HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE, AND CALLINAN JJ

BANKSTOWN CITY COUNCIL APPELLANT

AND

ALAMDO HOLDINGS PTY LIMITED RESPONDENT

Bankstown City Council v Alamdo Holdings Pty Ltd
[2005] HCA 46
7 September 2005
S480/2004

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the Court of Appeal of the Supreme Court of New South Wales entered on 12 October 2004 and in their place order:*

   (a) *the appeal to that Court is allowed; and*

   (b) *orders 1 - 5 of Gzell J made on 16 December 2003 are set aside and in their place order that the proceedings be dismissed.*

3. *Appellant to pay the costs of the respondent of the appeal to this Court.*

4. *Respondent's application for special leave to appeal is dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with E G Romaniuk for the appellant (instructed by Marsdens)

P Le G Brereton SC with J Stoljar for the respondent (instructed by Speed and Stracey)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Bankstown City Council v Alamdo Holdings Pty Ltd

Nuisance – Local government – Drainage – Nuisance in exercise of statutory powers – Indemnity under *Local Government Act* 1993 (NSW), s 733 for acts or omissions done in good faith relating to the likelihood of land being flooded or the nature or extent of such flooding – Council constructed and operated drainage system whilst involved in the process of urbanisation – Drainage system caused flooding of adjacent land owned by respondent – Whether Council thereby incurred "liability in respect of" its conduct in constructing and operating drainage system – Whether Council acted "in good faith".

Statutes – Construction – Council's statutory indemnity for conduct done in good faith relating to the likelihood or nature or extent of flooding – Whether indemnity precludes the grant of injunctive relief in addition to precluding award of damages for nuisance – Relevance of the objective of s 733 in protecting local government bodies – Relevance of the respective consequences of grant of damages and grant of injunctive relief – Relevance of discretionary nature of injunctive relief – Whether s 733 applies only to liability in respect of past events – Whether liability to injunctive relief is liability in respect of past events.

Statutes – Construction – Council's statutory indemnity for conduct done in good faith relating to the likelihood or nature or extent of flooding – Where Council deferred the taking of immediate action respecting nuisance complained of by respondent – Whether "good faith" requires dishonesty or similar state of mind – Whether something more than negligence is required – Relevance of pending litigation to the character of the Council's conduct in deferring action.

Injunctions – Mandatory injunctive relief – Relationship with grant of damages under *Supreme Court Act* 1970 (NSW), s 68 – Relevance to whether Council would have incurred any liability in respect of its conduct.

Lord Cairns' Act – Availability of damages in lieu of injunction – Whether such damages readily calculable in money – Relevance to whether Council would have incurred any liability in respect of its conduct – Relevance to character of such liability.

Words and phrases – "liability", "liability in respect of", "not incur any liability", "good faith".

Local Government Act 1993 (NSW), ss 59A, 733.
Supreme Court Act 1970 (NSW), s 68.

1 GLEESON CJ, GUMMOW, HAYNE AND CALLINAN JJ. The appellant ("the Council") is a body corporate constituted as a council under the *Local Government Act* 1993 (NSW) ("the Act") for an area including the Sydney suburb of Chester Hill. The respondent ("Alamdo") owns land at Chester Hill ("the Land") upon which two industrial buildings are erected. The Land is situated at a low point of the local catchment.

2 The Council is the owner of all works of stormwater drainage installed by the Council, whether or not the land in question is owned by the Council (s 59A(1) of the Act). The Council is empowered by s 59A(2) to operate, repair, replace, extend, expand and improve those works.

3 Alamdo purchased the Land in 1988. Before it did so, Mr Maurici, the managing director of Alamdo, had been told of a recent incident involving the flooding for a brief period of both buildings. Thereafter, in January 1998 and April 2000, portions of the Land, including on the first occasion one of the buildings, were briefly flooded.

4 For about 450 metres beside the Land stormwater is carried by an unlined channel which runs in part within an easement and in part within a drainage reserve. The Council operates a drainage system to the south of the Land which collects stormwater. Near the south-eastern boundary of the Land, the system contains what was called a "gross pollutant trap" or barrage which receives water from the outlet of two 2,400 mm stormwater pipes. Thereafter, water is directed into the unlined channel.

The Supreme Court litigation

5 In a suit heard in the Equity Division of the New South Wales Supreme Court[1], Gzell J held that there had been a significant increase in the frequency with which the Land was likely to be inundated. In 1960, before the first of the buildings was constructed, flooding had been likely as something between a one in five year event and a one in 10 year event. By 1998, floodwaters would be likely to enter one of the buildings "at flow rates somewhat in excess of a one in two year event". This increased frequency of likely flooding diminished the activity to be planned for the Land and was an unreasonable interference with the use and enjoyment of the Land of the kind against which the action for private nuisance was directed.

