

Criminal liability for development carried out by contractors

By Tim Beckett

While there has always been a general understanding that owners of land are generally taken to be responsible for any unlawful development on their land, the position has been less settled in relation to developers, builders, and contractors who carry out development on land owned by other parties.

This issue was the subject of a Supreme Court appeal in *City of Swan v All Earth Group Pty Ltd* [2021] WASC 279, following an initial acquittal of an earthmoving company which was responsible for depositing large quantities of fill onto a number of properties. We were successful on appeal, where the Supreme Court found that, irrespective of any liability that may attach to property owners, other entities are also required to ensure that any development carried out by them is lawful.

History of proceedings

On 9 November 2020, the accused company was acquitted of three charges under section 218(a) of the *Planning and Development Act 2005 (PDA)*, alleging that the company had carried out works on land without requisite development approvals. The agreed facts of those charges were that the company had deposited and roughly spread large quantities of fill on 3 unrelated properties without the development approval of the City of Swan. In each case, the property owners consented to the fill being deposited on their properties and the fill was provided to them free of charge, as it had become available due to the earthmoving company's operations in a nearby subdivision.

In the agreed facts before the Court, it was accepted that the company had:

- carried out the works with consent of all owners;
- had not made representations that it would obtain planning approvals for those works; and
- was not aware of the requirement for development approval for those works.

Furthermore, it was accepted that the company had only carried out a portion of the development relevant to that fill, as the respective property owners had carried out further work in each case.

In the Magistrates Court proceedings, the company was acquitted on the basis that the Court found that responsibility for obtaining development approvals rested with the respective property owners, rather than the earthmoving company. By contrast, the prosecution submitted that the relevant offence is committed by any person or entity who carries out development (or procures development to be carried out, in the case of an owner) and it was not relevant which person or entity is considered to be responsible for applying for and obtaining the requisite development approval.

The trial Magistrate made the following remarks:

"The delivery of the fill material was only a contribution to a larger scope of works undertaken by the relevant landowners, however sufficient work was done by the defendant to require development approval. The defendant was not aware of the full range of works to be undertaken on the respective properties.

The defendant was not an independent contractor because, amongst other matters, it did not decide what work was to be done, the manner in which the work was to be done (other than delivery and spreading) as well as the time and place the work was to be performed. The defendant did not have the requisite degree of control, including access, over the respective properties. Further, there was no delegated responsibility to the defendant to obtain development approval.

Each of the landowners was the responsible party to seek development approval. There was no requirement placed upon the defendant to obtain planning approval; that responsibility, in these circumstances, did not shift from the owners".

After the company was acquitted in the Magistrates Court proceedings, the City of Swan appealed that decision to the Supreme Court and that appeal was the subject of the decision in *All Earth*.

Appeal proceedings

The appeal was commenced on the basis that we submitted that the trial Magistrate:

'erred in law in finding that the respondent was not guilty of the charges on the basis that the respondent was not responsible for obtaining development approvals for the works the subject of the charges (Works), whereas the honourable Magistrate, having found:

- (a) that the respondent carried out the Works;*
- (b) that the Works required development approval; and*
- (c) that there were no development approvals issued for the Works,*

should have found the respondent carried out the Works without development approval in contravention of the City of Swan Local Planning Scheme No. 17.'

That is, we submitted that the concept of responsibility for obtaining development approval is irrelevant, rather it is the act of carrying out development without approval that renders a person or entity liable for that offence. The Supreme Court ultimately agreed with that position and plainly accepted that it is the responsibility of a person or entity carrying out development to ensure that appropriate approvals are in place.

During the trial proceedings and appeal proceedings, we referred to a number of comparable planning authorities from New South Wales and, on consideration of those decisions, the Supreme Court made the following remarks:

'The NSW Decisions explained the desirability of placing the onus on those carrying out works to ensure their conduct is lawful. It was noted that the effectiveness of the system of planning control would be reduced if persons were to

carry out developments without ensuring that necessary development consent had been obtained. It was noted that the regime was designed to ensure that persons take proper steps to ascertain the lawfulness of their proposed conduct; to give effect to the system of planning controls.'

The Supreme Court also placed substantial reliance on a decision under the *Building Act 2011*, which arose in similar circumstances, being *MKP Management Pty Ltd v Shire of Kalamunda* [2020] WASCA 130. In that case, a demolition contractor carried out demolition work without an appropriate demolition permit and, while that contractor was liable for that work, the Court of Appeal found that the owner of the subject property was not liable as it could not be shown that the owner was aware that the relevant demolition work would be carried out without a demolition permit and, therefore, the owner was not considered liable for procuring the offence to be committed.

In the *MKP* decision, the Court of Appeal made the following remarks:

'... Section 10(a) does not, on its proper construction having regard to the Building Act as a whole, impose a liability or duty, by reference to the owner of the land, to ensure that a demolition permit is obtained. Section 10(a), on its proper construction having regard to the Building Act as a whole, imposes that liability or duty on the person who is proposing to do the demolition work. Any accessorial liability for the owner in respect of demolition work done by a person contrary to s 10(a) is imposed by the Code and not by the Building Act.'

In the *All Earth* decision, the Supreme Court found that the regime under the PDA for obtaining development approval is very similar to the *Building Act 2011* and that there is no specific obligation on an owner, rather than a contractor or a third party, to ensure that the relevant approval is obtained before the development is carried out.

As a result of the Supreme Court's findings, the appeal was successful and the acquittals were overturned, with the company being convicted of each of the three charges.

Extent of Development

The Supreme Court was also called on to determine another number of other questions relevant to the proceedings, including whether depositing and spreading fill on land could constitute development in its own right. The respondent attempted to persuade the Court that the deposition and spread of fill only constituted a portion of the ultimate development and that it was not appropriate for a contractor to be found liable for that development in those circumstances. The Appellant attempted to equate the contractor's role to that of a courier or delivery service.

However, the Supreme Court rejected that proposition and accepted our submission that the works carried out by the company were sufficient in their own right to constitute development. That is, even if no further works had been carried out after the deposition and initial spread of fill, those works would still have constituted development in their own right, as they had effected a permanent change to the subject properties.

Summary

The *All Earth* decision is helpful for local governments taking future compliance action against contractors or developers, as it clarifies the position that they can be held criminally liable for an offence under the PDA, irrespective of whether the



owners of the relevant land also attract liability.

It remains open to local governments to prosecute owners and contractors in those circumstances, but in order for owners of land to be liable for those offences, the Court will need to be satisfied that the owner was responsible for carrying out, procuring, or permitting the unlawful development to occur. In the *All Earth* proceedings, it likely would have been open to the City to commence prosecutions against the respective owners of those subject properties, along with the earthmoving contractor, but there was no obligation for the City to do so. Ultimately, a local government has discretion as to how, and against whom, those prosecutions are to be commenced.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Tim Beckett by email to tbeckett@mcleods.com.au.

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