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Department of Environment & Resource Management v Clark [2011] QPEC 20 (3 March 2011)

Last Updated: 6 May 2011

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Department of Environment & Resource Management
v Clark* [\[2011\] QPEC 20](#)

PARTIES: **CHIEF EXECUTIVE OF THE DEPARTMENT OF
ENVIRONMENT AND RESOURCE MANAGEMENT**
Applicant

v

BARRY GRIFFITH CLARK
Respondent

FILE NO: No. 3801 of 2009

PROCEEDING: Originating Application

DELIVERED ON: 3 March 2011

DELIVERED AT: Southport

HEARING DATES: 3 November 2010, 12 January, 8 and 9 February 2011

JUDGE: Judge C.F. Wall Q.C.

ORDER: Respondent liable to remedy past offences against the [Environmental Protection Act 1994](#) and to be restrained from committing further offences against the Act. Further hearing of the Application adjourned to enable the terms of the orders to be determined.

CATCHWORDS: Environment - environmental protection - application by chief executive for orders to remedy offences against EPA committed by the respondent and to restrain the commission by the respondent of further offences against the Act - dust generated from respondent's property causing environmental nuisance - breaches of Environment Protection orders - continuing offences by the respondent - likely further offences - restraining order - affect on third parties.

LEGISLATION: [Environmental Protection Act 1994](#), [Sections 8, 9, 14, 15](#),

[319](#), [358](#), [360](#), [361](#), [440](#) and [505](#)

- CASES: *Briginshaw v Briginshaw* [\[1938\] HCA 34](#); [\(1938\) 60 CLR 336](#), CON.
Fletcher v May [\[2001\] QDC 081](#), CON.
- COUNSEL: S.L. Kissick – for the applicant
The Respondent represented himself
- SOLICITORS: Litigation Unit, Department of Environment and Resource Management - for the applicant
The Respondent had no solicitor acting for him

The application

[1] This is an application under [s.505\(1\)](#) of the [Environmental Protection Act 1994](#) for orders under [s.505\(5\)](#) to remedy offences against the Act committed by the respondent and to restrain the commission by the respondent of further offences against the Act.

[2] I am satisfied, if necessary to the extent referred to in *Briginshaw v Briginshaw* [\[1938\] HCA 34](#); [\(1938\) 60 CLR 336](#), that the applicant has established a basis for relief under the Act. The applicant suggested *Briginshaw* as the appropriate standard but I am not sure that it need be anything more than the normal balance of probabilities. If it is necessary to be satisfied beyond reasonable doubt about the commission of any offences by the respondent I am so satisfied.

[3] The Chief Executive of the applicant is the administering authority for the purpose of this application and, by [s.505\(1\)\(b\)](#), may bring a proceeding (the present type of application) for an order to remedy or restrain an offence against the Act or a threatened or anticipated offence against the Act.

The basis for the application

[4] The respondent owns land described as Lot 23 on Plan SP174294 situated at 22 Rudman Parade, Burleigh Heads ("the site"). See exhibit 9 (T3-70) and the aerial photographs exhibits 5, 6 and 7.

[5] In his first affidavit Mr Eugene Immisch, a principal environmental officer employed the applicant deposes as follows:

"7. In May 2009 I was appointed Project Manager responsible for investigating the unresolved complaints received about dust emissions from 22 Rudman Parade. As such I have custody and control of Derm's departmental files relating to this site.

11. The site is used by a number of businesses under commercial agreement.

12. The southern portion of the site is excavated out of a hill and an old quarry wall forms the western and part of the southern boundary of the site. The land is largely flat with a gentle slope towards Rudman Parade on the western side of the site and slopes towards Taree Street on the eastern side. Most of the site is unsealed and un-vegetated.

14. Mr Clark permits a number of other persons to use the site under lease, tenancy agreement and other forms of written or oral agreements.

15. The activities being carried out by other persons at the site include the environmentally relevant activities of operating a waste transfer station, crushing concrete, screening material extracted from the earth, stockpiling sand, soil and gravel.

16. The persons leasing portions of the site from Mr Clark access their leased areas via a vehicle cross over at 22 Rudman Parade, and "common" internal vehicular access ways through the middle of the site.

17. Mr Clark is responsible for the environmental management of any activities carried out on the site's "common areas" i.e. activities such as vehicular traffic movements along shared internal access roads and the release of stormwater runoff from common areas of the site that are not leased to any one operator by Mr Clark.

18. It has been the view taken by DERM that Mr Clark, in permitting other persons to use the site including the common areas, has a duty to take all reasonable and practicable measures to prevent and or minimise environmental harm as a result of the activities being carried out on his site.

19. During dry weather, a layer of dust covers the site. This dust is blown onto and accumulates on Rudman Parade as the result of wind and vehicular traffic through the site. This dust turns to mud when it rains and is trafficked along Rudman Parade.

54. Sediment that is deposited on roads has the ability to be washed into stormwater systems which usually discharge to either: creeks, rivers, estuaries and the ocean. Sediment is associated with causing elevated levels of suspended solids and turbidity which may have far reaching impacts including reducing light penetration, inhibiting water plant productivity and predator visibility. Deposited sediment can smother organisms and cause loss of critical refuge and habitat such as stream riffle zones for fauna such as aquatic insects and loss of spawning areas.

55. The most common symptoms experienced from dust impacts are irritation to the eyes and upper airways, which may:

- trigger allergic reactions and asthma attacks
- cause serious breathing-related problems

People who may be more vulnerable than others are:

- infants, children and adolescents
- the elderly
- people with respiratory conditions, such as asthma, bronchitis and emphysema
- people with heart disease
- people with diabetes.

Prolonged exposure to airborne dust can lead to chronic breathing and lung problems, and possibly heart disease.

57. A number of sites within South East Queensland have installed truck/wheel wash systems to manage sediment and dust and ensure that vehicles are sufficiently free of material prior to entering public roadways."

