

breach can give rise to both civil and criminal consequences.

The trial before Pain J did not deal with the exercise of discretion to grant declarations or make any orders because of the way the Council pleaded their case. However, Pain J did note that there was some evidence that suggested that relief may not be granted. The respondents argued in the Court of Appeal that Her Honour's comments disqualified her from hearing the case after the Court of Appeal judgment. This was rejected and it is only where a judge makes statements that suggest a possibility he or she may not bring an impartial mind to the question of relief will a judge be disqualified.

Young JA noted that the way the Council framed its case against Mr Norris involved seeking a declaration that, in issuing the CC, Mr Norris breached section 109F of the EP&A Act. This was extremely unfair because the Council was in effect asking the Court, in a civil case, to make a finding on the balance of probabilities that Mr Norris had committed a criminal offence. Criminal offences, of course, must be proved beyond reasonable doubt. The way the case was framed was tantamount to an abuse of process. What the Council should have sought was a declaration that Mr Norris could not have considered himself satisfied that certain preconditions to the issue of the CC had been met.

Lessons

This case has been extremely costly for all concerned. Where an issue has prominence, developers are reminded that councils will often require strict compliance with consent conditions. Cutting corners is very unwise. Certifiers need to take care to ensure preconditions are fully met before CCs are issued. Councils are reminded not to fight battles that won't win the war.

New South Wales - Land and Environment Court

Environment Protection Authority v Buchanan (No 2) 165 LGERA 383

By Sarah Froh - Solicitor Henry Davis York

In this case a company director was charged and convicted for a serious environmental offence.

Background

Ms Ruth Buchanan was the sole director of a company called Plastech Operations Pty Limited (**Plastech**). From 2004 until 2006 Plastech leased a site at St Marys at which it operated a hazardous industrial waste storage and treatment facility. Plastech carried out its operations on the site under a valid environmental protection licence issued by the EPA.

Over the course of Plastech's operations, EPA officers carried out a number of site inspections. As result of those inspections clean up notices were issued to both Plastech and Ms Buchanan under section 91 of the *Protection of the Environment Operations Act 1997*. Those clean up notices were issued for Plastech's disorderly and dangerous storage of hazardous wastes in such a way that it was likely to cause a significant pollution incident.

At the time that the clean up notices were issued, both Plastech and Ms Buchanan were experiencing extreme financial difficulties. Ultimately, Plastech went into liquidation and Ms Buchanan was declared bankrupt.

Both Plastech and Ms Buchanan failed to comply with the clean up notices (itself being an offence against the *Protection of the Environment Operations Act 1997*) and Ms Buchanan was charged for failing to comply with the conditions of Plastech's environmental protection licence. Ms Buchanan pleaded guilty to the charge and was accordingly sentenced.

Court's findings

During the inspections by the EPA officers, hundreds of drums and containers of dangerous chemicals were found

NELR casenotes

being stored in an open yard on the site. Many containers were found to be rotting and collapsing. Although no actual harm to the environment was caused by Plastech's operations, the Court found that containers of hazardous and dangerous materials were stored in such a way that a significant pollution incident could have occurred.

The Court also found that there was no logical reason offered by Ms Buchanan as to why the conditions of the licence were not complied with and found that the Plastech business was conducted negligently, with inadequately trained staff on-site.

Although the Court found that Ms Buchanan was unlikely to re-offend, the Court fined her \$40,000 for the offence and ordered a daily penalty of \$500 per day for the continuation of the offence from the date the clean up notice was issued until the company was evicted from the site (being 78 days and totally \$39,000). Ms Buchanan was also ordered to pay the clean up costs for the site which totalled \$465,000, in addition to the EPA's costs of the proceedings being \$88,000.

Implications

Liability of directors and managers

This case serves as a reminder that the EPA will in certain cases prosecute a director or manager concerned with the management of a corporation that commits an offence against the *Protection of the Environment Operations Act 1997*. This year alone there have been four cases in the Land and Environment Court in which the EPA sought to convict either the director or manager of a corporation that committed an offence.

Bankruptcy and a defendant's impecuniosity

The Court, when it considered the appropriate penalty, expressly considered Ms Buchanan's ability to pay a fine. Ms Buchanan was a declared bankrupt, and at the time of the hearing she was also 64 years old with no assets, no job and at the end of her working life. In her decision, Pain J, re-affirmed the principle that a penalty imposed by the Court for an offence under the *Protection of the Environment Operations Act 1997* is a debt that survives bankruptcy. Notwithstanding the defendant's limited means to pay any fine, the Court held that there was a need to set a penalty beyond a nominal fine to act as a general deterrent, but that fine was to be balanced against the seriousness of the offence.

Accordingly, although Ms Buchanan will continue to be liable to pay the penalty if/when she is discharged from bankruptcy, the penalty awarded against her was reduced to take into account her limited financial means.

Amendments to fines under the Protection of the Environment Operations Act 1997

In 2006, amendments to the *Protection of the Environment Operations Act 1997* more than doubled the maximum penalty that could be ordered against an individual and quadrupled the penalty against a corporation. Cases which have been commenced under those new amendments started to appear before the Court in the middle of last year. The amendments have not resulted in a corresponding doubling or quadrupling of the fines ordered, but there is a trend towards higher penalties.

Although the fine that was awarded to Ms Buchanan was within the normal range for an offence of this nature, Ms Buchanan's total penalty (when including clean up costs, fines and legal costs) is well over \$500,000, making it at the very top end of the scale for penalties awarded against individuals.

Environment Protection Authority v Delta Electricity [2009] NSWLEC 11

By Ed Lee - Senior Associate Henry Davis York

There is a general presumption that the rule of law should apply equally to both the public and private sector. However, when it comes to litigation between government agencies there is a question of whether the costs involved are in the public interest. This tension is reflected in guidelines from the Premier Memorandum M1997-