
27 Macmillan, Gillian, *Judicial Review, Competitors, and the Court's Discretion to Withhold a Remedy*, [1995] NZLR 192.
28 Unreported Land and Environment Court 2 December 1996.
29 *Sedevcic* at 340D.
30 *Sedevcic* at 342C-D.