A REMEDY for a WRONG

common law remedies in environmental litigation

By John Gordon

Much environmental litigation is statute-based, given the proliferation of environmental protection statutes in Australia over the last 20 years. However, common law remedies should not be forgotten when considering the options to prevent or redress environmental damage.

Common law remedies have proved successful in some major environmental litigation over the past decade, and may be available where statutes do not offer relief. They are especially useful – and perhaps the only redress – where governments are complicit with big business in sidestepping environmental protection statutes in order to green-light development projects.

This article canvasses recent examples where the invocation of common law remedies has produced successful outcomes.

COMMON LAW CAUSES OF ACTION IN ENVIRONMENTAL LITIGATION

Potential common law causes of action for environmental claims are numerous, and include:

- negligence;
- private nuisance;[1]
- public nuisance;[2]
- trespass;[3]
- the principle from *Rylands v Fletcher*;[4]
- a breach of statutory duty;
- occupiers' liability; and
- constitutional claims.[5]

Ok Tedi

In the Ok Tedi litigation, traditional landowners in Papua New Guinea had endured years of environmental damage from the waste discharged from BHP's gold and copper mine in the PNG highlands. The downstream rivers and lakes that provided the basics of life for 30,000 landowners from the mine to the Gulf of Papua were being polluted and rendered incapable of sustaining life. BHP, with the support of the PNG government, had entered a series of agreements that were enacted as statutes, which progressively watered down the environmental safeguards that had formerly applied, including a tailings containment dam, strict maximum pollution levels and rigorous monitoring. Protests to BHP and the government were ignored and requests for compensation

went unanswered. In desperation, the landowners sought assistance in the form of Australian lawyers, Slater & Gordon.

After assessing the claim, it quickly became apparent that any potential statutory environmental causes of action had been abrogated by the statutory agreements. The only recourse was the common law, which is broadly similar in the two countries.

Amid a blaze of publicity in the Australian media, litigation was commenced in the Supreme Court of Victoria claiming damages in negligence, private and public nuisance, trespass, under the doctrine in *Rylands v Fletcher*, for breach of statutory duty, breach of trust, and in strict liability. The remedies sought were an injunction to restrain the dumping of tailings into the river system; injunctions requiring construction of waste-retention facilities; declarations that the discharge of tailings and waste into the river system amounted to a private nuisance, a public nuisance, a trespass to land, and a breach of a duty of care owed to the landowners; declarations that each defendant was strictly liable for the discharge, that the failure to construct a tailings dam amounted to breach of a statutory duty; and a claim for compensatory and exemplary (punitive) damages.

The plaintiffs and their advisers considered that each of these claims had merit. The defendants made a sustained attack on the claims based on the principles in *British South African Company v Companhia de Mocambique*[6] (which prevent claims involving determination of title to land from being heard anywhere but in the jurisdiction where the land is situated), and the 'act of state' principle (which prohibits acts of a sovereign state from being tested in a foreign tribunal). After this attack, only the claim in negligence for loss of amenity, and the claim in public nuisance, survived.

The actions in private nuisance, trespass, and the mandatory injunctions (all of which were based on possession of the land) fell foul of *Mocambique*. The claims for breach of trust, and statutory entitlements, were inconsistent with the act of state principle. The High Court abolished the *Rylands v Fletcher* doctrine in *Burnie Port Authority v General Jones Ltd* so that argument also fell

Both sides appealed to the Victorian Court of Appeal. BHP appealed against the remaining causes of action for negligent loss of amenity and public nuisance. The plaintiffs argued that the rule in *Mocambique* should not be applied, since it had been vitiated in the Supreme Court of NSW, and the Supreme Court of Victoria had received the same powers through cross-vesting legislation.

BHP protested that the negligent loss of amenity claim could not be sustained because the breach of duty did not result in any economic loss, since the plaintiffs were only subsistence river-dwellers. The plaintiffs' counsel, Julian Burnside QC, responded that:

> 'the lifestyle of the landowners in gathering food, fishing and game and using it to eat or sell is no less an economic activity because it is not translated through the medium of money. It is economic loss to be deprived of your source of food, and it doesn't matter whether you are deprived of it because somebody takes away your ability to pay for it or hunt for it or because they kill it before you hunt for it.'

The plaintiffs' argument prevailed at first instance, and stood a good chance of surviving an appeal.

As for the public nuisance claim, the plaintiffs successfully argued that, although standing to bring a claim in private nuisance depended upon occupation or possession, a claim in public nuisance could be brought to redress the effects of BHP's activities on a general area.

Neither the appeal nor the trial was heard, because of a series of events, including the small matter of BHP being found in contempt of the Supreme Court of Victoria for drafting legislation for the PNG government that sought to criminalise the claims of the landowners proceeding in the Supreme Court.

The application of the common law remedies had, however, enabled the claim to survive long enough to force BHP to commit to paying substantial compensation, rehabilitation and to assess tailings containment options.

The Perth tunnel

The WA Government had made agreements with a joint venture consortium to construct a traffic tunnel under the Northbridge area of Perth. The early agreements provided for comprehensive analysis of the potential effects of drawing down the groundwater in the peat sub-soil underneath Northbridge, and for rigorous monitoring of the water levels and effects on structures in the area. Over time, those requirements were diluted. The water was pumped out >>

during the tunnel's construction and many of the heritage homes in the Northbridge area began cracking and sinking.