[6] The refusal by the respondent to take any steps to prevent the escape of dust or dust generating dirt from the site and to remove mud or dirt from Rudman Parade constitutes the conduct involved in the past and anticipated offences by the respondent relied on by the applicant.

[7] The "other persons" (lessees) whom the respondent permits (by the leases, exhibits 10, 11 and 12) to use the site are

(a) Pro Skips Pty Ltd and Procrush (who operate a crushing and waste transfer station business) (represented by John Sheerin);

(b) Coastal Tipper Hire Pty Ltd (represented by Ross and Brett Cook) and

(c) Joseph Ciano trading as Crushcon Queensland (which operates a crushing and material supply business) (represented by Tony Ciano).

[8] The areas of the site occupied by the lessees are marked on exhibits 6 and 7. The unsealed dirt roads on the site (which the applicant contends the respondent should seal) and the suggested location of a vehicle wheel wash (to remove dirt from the wheels of the vehicles before they exit the site) are also marked on those exhibits.

[9] On 12 January 2001 I suggested to the applicant's solicitor that consideration might be given to giving notice to the lessees of the relief sought by the applicant. Letters were subsequently written to them (see exhibits EI3-5 to Mr Immisch's second affidavit). The letters did not mention the possibility of truck movements being stopped or curtailed but this was discussed in meetings later held with representatives of the lessees (see exhibits EI6 and EI7 of the same affidavit.)

[10] None of the lessees are or have sought to become respondents to this application.

The [Environmental Protection Act 1994](#)

[11] [Section 358](#) provides so far as is relevant

"358 When an order may be issued

The administering authority may issue an order (an **environmental protection order**) to a person —

(a) —

(b) —

(c) —

(d) to secure compliance by the person with —

(i) the general environmental duty.... .."

[12] [Section 319](#) provides

"319 General environmental duty

(1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the **general environmental duty**).

(2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example —

- (a) the nature of the harm or potential harm; and
- (b) the sensitivity of the receiving environment; and
- (c) the current state of technical knowledge for the activity; and
- (d) the likelihood of successful application of the different measures that might be taken; and
- (e) the financial implications of the different measures as they would relate to the type of activity."

[13] The terms "environment", "environmental value", "environmental harm" and "environmental nuisance" are defined as follows in the Act

"8 Environment

Environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity,

intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and

(d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

9 Environmental value

Environmental value is—

(a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or

(b) another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

14 Environmental harm

(1) *Environmental harm* is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.

(2) *Environmental harm* may be caused by an activity—

(a) whether the harm is a direct or indirect result of the activity; or

(b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

15 Environmental nuisance

Environmental nuisance is unreasonable interference or likely

interference with an environmental value caused by—

- (a) aerosols, fumes, light, noise, odour, particles or smoke; or
- (b) an unhealthy, offensive or unsightly condition because of contamination; or
- (c) another way prescribed by regulation."

[14] An environmental protection order (EPO) under [s.360](#) may impose on the recipient on whom it is served "a reasonable requirement to prevent or minimise environmental harm" and may require the recipient

- (a) to not start, or stop, a stated activity indefinitely, for a stated period or until further notice from the administering authority; or
- (b) to take stated action within a stated period.

[15] It is an offence for the recipient of an EPO to wilfully contravene [\(s.361\(1\)\)](#) or to contravene [\(s.361\(2\)\)](#) the EPO.

[16] The applicant contends that the respondent has committed offences against [s.361](#) as a result of his contravention of EPO's issued on

- (a) 26 September 2003
- (b) 15 August 2008 and
- (c) 14 October 2008.

The EPO's relate to the activities complained of in this application.

[17] The applicant also contends that the respondent has committed and will unless restrained commit offences against [s.440](#) of the Act.

[18] [Section 440](#) makes it an offence to wilfully and unlawfully cause an environmental nuisance [\(s.440\(1\)\)](#) or to unlawfully cause an environmental nuisance [\(s.440\(2\)\)](#).

[19] There can be little doubt that, as far as it can be achieved, clean air,

dust free air, is an environmental value in the sense that it is a quality or desirable physical characteristic of the environment that is conducive to public amenity or safety and, depending on the circumstances, also ecological health. We would all like the air to be clear and as clean as possible all of the time. The environment includes people and communities living and working in a particular location or place or area and the contribution of clean, dust free air to the amenity and harmony of those locations places and areas. It also includes the effect on those locations, places and areas and the people living and working in them of unclean air and dust laden air such as is complained of here. Taking into account the nature, frequency, intensity and regularity with which it is generated, the number of people and businesses affected, their proximity to the activities generating the dust and the character of the neighbourhood, the dust here complained of clearly amounts to an unreasonable interference or likely interference with an environmental value. Similar considerations were referred to by McGill QC DCJ in Fletcher v May [\[2001\] QDC 081](#) at paragraph [28].

[20] The environmental nuisance here is caused by

(a) dust blown from the site;

(b) dust blown from the site by vehicles driving over unsealed areas of the site and as those vehicles enter and exit the site; and

(c) dirt on Rudman Parade deposited by vehicles after exiting the site which turns to dust as vehicles drive over it. .

[21] The applicant contends that the respondent should be ordered to stop vehicles traversing over the common (unleased and unsealed) areas of the site until he seals the areas traversed by the vehicles and installs and operates a vehicle wheel wash. The power to do so is said to be found in [s.505\(6\),\(7\),\(8\) and \(9\)](#). Whether a wheel wash would be required if the areas traversed by the vehicles were sealed was not the subject of any discussion during the hearing but I think it probably would be.

