COLLEGE OF LAW LECTURE

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Liability of Councils in tort and section 149 *EP & A* Certificates

The Scenario

1. Sometimes certificates issued under Section 149(5) of the *Environmental Planning and Assessment Act*, included in the contract for sale of a property, do not disclose the presence of Council stormwater pipes which run underneath the property. Assume no other document included in the contract for sale refers to the pipe, eg the survey plan included – often the focus of a survey is to show that all improvements stand within the boundaries.

2. Assume the requisitions did not probe specifically about pipes, but only about eg unregistered easements and restrictions on development (Reqs 6 & 19), to which the usual answers ie "make own inquiries", are given.

3. The new owners only become aware of these pipe/s after purchase eg when they investigate developing the property and discover the pipes, or otherwise.

4. If the pipes were laid by Council, there would be records in Council of the same eg budgets showing how much was to be spent or was in fact spent on laying pipes, either on the affected property but more probably, to the locality; memoranda to the building section or an independent contractor; perhaps correspondence with neighbours and others. Certain council officers may actually recall the laying of the pipes.

5. There is no *registered easement* in favour of Council in respect of the pipe/s. The *Conveyancing Act* sections 88A, 88 B(2)(a) and (3)(a) allow easements in gross ie without a dominant tenement, to be registered in favour of certain utilities: *Trevlind v BMP Manufacturing* [2008] NSWSC 603 para [24].

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6. The Council asserts an entitlement to retain its pipes *in situ* pursuant to section 59A of the *Local Government Act* or implied rights having regard to the statutory framework in various legislation which mandates Councils to run the stormwater drainage system, and authorises Councils to enter upon land to perform, install & repair works , and allows compensation for same for any damage caused; and which declares Councils the owners of their works: *Ku-ring-gai Shire Council v Gigli* (1985) 3 NSWLR 178.

7. The new land owners now have a property that may have its future "developability" compromised due to the presence of these pipes: there may be restrictions on building structures above drainage pipes *within easements*, which restrictions differ from Council to Council: see eg *Tony Stepanoski v Zhimin Chen* 16/12/11, Bryson AJ, para [43].

8. The question arises whether Council owed a duty of care in issuing the section 149(5) certificate, which was relevantly breached. Allied questions are whether there is a claim against the vendor or the selling agent.

Relevant legislation

9. Under section 59A(1) of the *Local Government Act 1993* (NSW) (**"LGA"**), a Council is the owner of pipes installed by it, as part of its storm water system. The Council is empowered under section 59A(2) of the LGA to operate, repair, replace, extend, expand and improve the pipe. This section was considered by Young CJ in Eq (as his Honour then was) in *Bonaccorso v Strathfield MC* [2003] NSWSC 408 paras [45]-[47] as follows:

> "45 Accordingly, despite running contrary to the general presumption of this sort of statute, it seems to me that in the instant case the legislature has used sufficiently strong words to show that the section covers installations both before and after 1 August 2002.
>
> 46 The consequence is that the works, not only the pipe but also the air space within the pipe and the material flowing within the pipe, are the property of the Council. *Those rights may well constitute real property sui generis* as hinted at by Windeyer J in the **North Shore Gas Company case** at pp 131-134. Whatever be its classification, however, the right to operate, maintain and improve the pipe and do

any other necessary or appropriate things to it must carry with it the right to keep the pipe in situ and the right to pass a reasonable amount of water through it; see **Madden v Coy** [1944] VLR 88.

47 Because the pipe was initially placed and the permission to put water through the pipe was done with the consent of the plaintiffs' predecessor in title, and was not an act which was explicitly authorised by the Council, there can be no action in trespass. The action, if there is any at all, is on the case and in nuisance."

10. His Honour observed at para [26]:

> "I also threw out some suggestions that it may be that the defendant would like to consider some estoppels based on conduct of the plaintiffs' predecessors in title, but such suggestions met with nil response."

(the requirements for an easement by estoppel were considered in para [37] of *Campbell v McGrath* [2005] NSWSC 496; reversed on appeal [2006] NSWCA 180).

11. The *North Shore Gas case* (above) stands for the proposition that the Council's right to ownership of the pipe, and occupation of the land, does *not* confer an interest in land, only a limited right to occupy (pp 127-128).

12. The Council is required to issue a planning certificate (**149(2) Certificate**) pursuant to section 149(2) of the *EP&A Act.* Section 279 of the *EP&A Regulations 1979* (NSW) prescribes that matters listed in Schedule 4 must be specified in a section 149(2) Certificate. Schedule 4 should be read herewith.

13. Section 149(5) of the *EPA* provides:

> *"A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware."*

14. The *Civil Liability Act,* sections 1-6, should be read herewith.

Defect in title

15. A defect in title might be an integer in the equation to contend that there is something which "affects the land". However, the purpose of section 149 could not be to shift to Councils the obligations which in conveyancing transactions ought be disclosed by vendors or discovered by due diligence of purchasers.

