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Précis Paper

When a Local Council Owes a Duty of Care Concerning Town Planning and Consents

This presentation is important not only for lawyers, but also developers, town planners and architects. It is brilliant. I've watched it twice and look forward to a third viewing with my friends.

Discussion Includes

- Facts of Dansar at original hearing and on appeal
- When will a duty of care be owed by the council?
- No duty will arise in the process of considering an application
- Distinguish the duty of care when exercising the function of granting an application
- The distinction between duty of care and breach

Précis Paper

When a Local Council Owes a Duty of Care Concerning Town Planning and Consents

1. In this edition of BenchTV, Mr Peter Taylor SC (Barrister) and Mr Ian Benson (Solicitor) present on tort law, with particular reference to the NSW Supreme Court of Australia's (McCallum J) decision in *Dansar Pty Ltd v Byron Shire Council* [2013] NSWSC 17 and the NSW Court of Appeal's (Macfarlan, Meagher and Leeming JJA) decision in *Dansar Pty Ltd v Byron Shire Council [2014] NSWCA* 364. Mr Taylor SC acted as Counsel for the defendant/respondent Council at both instances.

Dansar Pty Ltd v Byron Shire Council [2013] NSWSC 17

2. In the 2000s, the Byron Shire Council (the Council) had assessed that the sewage treatment plan of Byron Bay was at excess capacity for new developments. Dansar, a developer, had lodged an application for approval but this was refused. Dansar appealed that refusal, but the appeal was dismissed by the Land and Environment Court. In 2002, Dansar lodged new development applications and they were approved in 2005. Dansar argued that there was a duty of care owed by the Council in the processing of its development approval, to correctly calculate the available sewage capacity in their catchment. Dansar asserted that the Council negligently underestimated the degree of spare sewage treatment capacity in Byron Shire and overestimated the extent to which such capacity was already at least notionally allocated to existing properties or other approved developments, resulting in its denying the existence of spare capacity sufficient to meet the requirements of Dansar's proposal. The issue was whether the Council owed a duty of care to Dansar for loss arising from delayed approval. The Court found that the Council did not owe the relevant duty of care and entered judgment for the Council.

3. Section 96A of the *Environmental Planning and Assessment Act 1979* (NSW) confers power to revoke or modify any consent in force if, "having regard to" the provisions of any draft local environmental plan it appears to the Council that the development should not be carried out or completed.

4. Notably, there was disunity between the way the capacity was assessed on one value of equivalent tenements (4 people per dwelling) but allocated through s 96 contributions on a different assumption (the Council's s 96 study had a scale of assumptions from 2 to 3 people per dwelling). McCallum J did not consider any issues of breach or damages as it was found that there was no duty of care owed and suggested there was a lack of coherence between an unexaminable subjective discretion of the Council and a private law duty of care for economic loss.

Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364

5. On appeal, Dansar argued that it was wrong for the Council to allocate capacity on the basis of an assumed population of 4 people per dwelling when they should have done it on the basis of 2.8 people per dwelling. Dansar argued that having decided upon an arithmetical process to allocate sewage capacity, the Council owed a duty of care to do it correctly. The Council argued that a duty of care cannot be owed to allocate capacity in relation to a statutory task which is simply to grant or not grant the development approval. Since the Council never reached satisfaction that it should grant the approval for any reason, it was nonsense to talk about some duty to allocate sewage capacity to a development that did not have approval anyway. Whilst MacFarlan JA suggested there was no reason why there could not be a mathematical duty of the kind suggested by Dansar (though it did not mean there was any breach of that duty), Meagher and Leeming JJA found that there was no duty of care. Leeming JA noted that it did not make sense to attach a private law duty to a process of consideration when the Council never made an actual decision in exercising its statutory function. Meagher JA noted that you cannot have a private law actionable duty of care that simply attaches because you embark on a mathematical calculation process, where this process may be discretionarily dropped.

6. Dansar's special leave application to the High Court of Australia was refused with costs on 17 April 2015.

When a Duty of Care may be Owed by Council

7. Mr Taylor SC discusses a range of cases whereby a duty of care was owed by a Council. For example, in *Armidale City Council v Alec Finlayson Pty Ltd* [1999] FCA 330, the Council was held to owe a duty of care in granting a development approval, but no duty of care in relation to re-zoning of land where the Council knew that it had been contaminated. In *Wollongong City Council v Fregnan* [1982] 1 NSWLR 24, there was a duty of care owed where the Council gave a grant of approval for development in areas that were subject to subsidence. Mr Taylor SC notes that there are other cases where a duty has been found in granting an approval where specific certification requirements that needed to be met, were not met.

8. However, a duty of care is not owed in the procession of an application. In *Robert Gilbert Coshott and Ljiljiana Coshott v Woollahra Council* [1996] NSWLEC 256, Coshott claimed damages because there was a delay by the Council in dealing with his development application. The Court held that the Council did not owe any duty of care in processing an application. Mr Taylor SC notes that the key is to "look at what the application is, what the nature of the loss is and what function the Council is actually exercising".

9. Mr Taylor SC notes that where there is a public safety statutory function primarily directed at the protection of the public generally, you cannot import a private law duty of care into that unless and until the statutory decision maker actually becomes informed of the reality of the risk and decides to do something about it (*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54). It seems the courts are willing to allow decision makers freedom to make mistakes in the real time of considering an application, without exposing them to the anxiety that in hindsight with different information and on reflection, they would come to a different outcome.

10. Mr Taylor SC discusses the importance of remembering that negligence liability has three distinct components: duty, breach and remoteness. He highlights that the distinction is there for the reason that the question of breach of duty and reasonableness is highly emotive and impressionistic. Thus, there is a critical distinction between liability that attaches to the exercise of the power as distinct from liability that may arise because of either the criteria adopted for the planning process or the process of decision-making itself.

BIOGRAPHY

Peter Taylor SC

Peter graduated from the University of Adelaide in 1974 with Honours in Law and was appointed to senior counsel in New South Wales in 1993. He has chaired the New South Wales Bar Association Advocacy Committee and been a member of the Legal Profession Admission Board for fourteen years.

For twenty one years, Peter was the General Editor of Ritchies NSW Supreme Court Practice. Since 2005, Peter has been the General Editor of Ritchies NSW Uniform Civil Procedure. In 2006, Peter was appointed part-time senior member of the Administrative Appeals Tribunal.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Cases

Dansar Pty Ltd v Byron Shire Council [2013] NSWSC 17

Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364

Benchmark Links

https://benchmarkinc.com.au/benchmark/composite/benchmark_19-02-2013_insurance_banking_construction_government.pdf

https://benchmarkinc.com.au/benchmark/construction/benchmark_30-10-2014_construction.pdf

Judgment Links

https://www.caselaw.nsw.gov.au/decision/54a638f53004de94513da4f1

https://www.caselaw.nsw.gov.au/decision/54a63ff83004de94513dc785

Legislation

Environmental Planning and Assessment Act 1979 (NSW)

Cases

Wollongong City Council v Fregnan [1982] 1 NSWLR 24
Armidale City Council v Alec Finlayson Pty Ltd [1999] FCA 330
Robert Gilbert Coshott and Ljiljiana Coshott v Woollahra Council [1996] NSWLEC 256
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54