



Client Newsletter

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79

May 2012

On 4 April 2012 the Court of Appeal of Western Australia handed down a decision which contained an analysis of the duty of care owed by the State to grape growers affected by smoke from a prescribed burn of adjacent land.

The prescribed burn was carried out by officers of the Department of Conservation and Land Management (the Department) from late March to early April 2004, and covered 560 ha of land in the Warrant National Park (the Park) in south-west Western Australia. The first appellants were the registered owners of land on the boundary of the Park, while the second appellants leased portions of this land, on which they cultivated vines and grapes for wine production. The burn took place during the period from veraison to harvest of the grapes, at which stage there is a 'not insignificant' risk that the grapes would be damaged by smoke from the burn. The smoke damage resulted in the loss of the annual crop, amounting to \$620,000. The appellants made their claim on the basis of property damage, not pure economic loss.

At trial, Justice Murphy held that the respondents did not owe a general law duty of care to the appellants to avoid smoke damage to their grapes under the *Civil Liability Act 2002* (WA) (CLA). Even if a duty did exist, it had not been breached.

Summary

The Court of Appeal of the Supreme Court of Western Australia has found that the Department of Conservation and Land Management does not owe a duty of care to grape growers to avoid the risk of damaging grapes by smoke taint when carrying out prescribed burning of adjacent land.

The Court determined that the imposition of a duty of care in the circumstances would be incompatible with the Department's statutory obligation to manage the land in accordance with the relevant fire management plan.

On appeal, the appellants challenged the findings relating to duty of care and breach. The respondents— the Executive Director of the Department, and the State of Western Australia as first and second respondents, respectively— filed a notice of contention to uphold the findings on the additional ground that they are exempt from liability under the *Conservation and Land Management Act 1984* (WA) (CALM Act).

The Court of Appeal ruled against the appellants in a 2-1 decision, with the principal judgment given by McLure P, and Pullin JA in dissent.

The evidence

It was accepted at trial that, at the time of the prescribed burns, there was awareness of the risk of smoke contamination of wine grapes. The appellants had communicated their concerns about the potential harm with the Department and its CALM officers who conducted the burn. In the months prior to the burn the Department also received requests from other grape growers in the area to defer the burns until after harvest. The burn prescription was initially amended to minimise the smoke impact on the appellants' vineyards, but the Minister approved the Department's position to carry out the prescribed burns when the field conditions were deemed suitable, and not to delay them at the request of neighbours.

At trial, Murphy J accepted evidence that the Park was a necessary part of the prescribed burning programme and that, between 2000 and 2007, there had been on average only one day every fire season that was suitable for burning the relevant type of karri forest. The prescribed burn of the Park required two days just for the purpose of lighting up.

Murphy J also accepted expert evidence that it was neither possible to conduct a prescribed burn on the land without putting some smoke over the appellants' vineyard, nor to maintain an effective fuel reduction burning programme if burning were restricted to outside the veraison to harvest period. Further, reasonable steps had been taken to minimise smoke over the vineyards when the burn was conducted, and no other reasonable steps could have been taken other than deferring the burn.

The burn had originally been planned in 1999, but was deferred each season until 2004. On 30 March 2004 the Department's officers carried out the burn on the basis of a four-day forecast which indicated that conditions were suitable for the burn to take place. Murphy J found that a prudent fire manager would have taken advantage of the window of opportunity on 31 March 2004 to conduct the burn.

Regulatory framework

Under the CALM Act, the Department is under a statutory duty to manage land to which the Act applies in accordance with the Forest Management Plan. The Forest Management Plan requires the Department to undertake an annual prescribed burning programme in accordance with its fire management plan and smoke management guidelines. Therefore, the Department is under a general statutory duty to conduct prescribed burns. It was pursuant to these duties and powers that the Department placed the land on the annual prescribed burning programme.

McLure P placed significance on the language of these statutory obligations, finding that the objective of 'minimising' the risk of smoke damage from the burn is a subsidiary purpose of the statutory framework. This means that where the need to minimise smoke conflicts with the primary statutory objectives, the latter must yield to those primary purposes.