16. A large drainage pipe running centrally through a property, which would cost a lot to relocate, may well constitute a latent defect in title; and may place the pipe in the category of rights called quasi easements, in circumstances where there is a statutory right by Council to retain same in place: *Liberty Grove (Concord) Pty Ltd v Yeo* [2006] NSWSC 1373. However, the rather casual conclusion of quasi easement by Palmer J was without reference to *North Shore Gas Co*, though seems consistent with it.

17. As per *Eighth SRJ Pty Ltd v Merity* [1997] NSWSC 139, a defect in title means where the vendor is unable to convey the full estate which it promised to convey to the purchaser. This would entitle rescission (p 5 of the austlii print out, last 3 lines to p 6).

18. The defect is latent where ordinary conveyancing practices would not reveal it*:* *Scarcella v Lettice* [2000] NSWCA 289.

19. The conveyancing solicitor for the vendor may owe a duty of care directly to the purchaser to not be negligent in the answering of requisitions on title: *Bebonis v Angelos* [2003] NSWCA 13, which left this question open.

Issues of statutory interpretation and Council practices

20. What is the meaning of "affecting the land"? What light do practices of various Councils shed on this aspect (also relevant to the *CLA* aspects)?

21. Consider:
    (a) *Interpretation Act*
    (b) reading speech
    (c) differing practices of various Councils.

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22. *[Discuss application of the above to section 149(5) in context*.]

Councils' duty of care in relation to Section 149 Certificates

23. Councils have a duty of care to answers questions in section 149 certificates with due care, and not negligently: *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408; 116 ALR 460. In that case, a *specific question* about the risks of flooding was answered wrongly, in circumstances where the Council well knew of the risks of flooding.

24. But "It is not sufficient to ask if the appellant owed a duty of care to the respondent. At that level of generality, of course it did. The respondent no doubt walked on the appellant's roads and footpaths, and was owed a duty of care in relation to their condition…a postulated duty of care 'must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member'."*: Sutherland Shire Council v Becker* [2006] NSWCA 344, para [12].

25. It is necessary to have regard to the cumulative effect of the "salient features" of each case: *Makawe Pty Limited v Randwick City Council* [2009] NSWCA 412; 171 LGERA 165.at 171-172 [17]. Where the allegation against a Council arising out of its exercise of (or failure to exercise) powers, is of a duty of care in respect of economic loss, the salient features as to whether there was a duty of care, would include:

    (a) vulnerability, meaning an inability on the part of a plaintiff (as a member of a relevant class) to protect him or itself from the economic losses: *Woolcock Street Investments Pty Limited v CDG Pty Limited* [2004] HCA 16; 216 CLR 515 at 530-531 [22]- [24];

    (b) reliance (as a matter of fact) on any representation or conduct which is reasonably foreseeable;

    (c) degree of control exercisable by the Defendant;

    (d) consistency with the statutory regime under which the duty is said to arise;

(e) coherency with legal principles which afford or preclude remedies. See generally *MM Constructions (Aust) Pty Limited v Port Stephens Council (No. 6)* [2011] NSWSC 1613.

26. In *Makawe*, the court analysed planning cases in tort against Councils and extracted these principles at para [43]:

> "(1) General statements such as that of Gibbs CJ in *Heyman*, to the effect that when statutory powers are conferred they must be exercised with reasonable care, do not mean that in all cases, where a local authority exercises statutory powers in respect of the approval of subdivisions and/or building work, it owes a duty of care in respect of those approvals to developers and/or subsequent purchasers of the property.
> (2) However, if the approving authority is subject to a statutory requirement not to give consent unless it is satisfied of something, the courts may well find a duty, owed to developers and to purchasers, to exercise reasonable care in considering whether it is so satisfied: *Taitapanui*, *Western Districts*.
>
> *(3) If the approving authority actually knows something seriously detrimental to the subdivision or the building, and is aware that it is likely that developers and/or purchasers do not know this, the courts may well find a duty owed to developers and purchasers to exercise reasonable care in relation to that detrimental feature*: *Fregnan*, *Finlayson*, *Booth*.
>
> (4) If the approving authority makes a positive requirement that something be done which otherwise would not be done, the courts may well find a duty owed to developers and purchasers to exercise reasonable care in making that requirement: *Fregnan*.
>
> (5) If the approving authority is required to consider or take into account some particular matter which bears on the structural integrity of buildings to be erected, the courts may well find a duty owed to developers and purchasers to exercise reasonable care to avoid risks

of property damage arising from this matter: *Fregnan*, *Bamford*."

27. The italicised principle no (3) above is particularly apposite, though of course cannot be transported uncritically into every factual context.