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1 *Alamdo Holdings Pty Ltd v Bankstown City Council* (2003) 134 LGERA 114.

6 Gzell J rejected the submission by the Council that, because Alamdo had purchased the Land with knowledge of its flood-prone state, in the exercise of his discretion he should withhold injunctive relief. His Honour also rejected the Council's submission that there was such a disproportion between the cost to it of abating the nuisance (estimated as being at least $1.5 million) and the prospective damage suffered by Alamdo that injunctive relief should be refused.

7 An injunction was granted restraining the Council from causing or permitting stormwater from inundating the Land "so as to cause a nuisance". The Council was ordered, without expense to Alamdo, to "carry out works to abate the nuisance", and to supply Alamdo with a detailed report of the steps it proposed to take to comply with that obligation. There is no issue in this Court respecting the form taken by this mandatory relief.

8 Section 68 of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") empowered the Supreme Court to award damages "either in addition to or in substitution for" an injunction "against the commission or continuance of any wrongful act". This provision is the local representative of s 2 of *Lord Cairns' Act* 1858 (UK)[2]. These provisions extend even to an award of damages in place of an injunction where the plaintiff has moved *quia timet* and before any wrong has been committed. The damages are awarded "in respect of an injury which is still in the future"[3].

9 Gzell J made no provision for damages assessed by reference to the flood-prone nature of the Land and the consequent diminution in the value of the reversion; this was because his Honour considered that this injury would be rectified by the mandatory injunctive relief. The evidence suggested that the damages assessed by reference to that diminution of value would have been at least $1.4 million.

10 At the trial, both parties approached the matter on the basis that the damages, being damages for nuisance, were readily ascertainable. This appears from the following passage in the trial judge's reasons:

> "The [Council] submitted that permanent damage to the reversion had not been established. But there was evidence from valuers on both sides and evidence from Mr Maurici that rental values were permanently affected by

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2 21 & 22 Vict c 27.

3 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 860.

> the flood prone nature of the site. Mr Maurici said that the flooding had been mentioned by tenants in his negotiations over rent and they had demanded an attractive rental level. Kent Wood, the valuer called by the [Council], put a figure of $1,417,340 on the diminution in value of the reversion as a result of [Alamdo's] land being flood prone. Peter Byron, the valuer called by [Alamdo] put a higher figure on the damage to the reversion."

11 No attention seems to have been paid to the fact that the claim for injunctive relief was a claim in the auxiliary jurisdiction and would ordinarily only be ordered if damages were not ascertainable or otherwise not an adequate remedy. Another curiosity was that Alamdo invited the trial judge to make an order that, if remedial works in accordance with a specification proposed by one of the experts were not completed by the Council within two years, then the Council should pay damages calculated by reference to the diminution in the value of the reversion in conformity with Alamdo's valuer's assessment.

12 Gzell J declined this invitation and chose instead to grant mandatory injunctive relief. That there may have been some confusion with respect to the nature of the relief which could and should have been granted appears from this further passage in his Honour's reasons:

> "However, since those damages are limited to the diminution in the value of the reversion, which should be rectified by the abatement of the nuisance, I do not propose to order an inquiry as to damages."

13 The fact that the relief ultimately granted was a mandatory injunction very much masked the true position that, if the Council were liable, its liability was readily calculable in money and was for damage which had already been done to the reversion.

The Court of Appeal

14 An appeal by the Council to the Court of Appeal (Spigelman CJ, Giles and Ipp JJA)[4] failed, and a cross-appeal by Alamdo was dismissed. However, the mandatory injunctive relief is suspended pending the outcome of the appeal to this Court.

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4 *Bankstown City Council v Alamdo Holdings Pty Ltd* (2004) 135 LGERA 312.

15 The grounds of the appeal by the Council to the Court of Appeal were widely drawn but Spigelman CJ (who delivered the principal judgment) noted that some were abandoned. His Honour also remarked that the primary judge had not identified in express terms the act or condition performed by the Council, or for which it was responsible, which made the Council liable for the nuisance constituted by flooding. Whilst Gzell J had referred to the increased flow resulting from the urbanisation of the catchment area since 1930, he had not referred expressly to the significance for that urbanisation of development approvals by the Council. However, Spigelman CJ accepted that the primary judge was to be taken as having treated the relevant conduct of the Council as encompassing both the construction and operation of the drainage system and its role in the urbanisation process which had rendered the system less and less adequate.