The witnesses generally

[22] Four gave evidence for the applicant. They were Mr Immisch, Ms

Adrienne Wooding, a senior environmental officer employed by the applicant, Anthony Spittle, a cell manager employed by Holcim (Australia) Pty Ltd, a construction materials company which owns and operates a concrete batching business at 13-15 Rudman Parade (see exhibit 1) and (by telephone) Gary Raschke, the manager of a self storage facility located between Hornet Place, Rudman Parade and Bee Court (see exhibits 1 and 4). Affidavits or statements from each were also relied upon. All except Ms Wooding were cross-examined.

[23] In addition the applicant relied on statements or affidavits by

(a) Sid Sarantis, the managing director of a wholesale vitamin company at Unit 1, Lot 1, Bee Court (see exhibits 1 and 4)

(b) Gregory Roberts, who operates a business at Units 2 and 3, 1 Bee Court (see exhibits 1 and 4)

(c) Craig Copeland, a director of an industrial electrics business at 4/1 Bee Court (see exhibits 1 and 4) and

(d) Stephen Barclay, a legal officer employed by the applicant.

None of these witnesses were required for cross-examination.

[24] The respondent only gave evidence in his case.

The applicant's witnesses

[25] I accept their evidence. With the exception of Mr Barclay (whose evidence was only mechanical) they were long suffering, frustrated at the intransigence of the respondent and extremely patient; they were everything the respondent wasn't. The applicant's officers have been extremely tolerant and considerate in their relations with the respondent. He has been a frustrating and difficult person to deal with.

[26] I am satisfied that all who have complained about dust from the site and who have observed vehicles from the site and other vehicles generating dust are genuine and truthful in their complaints and their descriptions of events. Where there is a conflict with their evidence and the respondent I believe them and disbelieve the respondent.

The respondent

[27] Brett Cook of Coastal Tipper Hire described the respondent as "difficult" to deal with (ex EI6, second Immisch affidavit) and that is clearly so.

[28] The respondent is aged 77 and appears to be a successful businessman but as a person and a witness he was difficult, demanding, unrealistic, rude, unco-operative, self centred, uncompromising, rigid, untruthful, selective in what he said he could and could not remember, selfish, mean, grossly irresponsible, uncaring for the rights of others and dismissive of the case against him despite compelling evidence to the contrary. He couldn't care less that activities he allows to be conducted on his land have caused and are causing significant environmental nuisance problems for others in the near neighbourhood. He is dismissive of any regulatory attempts to limit or control his activities and is unwilling to consider any suggestion that he may have some responsibility for what is happening.

[29] The respondent opposed the application on the basis that it was not his obligation to do anything and that he has not and is not creating an environmental nuisance. He says he is not creating the dust. If dust is being created his tenants are doing that, he can't control their truck movements, they are not his trucks, they are not his truck drivers, they're not his employees. He says there would be significant costs to him if he were to provide a wheel wash and seal roads which he couldn't recover from his tenants. His property would also, he says, be degraded or devalued should he do those things. He seems to think that it would result in a less favourable "zoning". He's owned the land since 1974 and he's paid much in the way of rates and taxes and his tenants are making money out of the activities they carry out on the land and if their activities generate the dust they should be the ones to pay. He seems opposed to anything being located on common property because whatever is located there, either sealed roads or a wheel wash, would have to be removed at some time and he couldn't visit the costs of the removal on his tenants; he would have to pay them.

The evidence

[30] The dealings which officers of the applicant have had with the

respondent in relation to the matters the subject of this application are referred to in detail in the first affidavit of Mr Immisch, the affidavit of Ms Wooding and the evidence which both gave.

[31] The evidence establishes the commission by the respondent of offences relating to the contravention of the EPO's referred to in paragraph [16]. The activity he allows - vehicles traversing and entering and exiting the site - causes and is likely to cause environmental harm for the purposes of [sections 358\(d\)\(i\)](#) and [319\(1\)](#) and he has not taken all reasonable and practical measures to prevent or minimise that harm. Such measures would include the installation and operation of a vehicle wheel wash and sealing internal roads.

[32] For each of those offences the evidence is

(a) EPO 26 September 2003 - paras 20-27 of Mr Immisch's first affidavit and paras 8-11 of the affidavit of Ms Wooding. Notices for the contravention of this EPO were issued on 20 January 2004 (offence date 7-8 January 2004), 28 April 2008 (offence date 15 April 2008) and 14 July 2008 (offence date 26 June 2008). In each case a contravention of [s.361\(2\)](#) was alleged. The respondent ignored the notices and paid the fines.

(b) EPO 15 August 2008 - paras 28-37 of Mr Immisch's first affidavit and paras 12-20 of the affidavit of Ms Wooding. No contravention notice/s were issued in respect of this EPO but I am satisfied that the respondent never complied with it and that his contravention of it would have amounted to an offence/s against [s.361\(2\)](#) had he been proceeded against for the contravention/s.

(c) EPO 14 October 2008 - paras 38-50 of Mr Immisch's first affidavit, paras 21-33 of the affidavit of Ms Wooding and the affidavit of Mr Barclay. In the Magistrates Court at Southport on 6 December 2010 the respondent was convicted in his absence of two offences of contravening this EPO. He has not yet been sentenced. (I will ignore any suggestion that the EPO may have been contravened by the failure of the respondent to submit an application to the Gold Coast City Council for approval to install a vehicle wheel wash as it now appears (second affidavit of Mr Immisch paras 10 and 11 and exhibits EI1 and EI2) that none may be required). Contravention of this EPO continues on an almost daily basis.

[33] The Amended Originating Application refers to these contraventions in paras 6-10 and 13-14, para 10 effectively alleging that the respondent continues to contravene the EPO of 14 October 2008 and that is so. Paragraph 11 alleges that dust and sediment continues to be trafficked onto Rudman Parade and that is supported by the evidence.

[34] In relation to offences against [s.440](#) the Amended Originating Application alleges as follows

"14A The applicant further alleges that the respondent has committed an offence against [section 440\(1\)](#) of the Act in that the Respondent on divers dates between the 29th of October 2009 and 29th of October 2010 wilfully and unlawfully caused an environmental nuisance.