28. "***Makawe Pty Ltd v Randwick City Council*** [2009] NSWCA 412, (***Makawe***) is a decision of the New South Wales Court of Appeal concerning the liability of a council, as consent authority, for loss suffered by the appellant company, which purchased a building that suffered flooding in its car park, causing damage requiring rectification of works. Hodgson JA held that the approach to be taken in determining whether a duty of care exists, in circumstances where there is no authority establishing the existence of a duty of care, and if so its scope or content, was the salient features or factors approach outlined by Allsop P in ***Stavar***. Hodgson JA held the primary judge was wrong in finding that vulnerability was a necessary factor for the existence of a duty of care to avoid pure economic loss. His Honour said:

> In my opinion, these passages indicate that the primary judge approached the question on the basis that, in order to establish a duty of care, **Makawe** had to establish each of the elements of control, vulnerability and reliance; and in my opinion that is not the correct approach. These are three particularly important salient points to be considered in deciding whether there is a duty of care, but they are not all-or-nothing necessary elements to be satisfied if a duty of care is to be established. I accept that, for a duty of care to exist, there must be some element of control in a defendant and there must be some vulnerability in the plaintiff in some sense or another (which is not necessarily the same sense as the word has been used in some of the cases); but in my opinion these are matters of degree to be taken into account in an overall assessment. Reliance may be completely absent: for example, I am unable to identify any relevant reliance in ***Perre v Apand Pty Ltd*** [1999] HCA 36; (1999) 198 CLR 180.
>
> In my opinion the reasoning of the primary judge was erroneous in that he found that **Makawe**'s case failed because of absence of

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vulnerability (because there were avenues open to **Makawe** at the time of the purchase by which it could have protected itself) and because of absence of actual reliance, on the basis that these were each necessary requirements for the existence of a duty of care [21] - [22].

Campbell JA generally agreed with the reasons of Hodgson JA. Simpson J applied the salient features approach outlined by Allsop P in ***Stavar***. Simpson J accepted that one salient feature may be of overwhelming importance but, in effect, rejected that it is a necessary factor for the existence of a duty of care. Simpson J said:

It may be correct, as is suggested, that one salient feature may be of such overwhelming importance that others are unable to dislodge its impact. But that does not mean that it is not still necessary to consider all other salient features it can not be known whether that feature is of such overwhelming importance as to have that effect unless and until it is analysed in context with all others. In any event, even if the proposition were correct, that is not this case. His Honour was correct in his assessment of the features of vulnerability and reliance. The only feature which favoured **Makawe** was control, and that, alone, given the absence of vulnerability and reliance, could not establish a duty of care [139]."

(summary of *Makawe* extracted from *Alcoa of Australia Ltd v Apache Energy Ltd* [2012] WASC 209 (20 June 2012)

Section 149(2) Certificates

29. The focus of this paper is not section 149(2), as it is not usual for easements to be disclosed (*directly or indirectly*-see further below) in certificates under that section. However, for the sake of context, I will lightly canvas one major case on section 149(2), *Jazabus v Botany Council* [2000] NSWSC 58. There was a large block of land in Botany, near to the city's largest industrial site

which posed a potential hazard to any nearby residential development. The Department of Environment and Planning ("DEP") had prepared a risk assessment study of the area ("RAS") making recommendation as to how to safeguard against these chemical and other hazards. Once concern was that if there was large scale residential or commercial development, people could not be evacuated quickly enough in the event of an emergency.

30. One matter which must be disclosed in a section 149(2) certificate is whether the land was affected by a Council policy to restrict development by reason of land slip, bush fire, flooding, tidal inundation, subsidence or any other risk.

31. By 1990, Council has corresponded with the DEP regarding the development uses for the site, by reason of it being in a risk reduction zone, and continued to do so. Particular concern was voiced about a proposed sports club, where many people might attend and might have to be evacuated in an emergency.

32. The primary judge was left in "no doubt" para [132] that Council had a policy regarding to restrict development on the subject land.

33. Jazabas was a developer interested in purchasing the site. In December 1993, its director viewed the section 149 certificates provided with the proposed contract for the purchase of the property. The Council replied "No" to whether the land was affected as per above. At that time, Council was contemplating a new DCP regarding development of the subject land, which draft DCP made no reference to restrictions due to the RAS, of which Council was well aware.

34. The primary basis on which Jazabas put its case was that Council had an *informal policy* (ie not by formal resolution, but demonstrated by conduct viz approach to planning matters); but misled Jazabas into believing there was no such restriction; and that caused Jazabus to purchase the land and tie up its capital on byzantine litigation in the Land and Environment Court until it could obtain both a DA and BA; para [134] ff, then sell the land at a modest profit; whereas had it known of the RAS and the policy of restriction on development, it would have applied its human and economic capital in other, less fussy developments and derived a large profit (paras [210] ff on Damages).

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35. The decision was reversed on appeal [2001] NSWCA 94 (application for special leave to the HC dismissed 19/4/02) primarily on the basis that Council had no such "policy" to restrict residential development by reference to the matters in the RAS. What had occurred was that the Council had rejected a particular commercial development on industrial zone land which would have attracted a large number of "casual visitors " which would have been difficult to organise and evacuate in the event of an emergency: see the conclusion in this regard by Fitzgerald JA at para [164].

