

IN THE SUPREME COURT OF QUEENSLAND

No. 4039 of 1980

CHAMBERS

Before Mr. Justice Moynihan

BETWEEN:

ORMOND HERBERT FOXLEE and FOXLEE & CO. (a firm) Plaintiff

AND:

PROSERPINE SHIRE RIVER IMPROVEMENT TRUST First Defendant

AND:

GEOFFREY ANDREW KNOWLAN JOHN HERBERT HALES Second  
ADRIAN JOSEPH RYAN KEITH THEODORE MEINERT and Defendant  
ULLMAN & KNOWLAN PTY. LTD.

JUDGMENT - MOYNIHAN J.

Delivered the 10th day of May, 1989

Counsel: D.A. Reid for Applicant  
D.R. Boughen for Respondent  
Solicitors: Feez Ruthning for Plaintiff  
Messrs. Macrossan & Amiet for First Defendant  
Messrs. Morris Fletcher & Cross for Second Defendant  
Hearing dates: 20th April, 1989

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For reasons which I published on 21 December, 1988 I concluded that it was appropriate to have determined prior to the trial of this action a question of law. I left the ultimate formulation of the question to be considered by the parties in the light of my published reasons. Subsequently the plaintiffs and the first defendant asked to have determined as between them a question which they agreed ought to be in the following form:-

"Whether the first defendant is immune from liability for negligence and/or nuisance and/or otherwise (except liability for compensation pursuant to the provisions of the River Trust Improvement Act 1949 as amended) in respect of all works (being works as defined in s. 2(1) of the said Act) undertaken and/or maintained by it as directed or approved by the Commissioner of Water Resources with the consent of the Minister pursuant to the provisions of s. 10 of the said Act provided that, to the extent that the said directions or approvals leaves to the said Trust any discretion as to the manner in which the said works are to be undertaken or maintained, and the said works have been carried out and conducted with all reasonable regard and care for the interests of others."

On the earlier occasion the question I was considering was whether or not a question of law ought to be determined prior to the trial as distinct from determining a question of law. I there refrained from reaching any definitive answer to the question. That is what the plaintiffs and the first defendant now ask me to do.

In my reasons published on 21 December, 1988 I essayed an analysis of the allegations founding claims of

negligence and nuisance made by the plaintiffs against the first defendant in the pleadings as they presently stand. I will not repeat that exercise here. Suffice it to say that the action as presently constituted contends for a far wider liability than any which might arise as a consequence of simply carrying out works directed or approved by the Commissioner (as defined by s. 2(1) of the River Improvement Trust Act 1940-1977 - "the Act") with the concert of the Minister. Moreover even in respect of such works the plaintiffs contends for liability on a basis far wider than, as the first defendant would have it, the Act admits. For example, it seems clear from the pleadings that, although by para. 8(d) of its defence; the first defendant pleads a number of specific directions and approvals as authorising the works the effects of which are complained of, one of the issues that the plaintiffs wish to canvas is the concept and design of the whole flood mitigation scheme consequent upon which the specific approvals leading to the construction of the work in issue of the proceeding were obtained.

In my earlier reasons I also undertook an analysis of the more pertinent authorities directed to the issue of statutory authority. I do not propose repeating that exercise in these reasons although it will be necessary to refer to some of the cases. It is however desirable to set out certain of the provisions of the Act.

Section 2 of the Act defines "Works" in these terms:-

"Works" - The term includes the whole or any part of any works, project, undertaking, or other matter or thing whatsoever undertaken and/or maintained under this Act for the purposes of repairing as far as may be damage occasioned to the bank of any river within a river improvement area prior to or after the passing of this Act by flood or cyclone and/or of preventing as far as may be the future occurrence of such damage:

The term also includes any trees, grass, or other plants planted and/or maintained for any of the aforesaid purposes;

The term also includes -

- (a) The removal of dead or growing timber, or other vegetation or aquatic plants, or of silt, shingle, soil, sand, gravel, stone, rock or other matter or thing whatsoever, from the bed, banks or foreshore of any tidal waters or coastal lake or lagoon, or from the water or the bed or banks of a river or from any adjoining, adjacent or nearby lands, the placing or depositing of any such timber, or other vegetation or aquatic plants, or of silt, shingle, soil, sand, gravel, stone, rock or other matter or thing whatsoever, on any adjoining, adjacent or nearby land, including, in the case of removal from adjoining, adjacent or nearby lands hereinbefore referred to, on such lands, and the removal of or otherwise disposing of by burning (where appropriate, having regard to the nature of the matter or thing in question), or by any other means whatsoever, any such timber, or other vegetation or aquatic plants, or of silt, shingle, soil, sand, gravel, stone, rock or other matter or thing whatsoever placed or deposited as aforesaid;
- (b) Changing or preventing the changing of the course of a river; defining and constructing the course of a river through a swamp or otherwise draining land;
- (c) Preventing the erosion of the bed or banks of a river or of adjoining, adjacent or nearby lands by the waters of a river;
- (d) Preventing the siltation of the course of a river where such work is confined to the bed or banks of a river and adjoining, adjacent or nearby lands;
- (e) Preventing the flooding of land by the waters of a river;
- (f) Deepening, widening, straightening or improving the course of a river;
- (g) Preventing the inflow of sea water or saline water into the course of a river; or
- (h) Preventing the erosion of lands by tidal waters or by the waters of any coastal lake or lagoon.

