fiduciary duty is not one of them. Furthermore, restitution based liability allows a defence to a bona fide purchaser for value without notice and the related parties fell into this category.

Liability under the Second Limb of *Barnes v Addy*

The court also considered the second limb of *Barnes v Addy* which renders a defendant liable for knowingly assisting a trustee or fiduciary in a dishonest and fraudulent design. The court, however, drew a distinction with respect to the requisite type of knowledge stating that the law in Australia should follow the decision in *Consul Developments Pty Ltd v DPC Estates Pty Ltd*[2] which did not see constructive knowledge as sufficient for the second limb of *Barnes v Addy*.

Consul supports the proposition that 'actual knowledge', 'wilfully shutting ones eyes to the obvious', 'wilfully and recklessly failing to make such inquires as an honest and reasonable man would make'and 'knowledge of circumstances which would indicate to an honest and reasonable man' are sufficient to meet the requirement of knowledge in *Barnes v Addy*. However 'knowledge of circumstances which would put an honest and reasonable man on inquiry' is not.

Furthermore *Consul* established for Australia that 'dishonest and fraudulent design' can include not only breaches of trust but also breaches of fiduciary duty however any such breaches must be dishonest and fraudulent. The related parties in this case had no 'actual knowledge of the essential facts which constitute the breach' and hence were not liable under the second limb of *Barnes v Addy*.

Indefeasibility

Finally the court also stated that the properties of the related parties were protected by s 42(1) of the *Real Property Act* which grants indefeasibility to those registered on title. The fraud exception of s 42(1) did not apply in the present circumstances as the non-disclosure could not be described as 'actual fraud' amounting to moral turpitude as required by s 42(1). The related parties were not primary wrong doers and the court held that the fraud exception does not apply to a party who merely had notice of an earlier interest or notice of third party fraud. Hence the registered proprietors prevail over Say-Dee.

NEW SOUTH WALES

ANVIL HILL COAL PROJECT APPROVED BY NSW PLANNING MINISTER*

Introduction

Since the landmark decision of the NSW Land and Environment Court in November 2006 requiring the environmental assessment of this proposed mine to consider the impact of downstream greenhouse gas (GHG) emissions),[1] the decision of the Minister for Planning on whether the project should proceed has been eagerly awaited.

The Minister approved the Anvil Hill Coal Project (the Project) on 7 June 2007, subject to conditions. The methodology of the assessment conducted for the Minister, and the conditions which have been imposed on the approval (including requiring the mine to purchase a large

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2 (1975) 132 CLR 373.

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1 *Gray v Minister for Planning & Ors* [2006] NSW LEC 720. This case was reported at (2007) 26 AURELJ 92.

number of affected properties), may become benchmarks for future mining approvals with a comparable level of impact.

Background

The Project comprises an open cut mine near Wybong in the upper Hunter Valley in New South Wales, proposing to extract up to 150 million tonnes of coal over a 21-year period for both domestic electricity generation and export markets.

The Project was the subject of an application for project approval under Pt 3A of the *Environmental Planning & Assessment Act 1979* (NSW) (EP&A Act). An environmental assessment was prepared and exhibited from August to October 2006.

An environmentalist successfully challenged a step in the assessment process, satisfying the NSW Land and Environment Court that the environmental assessment was defective because it did not contain a detailed assessment of scope 3 emissions, namely an assessment of the GHG emissions produced by the combustion of the coal. The court held that the environmental assessment should not have been accepted as adequate for public exhibition. However, the court allowed the environmental assessment process to continue, because additional information about downstream GHG emissions was in fact provided by the proponent during the assessment process.

The supplemented environmental assessment, and over 2000 submissions made during the exhibition period, were considered by the Director-General of the NSW Department of Planning (Director-General) and also by an independent panel of experts, who reported to the Minister. The Minister approved the project, subject to conditions, on 7 June 2007.