16 However, neither at trial nor in the Court of Appeal does attention appear to have been drawn to a line of authority marshalled by the English Court of Appeal in *Marcic v Thames Water Utilities Ltd*[5]. This indicates that a body such as the Council is not, without negligence on its part, liable for a nuisance attributable to the exercise of, or failure to exercise, its statutory powers. In this Court, it had been remarked by Gavan Duffy and Starke JJ in *Metropolitan Gas Co v Melbourne Corporation*[6]:

> "And though it was said in argument that the Company's claim was founded upon either trespass or nuisance or negligence, still the liability of the Corporation must depend upon whether, in the exercise of its statutory powers, it has acted negligently, so as to do unnecessary damage to the Company."

17 The Court of Appeal rejected two submissions by the Council. The first was that the grant of injunctive relief, involving remedial measures at a cost of at least $1.5 million, had provided a disproportionate remedy in the circumstances of the case. The second was that the injunctive relief had been drawn in terms

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5 [2002] QB 929 at 988; revd on other grounds [2004] 2 AC 42. See also *Hawthorn Corporation v Kannuluik* [1906] AC 105, where the corporation was held to have been negligent in the planning of the original drains and in the construction from time to time of contributory channels.

6 (1924) 35 CLR 186 at 197. See further the discussion of the authorities by Owen J in *Benning v Wong* (1969) 122 CLR 249 at 324-337.

which were too broad. The Court also rejected the ground now relied on in this Court.

The issues in this Court

18 The Council confines its complaint to one only of the grounds unsuccessfully taken by it in the Court of Appeal. This ground is limited to what the Council contends is the exemption from liability provided by the Act. This is said to provide a complete answer to all of the relief granted against it in this litigation. That provision is found in s 733 of the Act, the text of which will be further considered below.

19 On its part, Alamdo makes two answers. The first is that the protection afforded the Council by s 733 does not extend to exposure to injunctive relief. The second is that the Council could rely upon s 733 only if it established that it had acted in good faith within the meaning of the section and that it had failed to do so. Gzell J accepted both submissions. The Court of Appeal accepted the first but not the second. It held that Gzell J's finding of absence of good faith could not be sustained. Nevertheless, because the Court of Appeal upheld the first point, the appeal by the Council failed.

20 In this Court, the submissions for the Council should be accepted and those of Alamdo rejected. The result is that the appeal by the Council should be allowed. We turn to explain why this should be the outcome.

Section 733 of the Act

21 The progenitor of s 733 was s 582A of the *Local Government Act* 1919 (NSW) ("the 1919 Act"). Section 582A was introduced in 1985 by the *Local Government (Flood Liable Land) Amendment Act* 1985 (NSW). In the Second Reading Speech in the Legislative Assembly on the Bill for that statute, the responsible Minister said that a principal purpose of the Bill was[7]:

> "to indemnify councils and other public authorities and their staff from liability from decisions taken in respect of flood liable land, provided that such decisions are made in accordance with government policy at the time".

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7 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 April 1985 at 6025.

Significantly, the Minister added that, without that protection, councils might continue to[8]:

> "adopt an unnecessarily conservative approach that sometimes leads to unnecessary refusal of development applications or the application of unnecessary and costly development and building conditions".

22 Section 733 has been amended on several occasions since its introduction by the Act. The section applies to, and in respect of, "the Crown, a statutory body representing the Crown and a public or local authority constituted by or under any Act" (s 733(7)(a)).

23 The central provision for this appeal is that in s 733(1). This provision applies, among other things, to advice furnished in a certificate under s 149 of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act") (s 733(3)(d))[9], to consents and refusals of development applications under that statute (s 733(3)(a)), to "the carrying out of flood mitigation works" (s 733(3)(e)) and, generally, to any other thing done or omitted to be done in the exercise of the functions of a council under the Act or any other statute (s 733(3)(g)).

24 The text of s 733(1) is as follows:

> "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."

25 The requirement of "good faith" is taken further by sub-ss (4), (5) and (6) of s 733. Sub-section (5) provides for the publication by the Minister for Planning of a manual relating to the management of "flood liable land", to be available for public inspection (s 733(6)). Sub-section (4) states:

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8 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 April 1985 at 6025.

9 See *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290.

> "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."

For the present appeal, nothing turns directly upon these three sub-sections.

"Not incur any liability"

26 What then is the content of the phrase in the opening words of s 733(1) "not incur any liability"? As interpreted in the Court of Appeal, the relevant conduct of the Council was in the construction and operation of the drainage system, together with its role in the process of urbanisation. That related to the likelihood of the Land being flooded, or to the nature and extent of such flooding of the Land. Accordingly, that past conduct of the Council related to a state of affairs apt to develop in the future, namely, in the words of par (b) of s 733(1), "the likelihood of [the Land] being flooded" or to its "nature or extent".