14B Alternatively, the Applicant further alleges that the Respondent has committed an offence against [section 440\(2\)](#) of the Act in that the Respondent on divers dates between the 29th of October 2009 and 29th of October 2010 unlawfully caused an environmental nuisance.

14C Particulars of the offences alleged in paragraphs 14A and 14B are the release of dust particles from the Respondent's site caused by vehicle movement resulting in an unreasonable interference with an environmental value namely public amenity and safety."

[35] The respondent is said to have caused an environmental nuisance by allowing vehicles to traverse and enter and exit the site which vehicles generate the dust and deposit dirt on Rudman Parade which turns to dust when vehicles drive over it. The short sealed section on the site leading to Rudman Parade (see exhibits 5, 6 and 7) is ineffectual as a dust preventative measure.

[36] The evidence supporting these allegations, and establishing in each case, in my view, at least an offence against [s.442\(2\)](#) is

(a) the first affidavit of Mr Immisch, paras 51-55, his second affidavit,

para 20 and his evidence;

(b) the affidavit of Ms Wooding, paras 32 and 33 and her evidence, and

(c) the other statements and evidence referred to in paragraphs [22], [23] and [38] - [45] hereof.

[37] The respondent continues to refuse to do anything to abate the environmental nuisance emanating from the site. He continues to contravene the EPO of 14 October 2008 and continues to commit further offences against [s.440](#). Such offences will clearly continue to be committed unless he is restrained from allowing the site to be used in ways which cause environmental nuisance of the type complained of. Dust blown from the site independently of vehicles would be significantly reduced were the internal roads sealed.

[38] The witnesses have described the environmental nuisance generated from the site and its effect on them in the following terms. Further details are in the EPO's.

(a) Wooding affidavit (since mid 2007)

- dust blown from common unsealed roads
- clouds of dust emanating from traffic driving along the unsealed applicable areas
- Rudman Parade not kept clean on either side of the entrance/exit to the site
- dust causing nuisance at nearby businesses
- sediment tracked onto Rudman Parade and washed/blown into the gutters along the road
- vehicles driving through sediment that had been tracked from the premises onto Rudman Parade causing dust (sometimes "large clouds of dust") to blow around the area.

Her observations are supported by the photographs exhibited to her

affidavit. The dust represents a significant problem for the area. It is also deposited on parked vehicles. Ms Wooding went on leave for nearly a year and Mr Immisch took over "the case" from her.

In evidence she said (T3-58, 59, 61) recent observations indicate

"there is still an issue with dust; there are still vehicles tracking mud onto Rudman Parade. There's still dust being created when traffic drives through the sediment".

(b) Immisch affidavits and evidence

- dust from the site has been a problem since 2003
- sediment was observed on Rudman Parade in front of the site on 29 May 2009 and truck movements from the site caused a noticeable plume of airborne dust. John Sheerin said he had a wheel wash available at another property he was willing to install on the site but the respondent prevented him from doing so
- on 6 November 2009 sediment was observed being "released from the site" and deposited on the road
- on 29 October 2010 a track of sediment was observed extending from within the site and onto Rudman Parade; after each vehicle entered and exited the site visible dust plumes were observed. The photographs ex 2, support these observations. On that day he observed at least 20 heavy vehicle movements to and from the site over an hour
- by 12 July 2010, 12 separate complaints had been received by the department from people working and operating businesses in the area alleging an environmental nuisance (air and dust, health issues, distress) caused by the dust from or associated with the site (ex AA to first Immisch affidavit and T1-34, 35). He described it as "a community that's hurting about this issue and just seeking some respite" (T1-36). The complaints appeared to him to be genuine and consistent with his observations (T1-75).
- He described the dust created by the vehicle movements as a "fog" (T1-

75). Most of the dust comes from vehicles entering and leaving the site (T1-45).

(c) Holcim (Australia) Pty Ltd

- has for the past 4 years suffered from dust from activities undertaken at the site causing significant impact or an interference with amenity at its premises. The dust is a problem Monday - Saturday from early in the morning until early evening, "dust blows through the plant and surrounding air when conditions are dry and vehicles use the road. When it rains, mud is carried/washed onto the road. This later turns to dust. Heavy traffic in the street at all hours causes the dust on the road to lift and cover everything in the plant including people, lunch areas, cars and equipment"(ex 3).

In his statement dated 5 January 2011, Mr Spittle says:

"4. Holcim is located adjacent [sic] to the entry to 22 Rudman Parade, a site occupied by a number of businesses. Dust and sediment from vehicles, entering and leaving 22 Rudman Parade, have for over the last three years caused significant impact on and interferes with the amenity of our industrial premises in Rudman Parade.

5. The dust issue is a problem from Monday to Friday, from early in the morning until the early evening, and on many days covers the length of Rudman Parade, from the entrance to the site to Reedy Creek Road, a distance of approximately 300 metres.

6. The movement of vehicles along Rudman Parade cause the dust to blow through the plant and covers everything in the plant, including people, lunch areas, cars and equipment. During the last three years, Holcim has spent over \$10,000 to have the dust and mud cleaned from within the plant and adjacent street frontage.

7. When it rains the dust turns to mud. The wheels on vehicles entering and leaving our site pick up mud and deposit it within the plant and along Rudman Parade. This mud must be cleaned up within the plant. When it presents a huge problem, the mud immediately outside the plant is cleaned up by Holcim.

8. This issue has existed for more than three years and we have made numerous complaints to both the Gold Coast City Council and the Department of Environment and Resource Management (DERM), including correspondence sent to DERM in April 2010. This correspondence included a number of photographs of the dust on Rudman Parade and around the plant."

