Case note: *Monticello Holdings Ltd v Selwyn District Council*

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Does a council owe a duty of care to a developer when issuing a PIM? Is a council required to disclose information in its historical records? These questions were answered in a very recent decision of the High Court.

The case concerned an allegation by a developer that a council was negligent by failing to disclose the existence of a former town dump on land purchased by the developer.

Background

In July 2005 the developer purchased a 10 hectare parcel of land in Leeston. The sale and purchase agreement contained a LIM condition and a LIM was obtained.

In April 2007 the developer entered into an agreement to purchase a neighbouring block of land containing another hectare (the Cooper land). The developer neither requested nor obtained a LIM for the Cooper land.

Later that month the developer submitted a resource consent application to subdivide the Cooper land into two lots. One of the lots was to be amalgamated with the 10 hectare parcel purchased in 2005. The other lot with a house was retained by Mrs Cooper (the amalgamated land is referred to as "the land" from here on in).

In July 2007 the developer applied for resource consent to subdivide the land into 103 residential lots. In October 2007 the resource consent was granted. It included a condition that:

> 43. The consent holder shall identify and report all hazardous waste sites within the subdivision prior to any engineering works commencing. Where a hazardous site is found at any stage of the subdivision development works then the Consent Holder shall undertake all necessary work to rehabilitate the site. This may include treatment and offsite disposal. All work shall be undertaken at the Consent Holder's expense.

In August 2008 Mrs Cooper obtained a PIM for work to be carried out on her lot to install and connect a sewer pipe from her house to the new sewer line and to disconnect and decommission her existing septic tank.

In September 2008 the council issued a PIM to Mrs Cooper for the work specified in her application. The PIM made no reference to any hazardous material.

Three years passed by with little activity by the developer.

In October 2012, during the completion of site works for the subdivision of the land, the developer discovered a buried rubbish pit. It was on the Cooper land. The rubbish was part of a disused town dump established in about 1933 and used until around 1955 by two predecessors of the current council.

The developer excavated the buried rubbish and placed it elsewhere on the land. It has remained there in a large mound ever since.

A year later the developer applied for (and was granted) a combined subdivision and land use consent to create 19 of the total 103 lots in two stages. The consent included a condition that the contaminated land be remediated. The cost of remediating the land, by treating the contaminated material and removing it off site, is estimated to be in excess of $800,000.

The legal arguments

The developer alleged that the council owed a duty of care to (a) maintain adequate records and record contamination in PIMs; (b) maintain adequate records and record contamination in LIMs; and (c) not to issue resource consents for land the council knows, or ought to know, is contaminated. The court found:

a. The council did not owe the developer a duty of care when it issued the PIM because the only person entitled to obtain the PIM was the neighbour, Mrs Cooper, and it was solely for the sewer works and not the broader subdivision. A council's responsibility for issuing PIMs does not extend to third parties;
b. The council was not liable in relation to issuing a LIM, or failing to record relevant information on a LIM, because no LIM was sought or received by the developer; and
c. The council did not owe a duty of care to the developer to furnish it with information when it issued the resource consent and the council was entitled to rely upon the information placed before it. The court also found that there was insufficient proximity between the council and the developer for a duty of care to exist. The court followed the Bella Vista line of authorities.

What does a council know?

The court found no duty of care was owed because of insufficient proximity between the developer and the council – but it did not just leave it there. The court closely analysed the extent of a council's duty of care in relation to the issuing of a PIM. This appears to be the first case where such a duty has been considered by the court. The comments are obiter but still very interesting.

The council argued that the fact a predecessor council knew of the dump did not mean that the current council did. Even if the information was in the council's archives it was not reasonable for the council to discover that historical information. To do so was described by the council as an "impossible burden".

The court did not like the council's argument. It said (at paragraph 101) that it was inclined to the view that a council was required to disclose information in its records, even its historic records. The justification for this was as follows:

1. Members of the public rely on local authorities for information.
2. A fee is paid for the provision of the information.

3. This is information is within the sole control of the council.
4. The disclosure need not be extensive – it needs to draw the attention of the parties to the hazard, rather than to provide substantial details of it.
5. The council knew that there were contaminated sites within its district.
6. The presence of the dump raises health and safety in relation to building or future building, which is what the Building Act is concerned with. Immediate obvious health and safety concerns might include the existence of heavy metals, leaching and a risk of subsidence.
7. The court's conclusion was supported by case authorities in relation to LIMs which the court viewed as applying equally to PIMs, and the court referred to Westland District Council v York and Henry & Tan v Auckland Council.
8. It was reasonably foreseeable that members of the public would rely on the information contained in a PIM they have requested – after all, the PIM must disclose special features of the land. That is one of the express purposes for which they exist.
9. The former dump site was owned and managed by the council's predecessor in time – this was not a piece of land for which the council has no records where contamination could only be discovered if a site investigation was undertaken. Quite simply, the council ought to have known about the dump.

On the unusual facts of this case (the developer did not obtain the PIM for work on its land, its neighbour Mrs Cooper obtained a PIM for the land next door and that PIM was for specific sewer type works) there was insufficient proximity to impose a duty. However the court has been quite clear that if the person suing the council was the PIM applicant, and the council was in possession of information it should have disclosed, then a duty will be imposed.

What if?

This case had very unusual facts. It is interesting to speculate about what the court would have decided if Mrs Cooper had applied for a PIM to build on the rubbish dump, had not done the work and shared that information with the developer before the developer purchased the land. In that situation it is likely that the developer could have argued it relied upon the PIM the council issued.

If the developer had applied for a LIM for the Cooper land or a PIM to build on the rubbish dump, and such a document failed to disclose the rubbish dump, then it is fair to conclude that the council would have been in serious trouble.

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