His Honour also found that the prescribed burning is to be carried out for the benefit of the south-west community as a whole, which is a wider class than the affected grape growers, and includes differing and conflicting interests.

Duty of care

The appellants asked the Court to find that a well-established duty of care existed between the Department (who was in control of the prescribed burn in the Park) and the appellants (who owned and occupied the adjoining land) under the common law. McLure P rejected this argument, under both common law and the CLA.

Instead, McLure P followed Hayne J's approach in *Modbury Triangle Shopping Centre Pty Ltd v Anvil* to find the scope of the duty of care: the question is whether the type of damage suffered is the result of the breach of a duty owed to the plaintiff by the defendant.

Despite remarking that the law of liability in negligence of public authorities is 'remarkably confused', McLure P accepted that there is a move toward focusing on the reasonableness of the act or omission in question, rather than providing immunity for policy decisions.

Statutory duties and powers must be exercised with reasonable care, but the prima facie duty to do so is subject to the principle of coherence. There will be no duty found at common law to the extent that it is incompatible with other duties, statutory or otherwise. Specifically, a duty will not arise if it undermines the effectiveness of duties imposed by statute or if it distorts the performance of statutory functions: *Sullivan v Moody* (2001) 207 CLR 562

In this case, a duty to *avoid* the risk of smoke taint to the grapes would require the Department to refrain from performing its statutory obligation to manage the land in accordance with its fire management plan, and prevent any prescribed burn. A duty of care to *exercise care to avoid* the risk of smoke taint would make the Department's statutory duties subservient to the duty of care. A duty to *give proper consideration* to the risk of smoke taint would distort the focus of the statutory decision-making process and the Department's performance of its statutory functions.

Finding a duty of care would therefore not be reasonable in the circumstances, and would impose a legal obligation which would be incapable of being discharged.

Breach

Once McLure P formulated the alleged negligent act to be the Department's performance of its statutory function itself, his Honour concluded that it is not the function of a court to rule on the reasonableness of statutory functions. The element of 'social utility' which the CLA requires the court to weigh is predetermined in this case, since the court is not free to form and act upon its own assessment of the reasonableness of the statutory objects and purposes. McLure P noted that Pullin JA's dissenting analysis of reasonableness, based on the possibility of

conducting the prescribed burn outside the vulnerable period of time, flows from a flawed formulation of the duty of care.

Dissenting analysis

Pullin JA found that, on the evidence, the option of conducting the burn outside the veraison to harvest period was open. Therefore it would be possible for the Department to discharge a duty of care to the appellants while performing its statutory functions, without an excessive burden. Accordingly, the respondents breached their duty by not deferring the burn.

Further, according to Pullin JA the policy defence did not prevent a finding of fault. Although the decision to not defer the burn was a decision based on policy, it was so unreasonable that no reasonable public body or officer in the respondent's position could have decided to press on with the burn instead of deferring it.

Social utility

Both the trial judge and the Court on appeal readily accepted that prescribed burns carry important social utility.

In dissent, however, Pullin JA questioned the weight to be ascribed to the utility of burns. In this analysis, the fact that Parliament has legislated to permit an act does not determine how much weight the social utility of that act should hold. His Honour found that there is not adequate evidence to conclude that prescribed burning achieves its stated purposes—even in evidence which had been before the trial judge, such as an inconclusive report of the Environmental Protection Authority. The stated purposes are, specifically, that prescribed burning 'optimises the maintenance of forest ecosystem health and vitality', 'promotes the conservation of biodiversity', and controls the 'adverse impacts of wildfire'. In contrast, Pullin JA found it plausible that prescribed burning may in fact be more damaging to the interests of the community than it is of social utility, due to the risks to humans, animals and property that it carries.

However, since there was no challenge of the trial judge's finding that there is social utility in prescribed burns, Pullin JA proceeded on the basis that the burn does in fact have social utility.

Conclusions

A duty of care to persons affected by smoke from prescribed burns cannot be found that is inconsistent with the government's statutory obligations to conduct the prescribed burning. These powers, however, must be exercised with reasonable care.

¹ (2005) 205 CLR 254.

Further Information

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