In his evidence Mr Spittle said in cross-examination by the respondent (T3-39, 40, 41, 42)

"I arrived in the business just short of three years ago and it was brought to my attention, at that stage, by the employees on site, that there was a significant health and environmental issue in relation to the dust, and it was resting in our amenities area, our lunch room areas in our business. We've continued - we, at that stage, elected to make a formal representation to the EPA and - and we've continued to pursue some sort of - some sort of correction, because it - it impacts on the health and wellbeing of our employees, and it's significant. And it is significant.

No, you're correct. There isn't any dust from the industrial buildings and there isn't any dust, that I'm familiar with, from Wagner's concrete operations. Both of those operations have sealed yard areas. They're hard stand areas are all sealed and you're quite right, there is no dust from them.

But, it could be coming from - it could have even been coming from the council quarry. Wouldn't that be logical? -- No. I don't believe so.

The bulk of the dust is being transported by the transports that are exiting your property and the actual truck movement, the truck movement itself is generating and blowing the dust, which they've transported from your property out onto the street. It's not all about prevailing winds, it's about the-----

They're transporting the dust from your property.

They're transporting the dust on their wheels.

HH: Is the dust generated by the trucks driving over Mr Clark's property and also carrying dust onto the road and driving over that as well? --

Correct.

Yes. From both those sources? -- Absolutely. And - and the - the result of some of the wet weather that Mr Clark was talking about, that turns it into mud.

Yes? -- Which tends to build up on the road.

RESPONDENT: Oh, come on.

HH: Yes? - And when it dries out, that turns into dust again and-----

Yes?-- ---- as the trucks transport over that same dust, it's -----

Yes? -- It's blowing onto the property.

Yes. I understand what you're saying.

RESPONDENT: You seem to be a good story-teller, that's all I can -----

RESPONDENT: Well, I - I don't know what he's talking about ----- It's beyond me."

(d) Gary Raschke. In his statement dated 1 May 2009 he says:

"3. I am the manager of a self storage facility located at Hornet Place and Rudman Parade and Bee Court. I have managed this business for 6 years. There are 190 storage sheds located on Rudman Parade and Bee Court. The current occupancy rate is approximately 80%.

4. Approximately 2 years ago I began noticing a dust problem on Rudman Parade, the dust was coming from a driveway of a property located on Rudman Parade. The dust flow has been constant and becomes worse when trucks enter or leave the driveway, as each truck drives over the dust on the road and the driveway, the dust flows onto my property and enters the storage sheds.

5. When there is a rain event, the dust on Rudman Parade turns into mud and makes the road difficult to drive through without having mud on the tyres of my vehicle. I constantly have to clean my vehicle, as it becomes covered in dust every day.

6. The dust enters the storage sheds on Rudman Parade continuously. As a result of this, I have received numerous complaints from my customers, complaining about the amount of dust in the storage sheds. I have had [sic] lost a number of customers because of the dust that enters the storage sheds. This has caused my business financial loss.

7. On one occasion I had to take a compressor to a storage shed in order to blow the dust off a customer's furniture so it could be removed.

8. I am aware that on a couple of occasions, the dust has been cleaned from the road by the company adjacent [sic] to the storage sheds on Rudman Parade. I am aware this is the company which is responsible for the dust problem.

9. The dust is a daily nuisance to myself and my business and to my knowledge there is no daily clean up action being taken by the company which is causing the problem."

In his evidence Mr Raschke said (T3-48, 49, 50)

Evidence in Chief

"Now, when anything goes along that road or out of that complex, dust just flies up and it's really bad. I've had customers crying to me. I've had to lend my air compressor to customers to blow dust off their belongings. I've

had people move out because of the dust. I'm not charging the right price, the full amount that I should be because of dust. If you walk or drive down where there's trucks going by and then there's - and it's not mud and it's dust, you can't see or breathe. It's - it's hard; you've got to close your eyes and if you're walking because the dust will go in your eyes, and breathing is hard. So, it it's a really massive problem, specially to my business. I don't know what the other businesses are like, but my business is really suffering.

And do I understand then, Mr Raschke, from your evidence there that since your statement was given on the 1st of May 2009 there's been no change in the problems that have been ----? -- No.

----- caused you by this dust? -- No.

All right. And the ----?-- There's only - there's only one thing I can see, there has to be - the driveway has to be extended and has a wash so when the trucks come out their wheels get washed off so they're not bringing the dust - the dirt and the mud out on to the road so it gives it a chance to turn into dust. The last month has been absolutely fantastic because we've had nothing but rain every day of the week, and it's just, you know, there's no dust at all because of the rain, but now that's fast drying out, then the dust starts.

Cross-examination

Yes, Yes the dust does come from the dust in the quarry, but not to give me any great concern as much as what you see when you - when you see the trucks come out of the driveway."

The property he is complaining about is the respondent's.

(e) Sid Sarantis. In his statement dated 22 April 2009 he says:

"3. I am Managing Director of Vita Gold products Pty Ltd. This is a wholesale vitamin company, which entails manufacturing, bottling, labelling tablets and casuals for vitamin supplements. I have been in

business here for approximately 15 years.

4. Approximately 2 years ago I began noticing a dust problem on the road in Rudman Parade which is located nearby. The dust is constantly in the air and blows into my business; because of this I am not able to leave the front door or the roller door open. When these doors have been left open, a film of dust occurs throughout my office, warehouse and clean room.

5. By law we must comply with the Therapeutic Goods Administration (TGA), which requires me to have a controlled clean room environment, this is the packaging area and must be completely hygienic and dust free.

6. I believe this dust is being caused by the adjacent [sic] property not having an adequate driveway. I am aware that the driveway adjacent [sic] to my business is not concreted or sealed in a way which would prevent dust from leaving the property. I frequently observe trucks leaving the site with uncovered loads, which creates more dust, not only from the tyres, but also from the back of the load the truck is carrying.