27 But, in respect of the conduct identified in this way, did the Council, but for s 733(1), "incur any liability"? What was said of the term "incurred" in a forerunner of s 51(1) of the *Income Tax Assessment Act* 1936 (Cth)[10] by Dixon J in *New Zealand Flax Investments Ltd v Federal Commissioner of Taxation*[11] is in point here. It would be unsafe to attempt an exhaustive definition of a conception such as "incur any liability" which is susceptible of various applications, given the normative complexity of the legal system, with the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies. Much must depend upon the subject, scope and purpose of s 733.

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10 Section 23(1) of the *Income Tax Assessment Act* 1922 (Cth).

11 (1938) 61 CLR 179 at 207. The passage reads:

> "To come within that provision there must be a loss or outgoing actually incurred. 'Incurred' does not only mean defrayed, discharged, or borne, but rather it includes encountered, run into, or fallen upon. It is unsafe to attempt exhaustive definitions of a conception intended to have such a various or multifarious application. But it does not include a loss or expenditure which is no more than impending, threatened, or expected."

28 This is not a case of construing a statutory provision which authorises government action such as that considered in *Coco v The Queen*[12]. There, a power to authorise entry onto premises to install and maintain a listening device was held not to extend to authorise an entry which otherwise would be a trespass. Nor is this a case of the protection of the interests of a statutory authority given privileges in the nature of a monopoly for provision of a public service, such as the postal service[13]. Nor is the present a case of the kind identified by McHugh J in *Puntoriero v Water Administration Ministerial Corporation*[14] where general words of immunity are read down "so that they do not apply to functions of an ordinary character performed by the respondent and which are done pursuant to agreements with the consent of private citizens".

29 Further, the objective of s 733 was not solely the protection of the funds of local government bodies. The Minister had pointed to the general inconvenience of unnecessary refusal of development applications, and imposition of the unnecessary and costly conditions upon approvals, by over-cautious councils. General statements, upon which Alamdo relied, calling for a narrow reading in immunity provisions of phrases such as "in respect of" do not provide a substitute for consideration of the subject, scope and purpose of the whole of the statutory text.

30 Alamdo fixed upon further passages in the Minister's Second Reading Speech to which reference has been made above. These mentioned the need for protection against "claims for damages". That phrase, Alamdo submitted, indicates a legislative purpose to provide protection only against accrued causes of action carrying the right to the recovery of an award for damages. However, given the context in which the Minister spoke, it must be highly unlikely that any such technical use of words was intended.

31 The circumstances of the present litigation illustrate the point. Is the perceived need of the Council for protection any the lesser where it is faced with an injunctive order requiring substantial expenditure for compliance than it would be if, in its discretion under s 68 of the Supreme Court Act, the Supreme Court had, in lieu of injunctive relief, awarded damages in a similarly significant

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12 (1994) 179 CLR 427.

13 cf *Suatu Holdings v Australian Postal Corporation* (1989) 86 ALR 532.

14 (1999) 199 CLR 575 at 589 [37].

sum? The answer must be in the negative. The legislation is concerned in s 733 with matters of substance and not merely with matters of legal or procedural form.

32 Given the past conduct of the Council, to which reference has been made in the discussion of par (b) of s 733(1), there was incurred liability "in respect of" that conduct. The Council was liable to the exercise of the equity jurisdiction of the Supreme Court, together with its statutory jurisdiction conferred by s 68 of the Supreme Court Act. Events had occurred which would authorise the Supreme Court to exercise its jurisdiction, albeit with discretion as to the grant and form of relief. Whether or not Alamdo may have been then entitled to recover damages on a cause of action for past invasion of its common law rights, it had an equity in the sense described by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[15].

33 The susceptibility of the Council to the adjudication of that equity was a liability which it had encountered, run into, or fallen upon and so one which, but for s 733(1), it had incurred[16]. To the equity suit commenced against it by Alamdo, the Council pleaded an immunity conferred by that provision. Subject to resolving in its favour any question of good faith, that was a good plea.

34 In *Crimmins v Stevedoring Industry Finance Committee*[17], Kirby J said of the word "liable":

> "[I]n some contexts, 'liable' will connote found liable in law. But in other contexts it will connote potentially or contingently or notionally liable if certain events occur or if a court were asked to determine the point".

