

# Update

## Issue #1

### Planning & Construction



Planning Permits - *APAC Design & Construction v. Whitehorse City Council* [2006] VCAT 594 addressed the issue of an application to alter a permit for the development of a retirement village.

The Tribunal recently had the opportunity to clarify the guidance that was previously provided in *Westpoint Corporation Pty Ltd v. Moreland City Council* [2005] VCAT 1049 concerning the use of secondary consents to amend planning permits that have issued by the Tribunal. The case, *APAC Design & Construction v. Whitehorse City Council* [2006] VCAT 594, concerned an application to alter a permit for the development of a retirement village. The proposed alternation involved increasing the height of two of the buildings included within the development. The Council refused to process the amendments by way of secondary consents.

The tribunal affirmed the *Westpoint* criteria, stating: "...when deciding whether a use or development may be altered under a secondary consent provision in a permit, the scale of the change is not relevant per se.

The change need not be "minor" to be allowable under a secondary consent provision provided it meets the following requirements:

It does not result in a transformation of the proposal.

- It does not authorise something for which primary consent is required under the planning scheme.
- It is of no consequence having regard to the purpose of the planning control under which the permit was granted.
- It is not contrary to a specific requirement as distinct from an authorisation within the permit, which itself cannot be altered by consent." In the APAC case the question was whether the development was of no consequence having regard to the purpose of the planning control under which the permit was granted.

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The Tribunal went on to draw a distinction between plans which are of no consequence and plans which might have an impact but are, in all the circumstances, reasonable and justified. Where, as in the *APAC* case, the proposed amendment falls into the latter category the 'no consequence' test is not satisfied and the secondary consent mechanism is inappropriate.

**Construction:  
Quantum Meruit Claims**

Monarch Building Systems Pty Ltd (**Monarch**) manufactures and supplies steel products to the building industry. Quinn Villages Pty Ltd (**Quin**), a property developer, through an agent (**Global**) ordered some steel from Monarch for one of its developments.

Down the track a dispute arose and Monarch sued for unpaid amounts that it said were owed under the contract.

Quin's defence was to deny that there was a contract and argue that Monarch's entitlement should be assessed on a quantum meruit basis. The basis of the defence was that the parties had reached an impasse in the negotiation process. Almost everything had been agreed but they had become stuck on the issue of liquidated damages. Quin wanted to include such a clause and Monarch were adamant that they would not accept one. Nevertheless Monarch had carried out the work and each of the parties had behaved as though a formal contract were in place - referring in correspondence to contractual obligations, procedures and payment mechanisms, even going so far as to provide bank guarantees. Traditionally the courts have gone to lengths to uphold a contract and where there has been subsequent action that was consistent with a contract this has usually proved enough. Certainly where the majority of the important clauses were agreed the courts have usually be dismissive of any quantum meruit arguments. However in this instance the Supreme Court of Queensland found that a binding contract did not exist due to the lack of consensus on a term that was so obviously important to both parties. It is significant because in the

absence of a binding contract the basis for payment becomes whatever is determined to be a reasonable amount for the value of work performed (quantum meruit). What it also does is confirm the importance of putting in place binding arrangements before any work is undertaken.

**Liquidated Damages or Penalty Clause: Spotting the Difference**

It has long been the case that penalty clauses masquerading as liquidated damages clauses would not be enforceable. The justification is and always has been the curtailment of unconscionable and oppressive conduct, which is thought to trump the parties' freedom to contract.

The difference can be stated fairly simply:

A liquidated damages clause is a genuine pre-estimate of the damage that will be suffered by a contracting party in the event that the other party fails to complete the contract works by the date for practical completion. A penalty clause is a clause that is triggered in the same way as a liquidated damages clause (and will in fact be called a liquidated damages clause) but the amount payable in the event of failure to complete the contract works by the date for practical completion is an amount that is designed to discourage breaches of contract. It is a fine distinction and there is no doubt that it is very easy to overstep the mark if some very careful thought is not given to the calculation of payments that are triggered by the liquidated damages clause.

The issue was considered recently in *State of Tasmania v Leighton Contractors* where the State had, using Commonwealth funding, contracted with Leighton for works on the Bass Highway. In the event they sought to enforce a liquidated damages clause which purported to entitle them to \$8,000 per day.

## For further information



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The amount was represented as being a genuine calculation of the expense incurred in overseeing the work. However upon further analysis the court found that the amounts were clearly inflated and the clause was said to be unenforceable.

It is important to be clear about what is included in the amounts that are specified as being payable by way of liquidated damages. Not only does this help with arguments about enforceability but it will also help to preserve any other rights that might be available by way of actual damages for losses that are suffered such (eg lost opportunities).

### Assessing Compensation Entitlements

There are various circumstances in which compensation can be claimed from local authorities, planning authorities and other statutory bodies. Whether these arise under the *Planning and Environment Act 1987 (P&E Act)*, the *Land Acquisition and Compensation Act 1986 (LAC Act)* or elsewhere, there are various principles that are commonly applicable. The purpose of this article is to briefly outline the position in relation to costs/losses incurred before the triggering event takes place.

Of course, different terminology is used in different statutory provisions. For example, section 94 of the P&E Act allows, amongst other things, for the recovery of compensation in respect of "any expenditure which is wasted" because a planning permit has been cancelled or amended. Section 40 of the LAC Act allows for the recovery of loss attributable to disturbance that is defined to mean "pecuniary loss suffered by a claimant as the natural, direct and reasonable consequence" of the service of the notice to acquire.

The difficulty with respect to the assessment of compensation is whether a loss occurring before a triggering event (perhaps a service of a notice of acquisition under the LAC Act) can be regarded for the purposes of assessing compensation as a loss that is caused by that triggering event.

The point is that at first sight a cause should precede an effect. This literal approach has now been rejected by the Victorian Supreme Court - *Brimbank City Council v Keilor Homes Pty Ltd* [2006] VSC 222 (21 June 2006).

In rejecting this literal approach to the question of causation and the assessment of compensation the Court considered the purpose of these types of legislative provisions. It is clear that the aim of such provisions is to provide fair compensation. However, the literal approach that was proposed by Brimbank City Council would have frustrated that purpose. It was observed that forthcoming events may "cast their shadows before them" so that people take action in anticipation of the triggering event. To draw a compensation line at the time of the triggering event would be artificial and would fail to give consideration to what actually happens. For that reason the literal approach was rejected.

If the literal approach to causation is wrong there is then no sensible stopping place and we have to recognise that all losses incurred in anticipation of a triggering event are potentially recoverable.

In *Brimbank City Council* the decision was made by reference to a claim under section 94 of the P&E Act. To what extent this will have broader applications remains to be seen.

However, everybody seeks to plan ahead and where this involves incurring losses in anticipation of a triggering event it is difficult to see how those losses could be fairly excluded from an assessment of compensation.

For further information on the matters covered in these articles or any other planning, construction or environmental issues please contact Simon French.