With no statutory remedies available, the homeowners sought advice on whether they had any way to force the government or joint venture partners to rebuild their damaged homes.

The most obvious potential cause of action was in nuisance. Any person who owns land has a right to enjoy the use of that land without that enjoyment or use being affected by the conduct of adjoining landowners. If it is, then the affected landowner can claim compensation.

However, a line of UK authority holds that there is no claim for nuisance where a party removes subterranean water and structures on a neighbour's property are affected.[7] As *Clark and Lindsell on Torts* (16th ed) at 24.53, stated:

> 'There is no right to have land or water supported by water. Therefore to pump out percolating water from excavations and to cause thereby damage to a neighbour's building by ground subsidence is not actionable as a nuisance. And this is so whether an injured party claims in nuisance or in negligence. There is no duty of care to a neighbour in abstracting percolating water so as to cause subsidence.'

In *Xuereb v Viola*,[8] Giles J in the Supreme Court of NSW accepted and applied the English authorities. However, in the case of water drainage by statutory authorities, the operation of the principle is confined to work carried out without negligence. In *Perth Corporation v Halle*,[9] Griffiths CJ said:

> 'I think that the rights of the appellants with respect to the land in the streets of Perth, although the property in it is vested in them, are only such as are authorised by the statute from which they derive their authority and power ... and that, if and so far as they exceed their power, they are in no better position than a mere wrongdoer creating a public nuisance in the street. There is no doubt that even an authorised work constructed by a municipal authority may be a nuisance if it is negligently executed or maintained. In that case they are not, in my opinion, protected either by the statute or by the rule laid down in *Chasemore v Richards*.'

This, of course, is consistent with the restriction of the statutory authority defence to claims of nuisance. If a particular activity is likely to cause harm to other landowners, but the government considers the activity to be of benefit to the community, the government can authorise the activity by passing a law to permit it. The defence is available only if the activity is conducted in accordance with the authority, and if it is conducted without negligence. Negligently conducting an activity otherwise authorised by statute voids the protection of the statutory authority.

Accordingly, whether the claim appears to be in nuisance, or if an activity authorised by statute is affecting adjacent landowners, the question of whether the acts are being performed negligently is a key consideration.

Of course, a relationship may exist between the creator of the hazard and the adjacent landowners so as to give the landowners a cause of action in negligence in any event.

This may arise because the act of the tortfeasor causes the release of a dangerous substance on to the plaintiff's land in circumstances that, before *Burnie Port Authority*, would have given the injured landowner a *Rylands v Fletcher* claim. With that principle now subsumed into the general law of negligence, landowners now have a stringent duty to ensure that they take reasonable care not to release dangerous substances on to adjoining property (as occurred with the fire in *Burnie Port Authority*).

Alternatively, in claims for damage consisting of pure economic loss, injured occupiers of land who can point to a foreseeable risk of injury from the impugned conduct, and factors sufficient to give rise to a duty of care, may be able to recover under principles of common law negligence. This was the case in *Perre v Apand*,[10] in which crops were affected by diseased seeds planted on another farmer's land.

The consequence of all this for the Perth tunnel claimants was the need to frame their claims against the state and the joint venture partners – claims that originally suggested 'nuisance' – entirely in negligence. They ultimately claimed for negligent removal of water; negligence causing physical damage to property; and negligence causing foreseeable economic loss to a defined and vulnerable class of people who depended on the exercise of reasonable care to avoid damage.

This ability to do so resulted in a substantial negotiated settlement in favour of the homeowners. The battle of the group to get to this point is now recorded in an award-winning documentary.[11]

CONCLUSION

The lesson from these examples is that common law remedies should always be considered when contemplating environmental litigation, both when statutory remedies are excluded or unavailable, and to supplement any statutory claims. ■

Notes: **1** Brought by a private landowner, or someone with exclusive possession of land, against adjoining landowners for loss of use and enjoyment of their land. **2** Brought by the attorney-general on behalf of a number of landholders to address a general problem in an area. Both forms of nuisance can be authorised by statute, provided there is no negligence. **3** This includes physical presence on another's land, as well as causing animals or substances to enter it. **4** (1866) LR 1 Ex 265. Where someone conducts a hazardous activity on their land involving a dangerous substance, which subsequently escapes on to adjoining land, the person is liable for any harm caused. A person is not liable for harm if the activity was authorised by statute (and there was no negligence), or if the adjoining land-owners consented. The *Rylands v Fletcher principle was abolished in Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 in favour of the broader doctrine of negligence; however, the court held that people in charge of hazardous activities had to exercise a very high standard of care to avoid negligently harming others. **5** Such as the Tasmanian Dams case: *Commonwealth v Tasmania* (1983) 158 CLR 1. **6** [1893] AC 602. **7** *Chasemore v Richards* (1859) 7 HL Cas 349; *Popplewell v Hodkinson* (1869) LR 4 Ex 248; *English v Metropolitan Water Board* (1907) 1 KB 588; *Langbrook Properties Pty Ltd v Surrey County Council* (1970) 1 WLR 161; *Stephens v Anglian Water Authority* (1987) 1 WLR 1381. **8** (1990) Aust Torts R 81-012. **9** (1911) 13 CLR 393. **10** (1999) 198 CLR 180. **11** *The Tunnel*, Inavision Films, 2005.

John Gordon *is a barrister at Seabrook Chambers in Melbourne.*
PHONE *(03) 9225 7064* **EMAIL** *j.gordon@seabrookchambers.com.au*