The expression in s 733(1) "not incur any liability" confers protection from liability in a general sense of "amenability to claims, or (to describe it from the opposite point of view) the range of the claims to the possibility of which the general principles of the law expose [a council]" in respect of any advice within par (a), or anything done or omitted to be done within par (b). The quoted words

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15 (2001) 208 CLR 199 at 216 [8]. See also *Hasham v Zenab* [1960] AC 316 at 329.

16 cf *New Zealand Flax Investments Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 179 at 207.

17 (1999) 200 CLR 1 at 68 [190]. See also the remarks of McHugh J at 52-53 [137]-[140] and of Hayne J at 90-91 [252]-[253].

are those of Kitto J in the particular statutory context dealt with in *Scala v Mammolitti*[18].

35 One limb of Alamdo's argument was that, because the injunction was a mandatory injunction and required performance in the future, it was a quite different remedy from a mere money remedy which would ordinarily only be awarded in respect of past quantifiable wrongs: that the latter was a liability of the kind against which s 733(1) of the Act immunised councils and stood therefore in stark contrast with the former. As we have already pointed out, the trial judge was invited, and would have been well able on the evidence, to assess and award damages as both parties contemplated he might and could do. It would be a curious result if the operation of s 733(1) of the Act could be avoided simply by substituting relief by way of mandatory injunction in the auxiliary jurisdiction in lieu of a readily quantifiable award of damages. In our opinion, this is a further matter arguing in favour of the construction of s 733(1) which is to be preferred.

36 The importance which must be attached to context indicates the caution with which there must be approached holdings in cases upon statutes with a different subject, scope and purpose to that of s 733. This is borne out by consideration of some of the leading authorities relied upon in submissions in this appeal.

Notice before action – the authorities

37 In *Brisbane City Council v Attorney-General of Queensland*[19], this Court considered a statute requiring notice before the bringing of an action against a local authority. One purpose of the legislation was disclosed by a provision for the tendering of amends within the notice period which, if not accepted, might later be pleaded[20]. Earlier, Bacon V-C had said of such a provision considered in *Attorney-General v Hackney Local Board*[21]:

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18 (1965) 114 CLR 153 at 157. The case concerned the nervous shock provision in s 4(1) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW).

19 (1906) 4 CLR (Pt 1) 241.

20 See (1906) 4 CLR (Pt 1) 241 at 247.

21 (1875) LR 20 Eq 626 at 629.

> "The policy of the law is, that if these public bodies, entrusted with powers for public purposes, in the course of executing those powers shall happen to commit any inadvertence, irregularity, or wrong, then before anybody has a right to require payment from them in respect of that wrong they shall have an opportunity of setting themselves right; they shall have the period of a month for the purpose of making amends, or for restoring if they have taken away anything, and for paying for if they have done, any damage."

38 In *Brisbane City Council*, Griffith CJ concluded that the statute referred to the past and "to something that has been done or omitted to be done before the action was brought, or intended to be done in the sense of referring to an act done with the intention of complying with the [statute]"[22]. A suit for an injunction to restrain commission of a nuisance might be commenced without the need for compliance with the notice provision. It was a claim for future protection. Griffith CJ went on to refer to English authority, *Chapman, Morsons & Co v Guardians of the Auckland Union*[23], upon such a notice provision which applied that reasoning to an award of damages under *Lord Cairns' Act* in lieu of an injunction. This reasoning operated in a context which differs from that of s 733 of the Act.

39 The same is true of the decision of the House of Lords in *Graigola Merthyr Co Ltd v Swansea Corporation*[24]. The *Public Authorities Protection Act* 1893 (UK) contained in s 1[25] a provision requiring notice before action with the added burden upon an unsuccessful plaintiff of a costs order to be taxed as between solicitor and client, here brought in at £70,000. This "statutory privilege" of defendants[26] applied to the costs of an unsuccessful suit for *quia timet* injunctive relief.

40 The 1919 Act contained in s 580 a six month "notice before action" provision. In *Garlick v Council of Municipality of Wingham*[27], Long Innes J held

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22 (1906) 4 CLR (Pt 1) 241 at 248.

23 (1889) 23 QBD 294; cf *Harrop v Ossett Corporation* [1898] 1 Ch 525.

24 [1929] AC 344.

25 Incompletely set out at [1929] AC 344 at 348.

26 The phrase used by Lord Buckmaster [1929] AC 344 at 352.

27 (1925) 26 SR (NSW) 9 at 14-15.

that s 580 applied to an equity suit. Thereafter, in *Thompson v Council of the Municipality of Randwick*[28], Nicholas CJ in Eq reached the contrary conclusion respecting s 580. He relied particularly upon the judgment of Bowen LJ in *Chapman, Morsons & Co v Guardians of the Auckland Union*[29], which had not been cited to Long Innes J. These twists and turns of authority upon other provisions are of no decisive importance for the construction of s 733 of the Act and, indeed, tend to distract attention from that task.