Other relevant provisions of the Act include:-

"9. Compulsory acquisition of land.

- (1) In respect of any works or purpose with respect or in relation to which any right, power or authority is conferred or duty or obligation imposed upon the Trust under this Act, the Trust shall be a constructing authority under "The Acquisition of Land Act of 1967."

10. Works which Trust shall undertake and/or maintain.

- (1) The Trust shall undertake and/or maintain the following works, namely:-
  - (a) All such works as the Commissioner, with the consent of the Minister, from time to time directs or approves; and
  - (b) All such works as the Commissioner, with the consent of the Minister, directs the Trust to maintain:

Provided that no such work shall be undertaken by the Trust in, on, over, through or across any foreshore or any land lying under the sea within Queensland waters or any land lying under any harbour (including any navigable river) without the joint approval of the Minister and the Minister administering "The Harbours Acts, 1955 to 1959" and "The Queensland Marine Act of 1958" previously had and obtained.

The provisions of subsection two of section eight-six, sections eighty-seven to ninety, both inclusive, and subsection one of section ninety-one of "The Harbours, Acts, 1955 - 1959" shall not apply to works undertaken for the purposes of this Act with the joint approval of the Minister and the Minister administering "The Harbours Acts, 1955 to 1959" and "The Queensland Marine Act of 1958":

Provided further that any such works which will interfere with, damage, or prejudice otherwise howsoever any works or undertakings of the Crown, any Local Authority, any Electric Authority, or any corporation, instrumentality or authority (other than a Harbour Board) created by or under any Act, or which are objected to by any of the aforesaid on the ground

of interference, damage or prejudice as aforesaid shall not be undertaken by the Trust without agreement as to the steps and things to be taken and done for preventing or minimising any such interference, damage or prejudice or, failing such agreement, until such steps and things have been determined by the Governor in Council.

- (2) Moreover, the Trust shall before the expiration of each year plan a programme of works for the following year and shall submit such plan to the Commissioner who, subject to the consent of the Minister, may approve of same either with or without modification.

This subsection shall not prejudice or limit the power of the Commissioner to direct the Trust to undertake and/or maintain any works.

- (3) The power of the Trust to undertake works includes, but without limiting the ordinary meaning of that term, power, subject to the direction or approval of the Commissioner in that behalf given with the consent of the Minister, to construct, establish, carry out, manage, and/or control the works concerned.
- (4) The Trust may enter into contracts for or with respect to the undertaking and/or maintenance of any works.
- (5) Contracts. The Trust may agree with any owner or, where the owner is not the occupier, with the owner and occupier of any land for or with respect to the undertaking and/or maintenance by the Trust of works in or upon such land or any part thereof and/or for or with respect to the use by the Trust of any land or any part thereof for the purposes of ingress, egress, and regress to and from such land or any other land upon or in which the Trust is undertaking and/or maintaining any works.

Upon production to the Registrar of Titles or, if some other authority is charged with registering instruments of title to the land concerned, then to such other authority, of any such agreement and the lodgment with him of a copy thereof the Registrar of Titles or such other authority shall register same upon all instruments of title to the land concerned, and thereafter such agreement shall, while it remains

in force, be binding upon every person who had at the time of the making thereof, or who, at any time after the making thereof, becomes possessed of any estate or interest (legal or equitable) or any easement, right, power, or privilege over, in, or in connection with such land.

- (6) All contracts or agreements made by the Trust under subsection four or, as the case may be, subsection five of this section shall be effectual in law and shall be binding on the Trust and all other parties thereto, their successors, executors, administrators, and permitted assigns, as the case may be, and in the case of default in the execution of any such contract or agreement, either by the Trust or by any other party thereto, such actions may be maintained thereon and such damages and costs recovered by or against the Trust or the other parties failing in the execution thereof as might have been maintained and recovered if the same contracts or agreements had been made between private persons only.
- (7) The Commissioner or any person authorised in writing by him in that behalf or any member of a Trust or any of its officers or employees authorised in writing on that behalf by the Trust may enter upon any land -
  - (a) where an emergency exists, forthwith;
  - (b) in any other case, upon seven days' notice in writing being given to the owner or occupier of that land, for the purpose of -
    - (c) examining whether any of the provisions of this Act or any requisition, notice or order issued pursuant to this Act is being complied with or is being contravened;
    - (d) making any plan or survey or taking levels;
    - (e) making any inspection or examination;
    - (f) otherwise in or for carrying out any of the powers, duties or authorities conferred or imposed upon the Trust by or pursuant to this or any other Act.