36. Fitzgerald JA held that Council's "turning point" (ie when it changed its policy) occurred in 1996 (ie after the sale): para [208].

Cases on Section 149(5) EP&A Act

37. Below are extracts from the judgment of Giles JA for the plurality in *Port Stephens Shire Council v Booth & Ors; Port Stephens Shire Council v Gibson* [2005] NSWCA 323, a case which involved i.a. Section 149(5) certificates which did not warn of aircraft noise above the proposed development, which Council knew about. The Moffat family had land in the Port Stephens area which had been in the family a long time. In 1993 they sought consent for the development of a budget level holiday cabin resort on the family's land, to be known as Fisherman's Village including the construction of forty-one cabins. The land was to be subject to a community plan subdivision so that lots in the subdivision would be sold with the purchasers having shared interests in community property. On 21 April, 1993 the Council granted development consent.

38. A building application was approved; construction commenced and cabins were purchased "off the plan". But nearby was an air force base with a weapons range. The developers claimed against Council, for negligence in the grant of the development consent; and 25 purchasers claimed damages for negligence in the issue of section 149 certificates.

39. The *Port Stephens case* is important in that it post-dates the *Civil Liability Act* of 2002, and noted in para [111] that *it was in not dispute at the trial* that a

duty of care was owed to the purchasers when the Council had issued section 149 certificates.

40. There was considerable analysis of what the extent of the duty was.

41. *[explore if time]*

42. Giles JA then held at [147] that as the solicitor acting on the purchasers had been misled by the section 149's, thus so had the purchasers, and hence causation had been proved.

43. What is encompassed by things that "affecting the land" as contemplated by section 149(5)? Anything *of a planning nature* would arguably fall within that phrase: the thrust of section 149 is planning matters.

44. A question is whether quasi easements etc, also "affect the subject land", in the relevant sense, in the statutory context.

45. It is reasonably arguable that Councils owe a duty of care in issuing section 149(5) certificates to answer express questions in a non negligent manner.

    In other words, that same is an established category of duty of care. Same was accepted (*without being argued)* well post the enaction of the *CLA* in the *Port Stephens* case.

46. That is not to say however, that a Council may not choose to challenge that aspect, in due course.

47. However, it is important to recognise that cases such as *Mid Density* and *Port Stephens* involved *positively misleading* information being provided, about planning matters.

48. In *Port Stephens* it was noise affectation of a land use study, called an ANEF, relating to a nearby air force weapons range, which was misrepresented in the section 149(5). In *Mid Density*, it was non notation of the risk of flooding. Noise affectation was something which did not physically impact the land, but only diminished its value. Flooding is something in its nature, which is apt to physically impact the land.

49. The way in which the physical pipes (or the easement relating to them) might arguably be considered a matter affecting the land in a *planning context* , is if

Council had a policy at the time the Sec 149 (5) was requested, that easement (quasi or legal) impacted on the future development of the land and thus it would impose restrictions on development, if ever anyone sought to develop : *Bonaccorso* (ibid) paras [45] ff.

[discuss]

Council officers' duty of care in answering questions

50. Often, a person interested in purchasing property will speak to a Council officer to elicit information of a planning nature pertaining to the property; sometimes regarding a properties' development potential. This is what occurred in the *Jazabas* case (above [2001] NSWCA 94). Once Mr Haigh, a director of the developer, became aware of the section 149 certificates, and a letter of Council advising there was a new DCP on the cards, he telephoned Mrs Cuthbert, the letter's author, and had a short conversion with her. She gave a short, off the cuff, response, making it clear that she was providing her personal opinion.

51. Mason P in a minority judgment (consistent with the majority) gave the fullest analysis to this aspect; and here follow relevant extracts:

> "[41] The provision of information in the letter clearly attracted a duty of care in light of the principles stated in *L Shaddock & Associates Pty Ltd v The Council of the City of Parramatta* [1981] HCA 59; (1981) 150 CLR 225 (***Shaddock***). In an oft-cited passage, Mason J approved what Barwick CJ had written in ***Mutual Life & Citizens Assurance Co Ltd v Evatt*** [1968] HCA 74; (1968) 122 CLR 556 at 572-3, saying (at 250):
>
> > According to the Chief Justice, whenever a person gives information or advice to another upon a serious matter in circumstances where the speaker realizes, or ought to realize, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to

> exercise reasonable care in the provision of the information or advice he chooses to give."

[42] Nor could there be any doubt that the Council through Mrs Cuthbert was under a duty of care when providing "*further information... in relation to the proposed development control plan"*. Enquirers had been directed by the letter to Mrs Cuthbert for that very topic of information.

[43] Mr Haigh's question to Mrs Cuthbert arguably entered a new dimension because it went beyond the scope of the invitation in the letter and it did not relate to the contents of the proposed development control plan. The antecedent relationship between the two people did not commit Mrs Cuthbert to answer whatever Mr Haigh asked, or to make the range of disclosures expected of a specialist medical practitioner pursuant to the duty of care expounded in ***Rogers v Whitaker*** [1992] HCA 58; (1992) 175 CLR 479.