Assessment of GHG Emissions

The assessment report prepared by the Director-General provides a clear insight into the Department's (and presumably the Minister's) attitude towards the relevance of downstream GHG emissions in the planning approval process in New South Wales.[2]

The Director-General did not accept that the threat posed by global warming/climate change should necessarily preclude approval of the Project, but rather that it should be balanced in consideration with several other factors, such as the Project's contribution to global warming, the need for and benefits of the Project, the objects of the EP&A Act, and whether refusing the Project would reduce global GHG emissions. Here, the Director-General was persuaded that refusal of the Project would do nothing to reduce global CO_2 emissions because the resultant gap in coal supply would be 'almost certainly filled by another coal resource' either within, or beyond, New South Wales.

In summary, the report concluded that the key response to global warming/climate change needs to be made at a policy or strategic planning level, outside and above the New South Wales project assessment process, and that any ad hoc response to specific projects (such as requiring the payment of a CO_2 levy on product coal) would not be in the public interest.

The Minister was not prepared to impose conditions requiring the proponent to offset or abate the GHG emissions generated when the coal is burnt, recognising that an emissions trading scheme or

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2 The assessment report and approval conditions are available on the NSW Department of Planning's website at www.planning.nsw.gov.au.

other policy mechanism was a fairer and more appropriate way to address that issue than the imposition of conditions on a project-by-project basis. Consistent with NSW government policy, the report concludes that 'a broadly applied scheme to internalise the cost of CO_2 administered outside and above the NSW planning system, is a more sensible and much fairer method to combat the major sources of global warming/climate change'.

Given the conclusions reached as to the demonstrable need for new coal resources, the Director-General did not accept that the absence of a national emissions trading scheme was a justifiable reason to refuse the Project.

The report acknowledges that the world economy is, and for the lifetime of the Project would remain, structurally dependent on coal-fired energy, and that coal is 'not a particularly scarce resource at present'. These factors support two significant points identified in the report, which underpin the conclusion that the Project should be approved:

- that the primary driver of GHG emissions is people's demand for energy, not coal mining, and that for the foreseeable future that demand is likely to be structurally dependent on coal-fired energy; and
- that refusing coal mines is likely to be a highly ineffective, perhaps futile, means of addressing the potential threats of climate change.

The approval is a clear affirmation of the NSW Government's willingness to approve resources projects which provide economic and employment benefits to New South Wales, even where the project, as here, is likely to generate impacts at a local, regional, national and global level. Indeed, even if GHG impacts associated with a particular project could be shown to pose a serious threat to the global environment, the assessment report indicates that such a project would not automatically be refused.

Assessment Methodology

One difficulty facing proponents in New South Wales is the absence of clear guidelines for the assessment and consideration of downstream GHG emissions. Until the court's decision in 2006 in relation to this project's environmental assessment, the prevailing view was that downstream emissions did not need to be assessed. That position has changed as a result of the decision, but there is still no prescribed methodology.

In this case the proponent applied GHG guidelines issued by the Australian Greenhouse Office and the World Business Council for Sustainable Development, which recognise inherent difficulties in the assessment of scope 3 emissions.

The Director-General's assessment concentrated on a comparison of project-related emissions against global GHG emissions, which it says 'provides a more meaningful indication of project–related GHG impact'. In this context, the Project's estimated contribution to national and global emissions was said to be relatively very small, and would lead to a negligible increase in global temperature of an estimated 0.0002 degrees Celsius.

The Director-General took into account the proponent's commitment to various project-related initiatives to mitigate GHG impacts (such as the use of energy management systems, use of some biodiesel in the mining fleet, and planting for carbon sequestration), and also looked to GHG initiatives being undertaken at the corporate level (including subscription to the Federal Government's Greenhouse Challenge Plus Programme and the coal industry's 'Coal 21 Fund').

The Director-General concluded that the project-related initiatives were comparable to contemporary mining developments. The initiatives identified in the Project, and their consistency with industry practice, provide an indication of the matters likely to be regarded as relevant by the Minister when assessing future resources projects.

GHG Conditions

The Director-General was concerned to ensure that the proponent's GHG initiatives were certain and referable to clear targets. While stopping short of setting specific emission reduction targets, the Minister imposed conditions which require the proponent to:

- prepare and implement an Energy Savings Action Plan for the Project,
- monitor the GHG emissions generated by the Project,
- investigate ways to reduce GHG emissions generated by the Project, and
- report annually on its GHG monitoring and abatement measures.