The decision in *Attrill*

41 However, reference must be made to *Attrill v Richmond River Shire Council*[30]. The Court of Appeal accepted *Attrill* in preference to doubts expressed by Cripps AJ in *Melaleuca Estate Pty Ltd v Port Stephens Shire Council*[31].

42 In *Attrill*, Hodgson J was concerned not with a "notice before action" provision, but with s 582A of the 1919 Act, the predecessor of s 733. After referring to authorities already mentioned and others dealing with "notice before action" provisions, his Honour said that it was possible that the term "liability" in s 733(1) could extend to a liability to be ordered to do something[32]. Hodgson J then continued[33]:

> "However, the liability which s 582A deals with is relevantly a liability in respect of 'anything done or omitted to be done'. That is, it is a liability in respect of past events. The question arises whether an injunction, whether prohibitory or mandatory, is correctly regarded, for the purposes of this section, as a liability in respect of past events.

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28 (1944) 44 SR (NSW) 455.

29 (1889) 23 QBD 294 at 303.

30 (1993) 30 NSWLR 122; appeal dismissed on other grounds (1995) 38 NSWLR 545.

31 [2004] NSWSC 415 at [70].

32 (1993) 30 NSWLR 122 at 127.

33 (1993) 30 NSWLR 122 at 127.

> Injunctions are generally directed towards requiring or preventing future events, which would themselves be wrongful (in a broad sense). Those future events must, by evidence in the case, be shown to be reasonably probable; and the usual way of doing this is to lead evidence of actions performed in the past by the defendant. But it seems to me that that is essentially an evidentiary matter: however the probability of some future wrong is established, it is to this future state of affairs that the order is directed. It seems to me that that sort of order, directed towards future states of affairs, does not fall within the words 'any liability in respect of anything done or omitted to be done' within s 582A."

His Honour concluded as follows[34]:

> "So, my view is that the protection in s 582A certainly extends to protecting the council from liability for damages in respect of past events. In my view, it does not extend to protecting the council from prohibitory or mandatory injunctions based solely on the probability of future events. While I do not think I need to decide this for the purpose of determining the particular question before me in these proceedings, I think it probably does not prevent the award of damages in lieu of such injunctions, provided those damages are limited to compensation for events occurring after the commencement of proceedings: that seems to be substantially the view taken in the *Chapman Morson's* case."

43 The propositions that (1) injunctions are generally directed towards requiring or preventing future events and (2) evidence of actions performed in the past by the defendant will show that which is apprehended to be reasonably probable, may be accepted. But this does not deny that the susceptibility of a defendant to suffer equitable relief *quia timet* may be said to be in respect of what has already been done by the defendant. That which presents the threat has already occurred.

44 The equity which the plaintiff has in such circumstances is not equated with an accrued right to sue on a cause of action at law in contract or tort. Equity responds to threats of future injury to legal or equitable rights. Take the case of an anticipatory repudiation of a contract for the sale of land, before the time for performance has arrived, where the other party elects not to accept the repudiation. This party has at that stage no cause of action for damages but has

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34 (1993) 30 NSWLR 122 at 127-128.

an equity forthwith to relief establishing that the contract ought to be specifically performed and carried into execution[35].

45 Once it is appreciated that the phrase in s 733(1), "not incur any liability", confers protection from amenability to the range of claims to which the general principles of law expose a council in respect of anything it has done or omitted to do within the scope of par (b), the limitation suggested by *Attrill* is shown to lack foundation in the statute.

Good faith

46 Although the Court of Appeal accepted *Attrill*, it did favour the case put by the Council respecting good faith, a holding which Alamdo attacks.

47 There thus remains the matter of the acts or omissions of the Council being "in good faith". The expression appears twice in s 733(1), once in par (a), where the text is "any advice furnished in good faith", and once in par (b), where the text is "anything done or omitted to be done in good faith". Section 733(4) provides that, in the limited circumstances explained earlier in these reasons, which can apply only to the furnishing of advice, the Council is to be taken to have acted in good faith, unless the contrary is proved. Otherwise, the pleading by the Council of an immunity pursuant to s 733, as occurred in this litigation, entails a burden upon the Council of making out its case for the operation of that section in its favour.

48 It is accepted by the Council that this includes the element of good faith, but Alamdo submits that there has been a failure in this respect which necessitates the dismissal of the appeal by the Council to this Court.