…

[67] In my view the existence and scope of a duty should depend upon the impression conveyed by the answer to a reasonable person in the position of the inquirer. The specificity of the information sought will be relevant (cf ***Howard Marine***) as will the specificity of the disclosed purpose of the inquirer's question (cf ***Woollahra Municipal Council***). If it is clear that the person questioned was not being asked to make any specific inquiries or to consult any records, or if that person made it plain that he or she had not done so before giving an impromptu answer, then a duty of care may be negated or alternatively attenuated in its scope and content. In ***Hedley Byrne***, Lord Pearce said (at 539) that:

> To import such a duty *[of care]* the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer .... A

> most important circumstance is the form of the inquiry **and of the answer**. (emphasis added)

[68] If, in the light of the surrounding circumstances, the speaker's answer was hesitant or uncertain, or was said to be based on recollection, then it should not normally attract a duty of care. On the other hand, an answer given promptly without qualification and with apparent confidence should attract such a duty if it impliedly represents that the speaker had no doubt about the answer. See generally Spencer Bower, Turner and Handley, **Actionable Misrepresentation** 4th ed, 2000, par 404.

[69] Not every *"I don't believe so"* answer will negate a broader duty of care. Thus, a solicitor who was asked whether a will should be in writing would not avoid liability for a negative answer by framing it *"I don't believe so"*. The particular inquiry related to a simple proposition of law and the answer would have conveyed an implicit, though guarded, negative statement of opinion. A prompt response would (depending on the circumstances) probably be insufficiently qualified to prevent concluding that legal advice was being provided.

[70] With fact-specific information or advice that would normally call for a more detailed investigation, such as a search of a file, an off-the-cuff response in similar terms would usually convey nothing more than the person's actual state of knowledge and belief about the inquiry. It could not affect the existence of a duty of care said to stem from the conversation that two similarly placed persons might honestly have given opposite answers, depending upon their familiarity with or recall of the file or their sensitivity to problems that might surface: the objective circumstances would establish the duty or its absence.

[71] For the reasons already given, Mrs Cuthbert's answer contained no misleading statement and it was not pregnant with a half truth. It did not import the outcome of a detailed investigation and it did not purport to address any more than a prediction as to the likelihood of a particular

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outcome, ie the grant of development approval. It follows that, since nothing imposed a duty of care to give a further or more qualified answer, then an honest failure to do so (even if *ex hypothesi* it were careless) did not sound in liability in tort. No relevant duty of care existed."

52. Both other judges held there was also a duty by Council to take reasonable care in relation to Mr Haigh's inquiry: Beazley JA at para [102]; Fitzgerald JA [252] , who after holding there was, then said the issue devolved to inquiring whether there was a reasonable basis for Mrs Cuthbert's opinion: para [253]. (The differences in the approach of the judges is discussed in the special leave application).

Good faith defence

53. Edited extract from *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408; 116 ALR 460:

"24. His Honour found that the statutory concept of "good faith" in the performance of the functions in question, included two criteria*. The first was that the act be done bona fide and not maliciously or to achieve an ulterior purpose. The second was that there be 'a genuine attempt to perform the function correctly, that is to say that the function should not be performed without caring whether or not it be properly performed'.* After considering a passage in the speech of Lord Sumner in *Roberts v Hopwood* (1925) AC 578 at 603-4, where his Lordship was considering what he described as 'an implied qualification of good faith' in s. 62 of the *Metropolis Management Act* 1855 (U.K.) his Honour concluded:

'In my opinion, Mr Mable completed the s.149 certificates as he thought appropriate. He turned his conscious mind to the task and answered the questions as he thought proper. He was, however, negligent, in that he failed to give any proper attention to the (PWD) Study and the (Wong) Study. In these circumstances, it seems to me

that the s. 149 certificates were given in good faith.' (Emphasis supplied)

25. Counsel for the appellant emphasised that, on their face, the certificates were issued by the respondent under the hand of the Town Clerk, and that in response to the question whether the Council had information which would indicate that the Land was subject to the risk of flooding or tidal inundation, the Council, stating that the information had been taken from its records, replied "No". It was true that the statement also said that the respondent 'cannot accept any responsibility for any omission or inaccuracy'. Nevertheless, the issue of negligence and the applicability of the statutory exculpation were to be determined by looking at what the respondent had done or failed to do. The question of "good faith" was not to be determined simply by an evaluation of the conduct of Mr Mable.

26. The appellant's submission was that the Council cannot have been acting in good faith in issuing a certificate under the signature of the Town Clerk said to be based on the records of the Council if the very records which would supply the relevant information had been consciously ignored. This did not involve a challenge to the primary Judge's finding that Mr Mable honestly believed that what he was doing was, for whatever reason, the right thing. Rather, the submission was that, as a matter of objective fact, if one put together several matters (viz. the knowledge of the Council that the records existed, the lack of any proper system of dealing with requests for information of the type in question, and, as a conscious decision, the execution of the certificates without reference to those records) the result was irresponsible conduct by the respondent and an absence of good faith in the statutory sense.