The power to enter upon any land includes power to -

- (g) remain upon that land for such time as is necessary to achieve the purpose of such entry and to place or deposit timber (whether dead or growing at the time it is removed as first hereinafter referred to), or other vegetation or aquatic plants, or silt, shingle, soil, sand, gravel, stone, rock or other matter or thing whatsoever, removed from the bed, banks or foreshore of any tidal waters or coastal lake or lagoon, or from the water of the bed or banks of a river or from any adjoining, adjacent or nearby lands, on land adjoining, adjacent to or nearby such place of removal, including, in the case of removal from adjoining, adjacent or nearby lands as aforesaid, on such lands, until it can reasonably be removed or otherwise disposed of by burning (where appropriate, having regard to the nature of the matter or thing in question) or by any other means whatsoever;
- (h) take such assistants, vehicles, materials, equipment or things as are necessary to achieve the purpose of such entry.
- (8) Where consequent upon the exercise of a power conferred by subsection (7) of this section, loss or damage results to the owner or occupier of the land in respect whereof such power is exercised, the Trust, or as the case may be, the Commissioner shall pay compensation therefor to the person or persons entitled thereto.

If the amount of such compensation is not agreed upon it shall be determined by the court or tribunal which would be authorized under this Act to determine the compensation payable in the event of the Trust or, where the Commissioner is to pay compensation, the Trust constituted in respect of the river improvement area in which the land in question is situated, taking the land concerned."

It may immediately be acknowledged that compensation pursuant to s. 10(8) is expressed to be confined to the owner or occupier of land suffering loss or damage consequent upon the exercise of a power conferred by ss. (7) and that that constraint is a material, but in my view not decisive, consideration; c.f. Allan v. Gulf Oil

Refinery Ltd. (1981) A.C. 1001 per Lord Edwund-Davies at 1016.

I am inclined to view the provisions of s. 10 as mandatory rather than facultative or permissive. In other words upon the Commissioner, with the consent of the Minister, having directed or approved the undertaking or maintenance of "Works" by a River Improvement Trust the Parliament "by express direction ... has authorised the construction and use of ... works carrying with it an authority to do what is authorised with immunity from any action ... "; Allen v. Gulf Oil Ltd. (1981) A.C. 1001 at 1011 per Lord Wilberforce and the cases there cited together with Caprino Pty. Ltd. v. Gold Coast City Council (1982) 53 L.G.R.A. 243 and Yorke Brothers (Trading) Pty. Ltd. v. Commissioner for Main Roads (1983) 1 N.S.W.L.R. 391. The more relevant aspects of these cases have been dealt with in the reasons I earlier published. By the same token the applicable concept of negligence is the limited sense spoken of by Lord Wilberforce at p. 1011 of Allen (ante) which is reflected in the question agreed on between the plaintiff and the first defendant.

If I have correctly understood the submissions made on behalf of the plaintiffs (and I may do the argument an injustice in any event by over simplifying it) they included submissions to the following effect. The definition of "Works" is directed to the prevention of flooding (in (e) and other aspects of the definition). Activities which did not have the consequence of preventing flooding or erosion but rather which cause it - consequences complained of by the plaintiffs as a result of work undertaken by the first defendant - were not "Works" in terms of the Act and hence were not authorised by the Act.

Assuming such an argument to be open on the pleadings (in my view a somewhat dubious assumption) having regard to the scheme of the Act manifest in s. 10 the argument would seem to face the same difficulties a comparable argument

ran into in Caprino Pty. Ltd. v. Gold Coast City Council (ante); see per Andrews S.P.J. and Thomas J. at 246 and following and per Connolly J. at 261 where he said:-

"... The extent of a statutory authority is a matter of construction and its consequences are a matter of law. That some other scheme more acceptable to the appellant might have been given statutory approval is neither here nor there. If the respondent is to be deprived of its statutory immunity it must be shown that it has failed to carry out the work actually approved and to conduct the operation approved with reasonable regard for the interests of others. It is not sufficient to show, and I express no view as to whether it has been shown, that the desired flood mitigation could have been achieved without injuring the appellant in the particular way of which it complains."

Applying the principles in the cases to which I have referred and construing the legislative provisions in this case as I think they must be construed, the first defendant, in my view, is immune from liability for negligence and/or nuisance or otherwise except for compensation in terms of the Act in respect of works undertaken and/or maintained by the direction or approval of the Commissioner with the consent of the Minister provided that to the extent any approval or direction left any discretion in the Trust as to the manner and maintenance of the work what was done was done with reasonable regard to the interests of others. The answer to the question of law is therefore yes.