7. The dust leaving the site is continuous and occurs whether or not it is windy. When it rains, the dust turns into a gummy type mud substance which sticks to the tyres of my car and the cars of my employees. I have considered leasing a new vehicle; however the dust problem has prevented me from doing so.

8. I have seen a sweeper on one occasion, approximately half way down Rudman Parade. The sweeper was mainly sweeping the gutters on the road. To my knowledge the adjacent [sic] property does not make any attempt to perform a daily clean up of the dust on the road, or prevent the dust from leaving their site.

9. On a number of occasions I have contacted my local Member of Parliament, the local council and the EPA in an attempt to try and have the issued resolved. I was told that other complaints had been made to the council in relation to this matter and they were looking into it.

10. As a result of the dust, I continuously have to clean inside and outside my business and I have to take extra care that my business is completely dust free in order to comply with the regulations. I am also concerned of

long term health issues which may arise from the continuous dust in the air."

The site he complains of is the respondent's.

(f) Gregory Roberts. In his statement dated 22 April 2009 he says:

"3. I am a glazier by profession and own and operate Silvaline Pty Ltd, trading as South Coast Glass and Mirrors. This is a glass/mirror manufacturing company, which entails manufacturing mirrors, shower screens and wardrobes and cut to size glass. I operate this business from Units 2 & 3, 1 Bee Court, Burleigh Heads and have done so for 15 plus years.

4. The business comprises of a retail sale/display area and a large workshop of glass. In this workshop I process the glass for shelving mirrors and wardrobes and showers. I have workers who assist me making the products and then take these products for installation.

5. There is a considerable amount of glass kept in the workshop and in the retail display area (showroom). In order for my company to sell the glass produce, the glass must be kept clean and free of any dust which will scratch the glass when put together. The glass needs to be stacked together when it is being shipped out of my workshop to the buyers.

6. Since approximately 18 months - 2 years ago there has been an issue with dust in Rudman Parade which is located nearby. The dust continuously blows in from the driveway of the adjacent [sic] property into my property and surrounding properties.

7. My show room, office desks and all vehicles parked outside are constantly covered in dust. I constantly have to have my car detailed to remove the dust at \$49 per time. All other staff parked on site also have to spend a considerable amount of time and money cleaning their vehicles. The machinery, office desks and showroom constantly need attention in order to keep the dust off.

8. I believe this dust is being caused by the adjacent [sic] property not having an adequate driveway. The driveway is not concreted or sealed and

produces a large amount of dust whenever a truck drives over the driveway, which blows in whichever direction the wind is coming from. Even when the wind is not blowing and there are no trucks driving over the driveway, the dust is still blowing and lingering in the air.

9. Dust is non existence [sic] when there is a rainfall event; however the trucks then bring mud onto the road from the driveway of the adjacent [sic] property. This affects my deliveries and the customer jobs going out from my workshop. My trucks which carry the glass and showers have to drive through the mud which then sticks onto the glass the truck is carrying.

10. On numerous occasions, I have had customers come into my workshop to pick up glass and they have complained about the amount of dust in the air and have asked how I put up with it.

11. I am aware that the road has been cleaned approximately half a dozen times in the last 4 months. This was done with a bobcat with a sweeper attached, which caused even greater dust problems. On other occasions I have seen them clean it with water, which creates mud. When the road has been cleaned the methods used have just washed the dust, dirt and mud into the nearby gutters. They have only attempted to clean the road since the EPA has become involved. The road is not cleaned daily.

12. Over the years, I have contacted numerous agencies in order to have this problem resolved, including the Mayor's Office, my local Member of Parliament, the EPA and the local councillor for Burleigh Heads. Nothing has come as a result of these complaints.

13. The dust blowing into my workshop and showroom is having an immense impact on my business, as I have to continuously clean the glass and the office. This takes time away from my work. The dust is so bad that I have a fear for my health as it affects the air and my breathing."

The property he complains of is the respondent's.

(g) Craig Copeland. In his statement dated 5 January 2011 he says:

"2. I am a Director of Industrial Electrics Pty Ltd, trading as Industrial

Electrics, a Gold Coast based electrical and communications contracting organisation located at 4/1 Bee Court, Burleigh Heads, Queensland, 4220.

3. Industrial Electrics has operated from this location for 2 years and employs 40 people.

4. The location of my business is opposite the driveway to 22 Rudman Parade, Burleigh Heads, a commercial site consisting of 5 units of which we occupy one.

5. Since Industrial Electrics moved in to these premises we have been battling this dust issue. We installed new timber flooring to enhance the entrance way for our clients but found we do not use this area as there is too much dust and dirt.

6. We installed a new computer system and after eight months and we have constantly had issues with the server crashing, upon investigation the server rack was found to be full of dust and the CPU fans etc had all jammed up. Industrial Electrics is only a small company trying to grow, we have gained some major Government contracts in the last year but we constantly battle with our I.T and it is becoming embarrassing when trying to deal with clients.

7. We also cannot afford to keep replacing equipment due to non warranty defects. The other issue we have to deal with is the constant amount of dust on the road, this becomes a major Safety Hazard after rain as the exit to our premises becomes very slippery. Our tool box talks regularly include references to driving with caution when exiting the premises."

[39] Various during the hearing the respondent expressed his views and his opposition to the orders sought by the applicant in the following ways:

T1-42

If somebody commits offence, he should've been prosecuted, not me. I have no control over the road, trucks are registered and if they create an offence or something like that, well, I mean, I can't tell a truck what to do.

T1-53, 54, 55

Why aren't we holding the owner of Pro Skips and John Sheerin responsible? You're trying to hold me responsible and they're responsible for their own actions. I am not responsible because they signed an agreement to abide by council and EPA rules, they've signed an agreement (lease) in the first place. They are responsible for their own production.