27. "Good faith" in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest, albeit careless. See, for example, *Smith v Morrison* (1974) 1 WLR 659. (Abstinence from inquiry which amounts to a wilful shutting of the eyes may be a circumstance from which dishonesty may be inferred: *Jones v*

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Gordon (1877) 2 App Cas 616 at 625, *The English and Scottish Mercantile Investment Company, Limited v Brunton* (1892) 2 QB 700 at 707-8, *The Zamora No. 2* (1921) 1 AC 801 at 803, 812.) On the other hand, "good faith" may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence. This, counsel urged, was what was required by the present statutory context. The appellant then submitted that there was a plain absence of good faith in this sense on the part of the respondent.

28. In *Siano v Helvering* 13 F Supp 776 at 780 (1936), Clark J said that the words "good faith" or their Latin equivalent appear frequently in the law and are capable of, and have received, what he described as ‘two divergent meanings’. The first was the broad or subjective view which defines them as describing an actual state of mind, irrespective of its producing causes. The other construed the words objectively by the introduction of such concepts as an absence of reasonable caution and diligence. In the instant case, the Court had under consideration a regulation promulgated by the Commissioner of Internal Revenue which used the expression ‘failure in good faith to observe and comply with the requirements of all Internal Revenue and other laws relating to any operations under his permit’. The appellant asserted that he had never heard of a particular tax which he had failed to pay. The Court said (at 781):

> ‘The government could and perhaps for the completeness of the record should have introduced evidence of the fame (or notoriety, as we said before) of the tax. Even in the absence of such evidence, we think the permitee was under a duty to make inquiry. We place that upon two factors: The nature of taxes, and the lapse of time. Three years and a tax universal to his trade call, in our opinion, for some curiosity. No attempt to satisfy that curiosity smacks to us too much of the ostrich and proportionately too little of good faith.’ See also *Lucas v Dicker* (1880) 6 QBD 84 at 88, *In re Dalton (A Bankrupt)* (1963) Ch 336 at 354-5, and *Rumsey v R.* (1984) 5 WWR 585 at 592-3. These cases illustrate that, in a particular statutory context, a criterion of "good faith" may go beyond personal honesty and the absence of

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malice, and may require some other quality of the state of mind or knowledge of the relevant actor. An example in this Court is *Wilde v Spratt* (1986) 13 FCR 284 at 292, where para. 135(4)(b) of the *Bankruptcy Act* 1966 was in issue; cf *Official Trustee in Bankruptcy v Mitchell* [1992] FCA 521; (1992) 38 FCR 364 at 371.

29. The concept of "good faith" as understood in various fields of the general law provides further examples. For example, an administrative decision may involve an improper exercise of power on the footing that it is unreasonable in the *Wednesbury* sense, without there being mala fides. Likewise, the whole doctrine of constructive notice which was developed in equity as appendant to the bona fide purchaser principle, operates by reference to what would have come to the knowledge of the purchaser if he had conducted his activities in the ordinary way; see *Consul Development Pty Limited v DPC Estates Pty Limited* [1975] HCA 8; (1975) 132 CLR 373 at 412-3.

30. In the present case, it will be wrong to assume that when used in the relevant legislation the phrase ‘anything done or omitted to be done in good faith’ (in sub-s. 582A (1) of the *Local Government Act*) and ‘in respect of any advice provided in good faith’ (in sub-s. 149 (6) of the E.P.A. Act) operate to leave the respondent liable only in respect of dishonesty.

31. These provisions, on their face, are designed to strike a balance between (i) the interests of the authority which is funded by public not private funds and which, pursuant to statute, provides the information, and (ii) the interests of the recipient of the information and others reasonably acting upon it where, in the ordinary course, those persons may be expected to incur substantial liability on the faith of what is disclosed by the authority. Is the individual interest to yield to what might be called the wider public interest unless the conduct of the authority may be stigmatised as dishonest? In our view, the statutes do not bring about that result.

32. A council is reasonably to be expected to respond to an application for information of a character of the obvious significance of that sought here by recourse to its records. If the council represents that it has done so (‘The above information has been taken from the Council's Records...’)

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then it still may have been acting in "good faith" if a real attempt has been made, even though an error was made in the inspection or the results of the inspection were inaccurately represented in the certificate which is issued. It is unnecessary to decide that question on the present appeal.

33. However, in our view, in the circumstances of the present case, a party in the position of the respondent cannot be said to be acting in good faith within the meaning of the E.P.A. Act and the 1985 Act, if it issues s.149 certificates where no real attempt has been made to have recourse to the vital documentary information available to the council, and the council has no proper system to deal with requests for information of the type in question. Indeed, in the present case, as counsel for the appellant emphasised, the council officer whose responsibility it was to deal with the request for information consciously ignored the very records which would have supplied it.