49 Something first must be said respecting the sense in which the phrase "in good faith" is used in s 733(1)(b). *Mid Density Developments Pty Ltd v Rockdale Municipal Council*[36] concerned the absence of any adequate system for the council to respond, when issuing certificates under s 149 of the EPA Act, to questions by the vendor and later the purchaser respecting the flooding of the particular land under contract. In that setting, it was held that, whilst not dishonest, the council had not acted in good faith. There had been no attempt to

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35 See *Turner v Bladin* (1951) 82 CLR 463 at 472; *Hasham v Zenab* [1960] AC 316 at 329-330.

36 (1993) 44 FCR 290.

supply information by recourse to the council's records and there was no system in operation for doing so. Indeed, the council officer whose responsibility it was to deal with the requests for information had consciously ignored the very records which would have supplied it[37].

50 Reference was made in *Mid Density* to various examples in the law where "good faith" is used as a criterion requiring some state of mind or knowledge other than the personal honesty and absence of malice of the relevant actor[38]. Moreover, given the range of advice, acts and omissions to which s 733(1) may apply, what is required for something to be done or omitted in good faith may vary from one case to the next. This makes it unwise, if not impossible, to place a definitive gloss upon the words of the statute.

51 In *Mid Density*, the standard of conduct against which the Council's conduct in issuing the s 149 certificates was to be assessed was apparent from the importance of the information sought for the routine processes of conveyancing. The present case stands quite differently in several respects. First, the nature of the nuisance complained of was clarified only in the Court of Appeal, and then recognised as encompassing the involvement of the Council over many years in the construction and operation of the drainage system and its role in the process of urbanisation. Given the vagueness of the complaints against the Council, the weight of its evidentiary burden to establish good faith was correspondingly lightened. Secondly, that was all the more so given that, without negligence on its part in the exercise or failure to exercise its statutory powers, the Council was not liable in nuisance. True enough that point was not taken as an answer to liability, but it cannot properly be shut out of consideration of the content of the requirement of good faith in this case. Here, something more than negligence is necessary because, unless negligence were present, there would be no liability for protection against which s 733(1) was required by the Council.

52 The Council led evidence at trial from Mr Morrison, the Manager of Roads and Infrastructure with the Council and he was cross-examined. The evidence in chief included voluminous records of the Council. Given the nature of the nuisance alleged against the Council, the material would, unless challenged, suggest both no failure on its part which was to be stigmatised as a want of good faith, and the presence of good faith as a positive attribute of the conduct of the Council over a long period.

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37 (1993) 44 FCR 290 at 300.

38 (1993) 44 FCR 290 at 298-299.

53 However, the primary judge held that the Council had not acted in good faith in the circumstances. His Honour referred to steps taken by the Council to respond to concerns expressed to Mr Morrison by Mr Maurici at a meeting on site in or about July 1998. Gzell J emphasised the importance attached by Mr Morrison to the pending litigation as a reason for deferring the taking of immediate action by the Council. The litigation commenced in May 1999. His Honour concluded:

> "Its abandonment of any further investigation pending the outcome of these proceedings put [the Council] in my view, outside the protection of [s 733]."

54 The Court of Appeal disagreed with that conclusion, and Alamdo, by its Amended Notice of Contention, challenges that outcome in the Court of Appeal. Spigelman CJ noted that Gzell J had expressly based his conclusion only on the inaction of the Council beginning in about February 1999 and concluded that, while the Council had the onus of proving good faith, the evidence to the contrary was an inadequate basis for the adverse finding. The Chief Justice noted the absence of consideration of any link between the litigation and the ordering of the priorities of the Council.

55 There was discussion in the argument in this Court of the significance of passages in the judgment of Spigelman CJ said to show that he misunderstood the placing of the burden upon the Council to show good faith, rather than upon Alamdo to show its absence. An examination of his Honour's judgment shows that any apparent infelicities of expression indicate no more than a response to the shape the issues had taken at trial. The presence of good faith had come to be assumed unless Alamdo made good its destructive response, as the primary judge held it had.

56 The emphasis upon the significance to the Council of the pending litigation advanced its case for good faith, not the case of Alamdo to the contrary. It must be remembered that, as Mr Morrison explained in his oral evidence in chief, the established procedures of the Council with respect to proposals for infrastructure expenditure involved consideration of the relative priority of all projects. Where, depending upon the outcome of litigation which the Council was defending, the Council might have no responsibility in law to make an expenditure, prudence would support deferral. Section 733(1) protects such an approach as an exercise in good faith of the Council's powers.

57 The holding at first instance to the contrary cannot be supported. Section 733(1) applied in this case.

Special leave application

58 This conclusion renders otiose the special leave application in which Alamdo seeks damages in addition to the injunctive relief granted at trial. That application should be dismissed with costs.