Notably, the monitoring, investigation and reporting obligations do not expressly include downstream GHG emissions.

Other Key Features of the Approval

The Director-General's assessment identifies that the Project would have a number of significant residual environmental impacts, but concludes that approval of the Project is in the public interest despite these impacts.

The Project is predicted to significantly impact 109 private properties including 84 residences, with 36 of the affected landowners having not reached agreement with the proponent to date. This degree of impact is acknowledged as being 'at the upper end of the scale when compared to contemporary coal mining developments in the Hunter Valley' but still did not warrant refusal of the Project.

The Minister's approval conditions require the proponent to offer to acquire those significantly impacted properties prior to the commencement of mining. Further, if the mine exceeds the air quality, noise, or vibration impact assessment criteria which are specified in the approval conditions, affected land owners can trigger an independent review procedure which may ultimately lead to a direction to the proponent to acquire those properties as well.

Where land is to be acquired, the approval conditions require the proponent's offer to encompass:

- the current market value of the land, as if the property was unaffected by the mine proposal;
- reasonable costs of relocation and legal advice; and
- reasonable compensation for any disturbance caused by the land acquisition process.

Water use was another key issue, and the Minister was prepared to approve the mine notwithstanding its water demands, on the basis that the proponent assumed the commercial risk of having to acquire adequate water rights on the open market.

Conditions were also imposed to require increased offset areas for vegetation to address the Project's threat to the biological diversity and ecological integrity of the locality.

Even with the implementation of 'all reasonable and feasible mitigation measures', the Project would still result in significant noise, air quality, blasting and/or visual impacts. However, the

Minister was willing to approve the Project because its overarching benefits were considered to outweigh its costs. This is a very high standard to meet, which proponents of projects with a comparable level of impact should expect to be required to demonstrate in future in order to obtain project approval. In such cases, where the public interest can be made out despite the nature of resulting environmental impacts, proponents should expect that the conditions imposed on the Project may become a benchmark for future approvals.

The approval also appears to highlight the primacy of the Department of Planning's views over those of other government departments, when the economic benefits to the State are driving factors. In this case, the Department of Environment and Climate Change had refused to support the Project for a number of reasons including that it would 'represent an unacceptable impact on an entire community'. Similarly, the Department of Water and Energy did not initially support the Project and expressed continuing concerns about the proposed water access arrangements. Despite these views, the Director-General concluded, and the Minister has accepted, that the Project's benefits sufficiently outweighed its residual costs and therefore that it is justifiable in the public interest.

Further Proceedings

There is no right of merit appeal against the Minister's approval of the Project.[3] However, there are ongoing proceedings in the Federal Court challenging the decision of the Commonwealth Environment Minister that the Anvil Hill project is not a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

EMPLOYMENT ARRANGEMENTS[*]

Wilton & Cumberland v Coal & Allied Operations Pty Ltd [2007] FCA 75 (Conti J)

Workplace Relations Act 1996 – Employment arrangements – Labour hire

Background

The applicants, Wilton and Cumberland, sought an order for payment of employment entitlements and the imposition of a penalty under s 178 of the *Workplace Relations Act 1996* against Coal and Allied Operations Pty Ltd (CAO), the respondent in the proceedings, for breach of a Certified Agreement. CAO operated a number of open cut coalmines in the Hunter Valley region, described as the Hunter Valley Operations (HVO).

In August 2002 CAO engaged Mining & Earthmoving Services Pty Ltd (MES) for the supply of maintenance and production labour hire. The applicants were engaged by MES as part of the labour supply to CAO.

The central issue in the proceedings was whether the applicants were the subject of an employment relationship according to general law, as between themselves (as employees) and CAO (as employer). Despite an employment agreement existing between the applicants and MES, if the applicants were found to be employed by CAO they would be entitled to look to CAO for remuneration and other pecuniary employment benefits under the Certified Agreement.

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3 The effect of s 75L of the EP&A Act is that there is no right of objector appeal where the project has been the subject of a report by a panel of experts, as occurred in this case.

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