34. *The statutory concept of "good faith" with which the legislation in this case is concerned calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority. In this case there was a failure to meet that standard.*

35. Accordingly, we would reach a different conclusion on this branch of the case to that of the primary Judge."

Section 733 Local Government Act

54. This creates a good faith defence for Councils in relation to advice given, or things done or omitted to be done in good faith in relation to the likelihood of land being flooded. This can extend to responses in Sec 149 certificates; consents and refusals of development applications under the *EPA&A* Act; and the carrying out of flood mitigation works.

It is not easy to see how this defence might be engaged in cases relating to undisclosed pipes , but out of caution, reference is made to a High Court case on the section , *Bankstown City Council v Alamdo Holdings* [2005] HCA

46; (2005) 223 CLR 660.

Vendor non-disclosure

55. Bear in mind the implied vendor's warranties as contained in the *Conveyancing (Sale of Land)* Reg 2005. Consider whether they have been breached on the facts of the case.

56. A seller has a positive duty to disclose latent, as opposed to patent, defects in the title to the property: *Smith v Colbourne* [1914] 2 Ch 324. There was a presumption that the seller knew the condition of their own title: *Yandle & Sons v Sutton* [1922] 2 Ch 199, 210 (Sargant J).

57. It was held, *obiter,* in *Bebonis v Angelos* [2003] NSWCA 13; (2002) 56 NSWLR 127 as follows:

> "… In these circumstances it is arguable that the implied term required the vendor impliedly to warrant that reasonable care had been taken in preparing the answers, in order to give business efficacy to the whole procedure. Since a purchaser would rarely discover the falsity of an answer prior to completion business efficacy would also seem to require that the implied warranty should not merge on completion. Compare *Palmer v Johnson* (1884) 13 QBD 351 CA.
>
> 42 There is no reason why an implied term requiring the exercise of reasonable care should exclude a duty of care in tort (compare *Midland Bank Trust Ltd v Hett Stubbs & Kemp* [1979] Ch 384). A solicitor acting for one party does not ordinarily owe a duty to another but exceptionally may do so if a responsibility to that party has been assumed… However in *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560 Nicholls VC held that the solicitor for an intending vendor owed no duty of care to the purchaser in answering preliminary enquiries before contract although the vendor owed such a duty. It might be thought anomalous that the lay client should owe a duty which ordinarily will be performed through a solicitor without the

solicitor also owing such a duty. It is not necessary to decide this question but …"

58. Austin J, in *Kirkland v Quinross Pty Limited* [2008] NSWSC 286, put *Bebonis* in context as follows:

> "50 I was taken to several cases that have addressed the question whether a solicitor for one party can ever owe a duty of care to another party to avoid economic loss. It is necessary to put these cases into context within the rapid development of the law of negligence causing economic loss that has taken place in the High Court of Australia in recent years. Some earlier cases in this area treat the concept of proximity as the centrepiece of analysis. ..... But more recent decisions by the High Court have taken a different approach, with the result that now, 'proximity is no longer seen as the 'conceptual determinant' in this area' (*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, ...
>
> 51 Generally speaking, the concept of vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. In the *Woolcock* case, Gleeson CJ, Gummow, Hayne and Heydon JJ explained the concept as follows (at 530; see also at 548-9 per McHugh J):
>
> > ' "Vulnerability", in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "vulnerability" is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant ... …'
>
> 53 The same analysis is to be applied to the position of a vendor's solicitor, when responding to the purchaser's requisitions on title,

though the outcome will depend upon a precise analysis of the instant facts. As regards some matters, the purchaser is not in a position of vulnerability because alternative avenues of inquiry are available (for example, with respect to such matters as zoning and unpaid rates). Difficulty has arisen, however, where the requisition relates to a subject on which the vendor's solicitor has special knowledge: for example, the contents of an unregistered agreement between the vendor and a third party affecting the land (cf *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, another case cited by counsel for Mr Davidson) or the existence of an unregistered easement created over the land in a transaction in which the vendor's solicitor acted (cf *Bebonis v Angelos* [2003] NSWCA 13;(2003) 56 NSWLR 127). In those cases it will be necessary to make a factual assessment in order to determine whether the purchaser's position of vulnerability is sufficient, together with other relevant circumstances, to give rise to a duty of care owed to him or her by the vendor's solicitor. In the *Gran Gelato* case it was held that no such duty existed; but in *Bebonis*, Handley JA, with whom Beazley and Heydon JJA agreed, questioned that decision (at 135 [42]), suggesting it might be anomalous that the lay vendor would owe a duty of care to the purchaser but the solicitor would not. It is unnecessary to resolve that issue here, as the facts are some distance away from requisitions on title.

...