Orders on the appeal

59 The appeal should be allowed. Orders 1 and 2 of the orders of the Court of Appeal should be set aside. In place thereof, the appeal to that Court should be allowed, the orders of Gzell J entered on 12 October 2004 be set aside and the proceedings be dismissed.

60 Special leave was granted by this Court upon an undertaking by the Council to pay Alamdo's costs of the appeal in any event, and not to seek to disturb costs orders in favour of Alamdo in the Courts below. Accordingly, the only costs order now to be made is that the appellant pay the costs of the respondent of the appeal to this Court.

61 McHUGH J. I agree that this appeal should be allowed.

62 In my opinion, s 733(1) of the *Local Government Act* 1993 (NSW) ("the Act") applies to, and gives a Council immunity from, injunctive relief sought in a Court of Equity in its auxiliary jurisdiction as enhanced by statutes such as s 68 of the *Supreme Court Act* 1970 (NSW). The facts and issues are set out in the joint judgment of Gleeson CJ, Gummow, Hayne and Callinan JJ. I need not repeat them.

63 Section 733(1) declares that:

> "A council does not incur any liability in respect of:
>
> ...
>
> (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."

64 As the joint judgment shows, the "past conduct of the Council"[39] "in the construction and operation of the drainage system, together with its role in the process of urbanisation"[40] made the Council "liable to the exercise of the equity jurisdiction of the Supreme Court, together with its statutory jurisdiction conferred by s 68 of the Supreme Court Act"[41] because "[e]vents had occurred which would authorise the Supreme Court to exercise its jurisdiction, albeit with discretion as to the grant and form of relief"[42] and because the plaintiff "had an equity in the sense described by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*"[43]. The result was that "[t]he susceptibility of the Council to the adjudication of that equity was a liability which it had encountered".[44]

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39 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ at [26].

40 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ at [26].

41 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ at [32].

42 Reasons of Gleeson CJ, Gummow Hayne and Callinan JJ at [32].

43 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ at [32] (footnote omitted).

44 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ at [33].

65 Alamdo Holdings Pty Limited ("Alamdo Holdings") contended that injunctive relief was not a "liability" for the purpose of s 733 of the Act because, unlike a common law award of damages, "[n]o 'right' to such a discretionary remedy is enlivened by the act or omission of a defendant; whereas a right to damages *is* enlivened by a relevant act or omission of the defendant." But as the joint judgment shows, there were two senses in which "[t]he susceptibility of the Council to the adjudication of that equity was a liability which it had encountered"[45]. And those two senses accord with the first and third senses of the term "liability" described by Windeyer J in *Ogden Industries Pty Ltd v Lucas*[46] that Alamdo Holdings cited in submissions to this Court. Moreover, a Hohfeldian rights analysis, upon which Alamdo Holdings also relied, denies Alamdo Holdings' argument that the equitable relief that it sought and obtained was not a "liability" within the meaning of s 733. That analysis demonstrates that the Council had a "liability" as a corollary of the following two "Hohfeldian rights":

(i) the corollary of the Supreme Court's power to exercise its equitable jurisdiction to grant the injunctive relief is that the defendant had a liability to have its legal position changed by the grant of the injunction. Thus, the existence of the power entailed the third sense of "liability", which was "a situation in which a duty or obligation can arise as the result of the occurrence of *some act or event*"[47], namely, the granting of the relief; and

(ii) the corollary of Alamdo Holdings having an equitable right that the Council not do acts or omit to do acts relating to the likelihood of land being flooded is that the Council had a duty to do acts or not to do those acts. Thus, the existence of the equitable right entailed the first sense of "liability", which was "a legal obligation or duty"[48].

66 Accordingly, the injunctive relief that Alamdo Holdings sought against the Council was a "liability" within the meaning of s 733(1)(b) of the Act.

67 For the reasons given by Gleeson CJ, Gummow, Hayne and Callinan JJ, the Council also acted in good faith within the meaning of s 733(1)(b). Consequently, the conduct of the Council, relevant to the action brought by Alamdo Holdings, was conduct "done or omitted to be done in good faith by the

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45 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ at [33].

46 (1967) 116 CLR 537 at 584.

47 (1967) 116 CLR 537 at 584 (emphasis added).

48 *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584.

council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding." The Council was therefore entitled to the immunity provided by s 733.

68 The appeal should be allowed. Allowing the appeal for the above reasons also has the effect that Alamdo Holdings' special leave application must be rejected.

Orders

69 I agree with the orders proposed by Gleeson CJ, Gummow, Hayne and Callinan JJ.