T1-75, 76

Holcim are in direct opposition to Wagner's; the concrete industry is very sad at the moment. It's a false statement. In my consideration it's jealousy because of Wagner's. I'm arguing it's false. Wagner's are taking their business from them. As far as I'm concerned it's a business operation that's all, nothing to do with it. In big business there's a lot of competition and opposition.

T1-93

To be quite honest the power is in the tenants. They have the power to do what you're ordering, something like that.

T1-95, 96, 97, 98

I've paid taxes, I just paid the government \$390,000. If you want to stop them you just say you want to stop them because they can go tomorrow if they want to. I don't want you to downgrade my property. I can't tell trucks what to do, they'd just run over me and they're all registered. Trucks are registered to go in there. I'm not the only one that goes down that road. I shouldn't have to pay for it. We're not the only ones creating the dust. I'm not the only one that carts down that road. I've proved here (leases) where each tenant has signed to say that he is responsible for his own action. You want to condemn me for what I've done now. A lot of people are earning a living out (of me) and if you want me to stop I would like you to write to each of the tenants and tell them that they can't operate.

T1-103

If you rent something the person that rents it's responsible for it in the period they were renting it, especially when they'd signed.

T1-106

I've got some good tenants.

T2-6, 7, 8

I'm listed as general industry and classified as Industrial 1 and Commercial C. So I have no intentions of having roads put all over the property out of concrete because we've got certain roads in there as it is. What I'm trying to say to you, your Honour, I'm - there's 150 people earn a living out of that place at the present moment, not out of me but out of subcontractors and that there. I pay taxes and that every year and I've got all my taxes up to date. I can put up a four storey building (but) at the present moment I don't have the money to do it. I pay a land tax bill of 140,000 per annum to the government alone. I've got to earn some money off it otherwise I'd never be able to pay the government. All the tenants that are there, they have written on their contract they've got, they must abide by council and EPA rules. So they are responsible.

T3-26, 27

I'm not going to do all that for just a couple of characters there that negotiated behind my back. I've got approval from the council, right. Now, how come that you're above the council? How come that you're above the council? Well I've asked him the question how come that you're trying to be above the council.

T3-29, 30

I've done everything legal way back since '74. If I allowed a wheel wash that would degrade my land. (If I was ordered) to provide a wheel wash and construct the roads I think it would be illegal.

T3-39, 40, 41, 42, 43

I can't see how a truck, when it's going out would be carrying dust, (that) doesn't sound right to me. There's a lot of other places there that dust does come from, it could have been coming from the council quarry. I haven't got any authority to pull up a truck and say that you're creating dust; any

trucks that we ever load are registered. How can you turn a small rock into dust?

T3-62

It's got nothing to do with me because I cannot pull up a truck and say "Listen mate, you shouldn't be carting there" or you can't do that. I classify myself as innocent, if you really want to know, not me doing anything wrong.

T3-65

The council quarry, so they would be getting dust from them, not me.

T3-70

The lessees sign that they must abide by which is now DERM, which has changed its name three times since 1996, but them and Council have got to abide by their rules.

T3-74, 75, 76, 77

Do those trucks generate dust? Well, I don't know, they are just normal trucks. If I go along with these fellows here (the applicant), they may degrade my land. If they (the lessees) want a wheel wash, they can pay for it and they can take it away with them. (I don't have to pay for the sealing of the roads on common property which leads to the areas leased by Coastal Tippers Hire, Pro Skips and Pro Crush and Crushcon Queensland). It'd be costing me more than the rent I've got off them. I don't have to. They're renting the ground and it's got to be left the same as it is. We've already got a sealed road in the front. It's in their contract. No I'm only renting ground, my friend. If I start doing what you are talking about, they'd downgrade me, and they'll downgrade me and I don't want to be downgraded. The Council will downgrade me. I'm not at fault.

T3-79

They (lessees) can do whatever they want (on their own site) provided they take it with them when they go.

T4-10

I've never committed any offence.

T4-12, 13

The EPA are the one that are in the wrong. I'm not on any pension or anything. I support myself. I pay my taxes and everything else, which is quite a lot of money and all the things that we done we applied to Council. So, I think that the EPA are in the wrong and they're trying to take over the council job.

T4-39

This fellow's (Mr Kissick) carrying on like a - he's trying to turn the country into a communist country. But, it seems that he's talking about something that he doesn't know a lot about.

T4-47, 48, 49, 50

I'm not stopping anybody from putting a wheel wash in. They can put whatever they like there, but they've got to take it with them when they leave. I'm not stopping them, they've already put buildings on there, which they've got to take away when they leave. I'm not stopping them from putting anything on the ground. I haven't stopped them from putting a wheel wash in either. I haven't stopped anybody from doing anything. I haven't stopped anybody from doing anything, as long as they - as long as they fix it when they leave. I'm not stopping anybody from putting it but it's got to be (that) they take it when they leave. I only rent them the ground. I'm not telling them. But this bloke (Mr Kissick) is making out [sic] common ground and Christ knows what. That don't exist because for the simple reason, if the space is big enough, I have trucks that come into the yard there and they pay me a monthly rent because they are not allowed to have their truck parked out in front of their house. There's no such thing as common ground and uncommon and as far as that other bloke yesterday on the telephone (Mr Raschke), he straight out lied, if you really want to know but he didn't tell the truth over the phone I can tell you that.

T4-56, 57, 58

I don't want to lose my classification of Industrial 1, Commercial C. If I start saying that I agree for them putting in, they'll downgrade my block, as I explained before. They'll downgrade it, and I don't want any involvement in that. It's under current plan and I'm allowed 75 per cent buildings to go on it, and if I start saying that we've got people in there doing what's-a-name, they'll say, "why didn't you" and they'll downgrade my property.