55 The notion of assumption of responsibility as a guiding principle has also been addressed by the High Court. In *Woolcock*, Gleeson CJ, Gummow, Hayne and Heydon JJ said (at 531):

> 'In other cases of pure economic loss (*Bryan v Maloney* is an example) reference has been made to notions of assumption of responsibility and known reliance. The negligent misstatement cases like *Mutual Life & Citizens' Assurance Co Ltd v Evatt* [(1968)[1968] HCA 74; 122 CLR 556; (1970) 122 CLR 628; [1971] AC 793] and *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* [(1981) [1981] HCA 59; 150 CLR 225] can be seen as cases in which a central plank of the

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> plaintiff's allegation that the defendant owed it a duty of care is the contention that the defendant knew that the plaintiff would rely on the accuracy of the information the defendant provided. And it may be, as Professor Stapleton has suggested [(2002) 50 *UCLA Law Rev* 531, at 558-9], that these cases, too, can be explained by reference to notions of vulnerability.' "

59. Absent fraud, or perhaps total failure of consideration, a completed contract for the sale of land cannot be set aside: *Svanosia v McNamara* [1956] HCA 55; (1956) 96 CLR.186, where it was emphasised that the defect in title under consideration (viz the land sold being about 1/3 on adjacent Crown land), could have been the subject of a requisition, but was not; and that whilst rescission might have been sought prior to completion, or perhaps specific performance might not have been granted, those remedies did not survive completion.

60. Reference is made generally to the principle in para [26] of *International Advisor Systems Pty Limited v XYYX Pty Limited* [2008] NSWSC 2 as to when equity will relieve against unilateral mistake induced by another.

Agent's non-disclosure

61. The question of when conduct can be misleading by silence was recently surveyed by various judges in *Owston Nominees (No 2) v Clambake* WASCA [2011] 76, in which McClure P said this:

> "Much of the confusion in this area of the law is because the circumstances in which silence or non-disclosure of information arises are many and varied. Half truths, unequivocal/unqualified statements where qualification is required and statements which are true when made but falsified by subsequent events ordinarily convey a representation (the latter by the device of relying on the continuation of the representation). Most of the leading cases on silence involve acts by the defendant in circumstances which gave rise to a representation which was falsified by the undisclosed facts: ***Henjo*** (the restaurant is licensed to seat 128 people); ***Demagogue*** (there was nothing unusual about access to the property); ***Fraser*** (we have provided all relevant and material information). In such circumstances, there is no requirement that the undisclosed facts be known to the defendant:

> ***Fraser*** (467); ***Johnson*** [66]. However, if that was a proposition of general application there would be no scope for a requirement that silence be intentional or deliberate. Moreover, the reasonable expectation test is predicated on an assumption that the defendant is aware of the undisclosed fact."

62. Paragraph [220] ff of Murphy JA's judgment also requires careful analysis on when there is a reasonable expectation that a party in negotiations will volunteer information known to it.

As against the agent

63. Assume the agent personally knew of the history of the pipe problem. The agent was acting in the course of its trade or commerce. Was his or her silence about the pipes misleading or deceptive? Perhaps this can be tested by asking whether the purchasers had a legitimate expectation the agents would disclose the pipes. A lot will depend on the facts of each case, eg did the agent discuss this aspect specifically with the incoming owners; or perhaps more generally discuss plans for developing the property.

64. I tentatively incline against the view that there could be a legitimate expectation for the agent to advise of such matters IF the agent does not answer any question in a misleading manner; nor provide any material that was misleading

65. The obligation to disclose latent defects is the vendor's: why should the notional agent think the vendor through its solicitor would do anything other than comply with the law?

66. However *Argy v Blunts* and *Butcher v Lachlan Elder Realty Pty Limited* [2004] HCA 60 bears careful rereading.

Reference material

Section 733 provides:

"(1) A council does not incur any liability in respect of:

(a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding, or

(b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.

....

(3) Without limiting subsections (1) and (2), those subsections apply to:

(a) the preparation or making of an environmental planning instrument or development control plan, or the granting or refusal of consent to a development application, or the determination of an application for a complying development certificate, under the *Environmental Planning and Assessment Act 1979*, and

(b) (Repealed)

(c) the imposition of any condition in relation to an application referred to in paragraph (a), and

(d) advice furnished in a certificate under section 149 of the *Environmental Planning and Assessment Act 1979*, and

(e) the carrying out of flood mitigation works, and

(f) the carrying out of coastal management works, and

(g) any other thing done or omitted to be done in the exercise of a council's functions under this or any other Act.

(4) Without limiting any other circumstances in which a council may have acted in good faith, a council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished, or the thing was done or omitted to be done, substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time.

(5) For the purposes of this section, the Minister for Planning may, from time to time, give notification in the Gazette of the publication of:

(a) a manual relating to the management of flood liable land, or

(b) a manual relating to the management of the coast line.

the notification must specify where and when copies of the manual may be inspected.

(6) A copy of the manual must be available for public inspection, free of charge, at the office of the council during ordinary office hours.

(7) This section applies to and in respect of:

(a) the Crown, a statutory body representing the Crown and a public or local authority constituted by or under any Act, and

. ..."

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