[40] On 30 January 2008 he said to Ms Wooding (her affidavit, paragraph 8, exhibits AW2 and AW3)

"The dust and sediment issues are between the EPA and the person there using the equipment. The driveway is on my land. They are supposed to sort that out amongst them. If one bloke uses it to 50 trucks and another for 1 truck how can I get them to contribute so therefore it's a community road for the people on the site. They can work it out amongst themselves. They are supposed to look after the roads themselves. Don't talk silly businesses. It is an industrial area my dear girl therefore there will be dirt. Trying to put the road onto me is not on. What is wrong with the people getting together and sorting out the dust and sediment. Those blokes are on the site all the time and they know what is happening."

[41] On 14 July 2008 he told her he would not install a wheel wash.

[42] On 1 September 2008 he said to her by telephone that the Council not the EPA control Rudman Parade. He also said his tenants were responsible for cleaning Rudman Parade. When told the EPA considered him responsible for cleaning the road (in accordance with an EPO) and the exit from the site and that he must comply with all requirements of the EPO he hung up the phone.

[43] On 14 October 2008 he said to her

- (the lessees) are responsible for the environmental issues
- it is up to the people working at the site to control the dust and the speed of the trucks

- there is a water truck at the site which (the lessees) can use to keep the dust down
- that he agreed that the wind also blew dust around "but I can't control the wind".
- this is an industrial site
- the Council would not allow him to install a wheel wash
- I want someone who's got a brain, go away, get lost.

[44] On 23 October 2008 he said to her

- what you want me to do doesn't make sense
- why can't you organise to have the road cleaned?
- Why are you always down here?
- I can't do anything (about the dust).

[45] Generally the respondent did not appear to dispute that his site was causing the dust problems everyone complained about. His case was that he wasn't causing it, trucks operated by people or businesses he had no control over were.

Relief

[46] An order restraining the respondent from allowing the site to be used in ways which cause environmental nuisance is likely to cause hardship to the lessees and their employees.

[47] Proskips and Procrush employ 34 people and could not continue to operate on the site without vehicles. The same applies to Crushcon Qld which employs 5 people. Both said they would at their own cost contribute machinery and labour "toward the construction of a sealed road and truck wheel wash... if Mr Clark were to pay for the costs of materials...." (ex EI10, second Immisch affidavit). Coastal Tipper Hire Pty Ltd is not renewing its lease when it expires in March or April 2011. It is the

vehicles of the lessees though which cause or contribute to the nuisance. Their vehicles, those associated with their activities and possibly also those the respondent allows to park overnight on the site are the ones which regularly drive on the site, enter and leave it, generate dust and deposit dirt which turns to dust on Rudman Parade.

[48] A wheel wash satisfactory to the applicant would cost \$61,105 plus \$4,450 for delivery (para 21 and ex EI15, second Immisch affidavit and T3-21).

[49] Concrete roads would cost something like \$200,000 maybe less if only one road (the shorter one) and not two was sufficient for the Proskips leased area (ex 16, second Immisch affidavit and T3-19, 20, 21, 33, 34, 35 and 36). If the respondent is to be ordered to seal roads more specificity is required as to those roads.

[50] The letter from the Gold Coast City Council (ex's EI1 and EI2) is not really a sufficient basis for a conclusion that development approval would not in fact be required from the Council for the wheel wash and sealing the roads.

[51] Notwithstanding the hardship, both human and economic, to Proskips/Procrush and Crushcon (Qld) which would be caused by orders such as are sought by the applicant extensive powers exist to restrain the activities the respondent is allowing on the site.

[52] [Section 505\(5\)](#)-(9) provides

"**505** (5) If the Court is satisfied—

(a) an offence against this Act has been committed (whether or not it has been prosecuted); or

(b) an offence against this Act will be committed unless restrained;

the Court may make the orders it considers appropriate to remedy or restrain the offence.

(6) An order—

(a) may direct the defendant—

(i) to stop an activity that is or will be a contravention of this Act; or (ii) to do anything required to comply with, or to cease a contravention of, this Act; and

(b) may be in the terms the Court considers appropriate to secure compliance with this Act; and

(c) must specify the time by which the order is to be complied with; and

(d) may include an order for the defendant to pay the costs reasonably incurred by the administering authority in monitoring the defendant's actions in relation to the offence.

(7) The Court's power to make an order to stop an activity may be exercised whether or not—

(a) it appears to the Court the person against whom the order is made intends to engage, or to continue to engage, in the activity; or

(b) the person has previously engaged in an activity of that kind; or

(c) there is danger of substantial damage to the environment if the person engages, or continues to engage, in the activity.

(8) The Court's power to make an order to do anything may be exercised whether or not—

(a) it appears to the Court the person against whom the order is made intends to fail, or to continue to fail, to do the thing; or

(b) the person has previously failed to do a thing of that kind; or

(c) there is danger of substantial damage to the environment if the person fails, or continues to fail, to do the thing.

(9) Without limiting the powers of the Court, the Court may make an order—

(a) restraining the use of plant or equipment or a place; or

(b) requiring the demolition or removal of plant or equipment, a structure or another thing; or

(c) requiring the rehabilitation or restoration of the environment."

[53] So far as these provisions are concerned I am, for the reasons given, satisfied that offences against the Act have been committed and will be committed unless restrained. The roads on the site should be sealed and a vehicle wheel wash installed. Subject to hearing further from the parties it seems to me that until the roads on the site are sealed and a vehicle wheel wash is installed and operating the respondent should be ordered to stop or prevent vehicles traversing the site and an order should be made restraining him from allowing vehicles to do so. What form that order should take and how it should be monitored (and the costs of doing so) should also be considered as should the time when it should commence. Whether any remedial action by the respondent should be ordered will also need to be considered. Reasonable notice should be given to the lessees and consideration should be given to hearing from them before final orders are made.

[54] I am satisfied that absent an order preventing vehicles traversing the site until a wheel wash is installed and operating and the roads sealed further substantial damage to the environment will be caused because of the continuing nature of the respondent's offending.

[55] I will hear the parties about the form of orders which I should now make.

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