Court of Appeal
New South Wales

Case Title:	Macquarie Generation v Hodgson
Medium Neutral Citation:	[2011] NSWCA 424
Hearing Date(s):	13/09/2011
Decision Date:	22 December 2011
Jurisdiction:	
Before:	Whealy JA, Meagher JA, Handley AJA
Decision:	(1) Appeal allowed with costs; (2) Orders 1 and 2 made by Pain J on 4 March 2011 be set aside; (3) In lieu thereof, order that the applicant's notice of motion of 15 June 2010 be dismissed with costs; (4) Order that the applicant's amended summons be dismissed with costs, but not so as to disturb any existing orders for costs in favour of the applicant; (5) The respondent to have a certificate under the Suitors Fund Act. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	CRIMINAL LAW - whether offence breach of statutory duty ENVIRONMENTAL LAW - pollution - emissions -- statutory licence -- whether

implied condition limiting emissions
NUISANCE - defence -- statutory authority -- reasonable care
STATUTE - statutory offence - whether breach of statutory duty

Legislation Cited:

Protection of the Environment Operations Act 1997, s 252(1)

Cases Cited:

Allen v Gulf Oil Ltd [1981] AC 1001
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Bartlett v Vinor (1692) Carthew 252
Blue Mountains Conservation Society Inc v Delta Electricity [2011] NSWLEC 145
BMA v The Commonwealth [1949] HCA 44; 79 CLR 201
Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; 149 CLR 337
Cope v Rowlands (1836) 2 M&W 149
EPA v Alkem Drums Pty Ltd [2000] NSWCCA 416; 113 LGERA 130
Gray v Macquarie Generation (No 1) [2009] NSWLEC 34
Gray v Macquarie Generation (No 3) [2011] NSWLEC 3
Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171
Kuligowski v Metrobus [2004] HCA 34; 220 CLR 363
Manchester Corporation v Farnworth [1930] AC 171
Meriton Apartments Pty Ltd v Sydney Water Corporation [2004] NSWLEC 699, 138 LGERA 383
Metropolitan Asylum District v Hill (1881) 6 App Cas 193
Metropolitan Water, Sewerage and Drainage Board v OK Elliott Ltd [1934] HCA 57; 52 CLR 134
Redpath v Allen (1872) LR 4 PC 511
Tate & Lyle Industries Ltd v Greater London Council [1983] 2 AC 509
Van Son v Forestry Commission of New South Wales (1995) 86 LGERA 108
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd [1978] HCA 42; 139 CLR 410

Texts Cited:	
Category:	Principal judgment
Parties:	Macquarie Generation (Applicant) Naomi Crystal Hodgson (Respondent)
Representation	
- Counsel:	R P Lancaster SC and L T Livingston - (A) I Lloyd QC and A Stafford - (R)
- Solicitors:	Clayton Utz (A) Environmental Defender's Office (NSW) (R)
File number(s):	2011/106649
Decision Under Appeal	
- Court / Tribunal:	
- Before:	Pain J
- Date of Decision:	01 February 2011
- Citation:	[2011] NSWLEC 3
- Court File Number(s)	40500 of 2009
Publication Restriction:	

HEADNOTE

The respondent brought proceedings in the Land and Environment Court (the Court) in Class 4 of its jurisdiction under the open standing provision in s 252(1) of the Pollution of the Environment Operations Act 1997 seeking declaratory and injunctive relief in respect of the emission of C02 from Bayswater Power Station at Muswellbrook. Macquarie operates that Power Station under a licence granted by the Environment Protection Authority. Pain J summarily dismissed some of the respondent's claims

[2010] NSWLEC 34. The respondent later obtained leave to amend [2011] NSWLEC 3. Macquarie's application for leave to appeal was heard as if it was an appeal.

Macquarie challenged the jurisdiction of the Court on the ground that the respondent's allegations of offences contrary to ss 64(1) and 115(1) of the Act were not within s 252(1) because offences under those sections were not breaches of statutory duty.

The respondent's first claim in her amended points of claim was that Macquarie's licence contained an implied or common law condition which limited its emissions of C02 to the level that would be achieved by exercising reasonable care for the environment. The respondent relied on the principle that lack of care could defeat defences of statutory authority in claims for common law nuisance. Another claim was that Macquarie had wilfully and negligently disposed of waste in the form of C02 in a manner likely to harm the environment. An injunction was sought to restrain Macquarie from burning more than 7 million tonnes of coal a year in breach of another implied term based on a statement in the Environmental Impact Statement (EIS) in 1979.

Held: Granting leave, and allowing the appeal: (1) The Court had jurisdiction because the offence sections created statutory duties; (2) Macquarie's licence under the Act did not contain the implied or common law condition relied on; (3) The licence did not contain an implied condition, imported from the EIS, limiting the consumption of coal at the power station.

JUDGMENT

1 WHEALY JA: I agree with Handley AJA.

2 MEAGHER JA: I agree with the orders proposed by Handley AJA and with his reasons for proposing those orders.

3 HANDLEY AJA: In July 2009 the late Mr Peter Gray and Ms Naomi Hodgson commenced proceedings in the Land and Environment Court (the Court) in Class 4 of its jurisdiction against Macquarie Generation (Macquarie), a State owned Corporation, which operates Bayswater Power Station (Bayswater) at Muswellbrook. The proceedings were brought under the open standing provision in s 252(1) of the Protection of the Environment Operations Act 1997 (the Act). Their summons sought declaratory and injunctive relief in respect of the emission of carbon dioxide (C02) from Bayswater as the wilful or negligent disposal of waste contrary to s 115(1).

4 Electricity has been generated at Bayswater through the burning of coal, since March 1996 (W/B1/89), and it emitted 14.1 million tonnes of C02 in 2008. The points of claim alleged that it emitted more C02 than any other power station in the State.

5 The generation of electricity on this scale is "a scheduled activity", within cl 17 of Schedule 1 of the Act. Under cl 1(1) and s 48(1) a licence is required for any premises at which a scheduled activity is carried out. Such an activity is a premises-based activity within Pt 1 of the Schedule.

6 Section 48(2) makes the occupier of premises at which any scheduled activity is carried on guilty of an offence unless he is the holder of a licence "that authorises that activity to be carried on at those premises." Licences are granted by the Environment Protection Authority (EPA) under s 55.

7 At all relevant times Macquarie has been the holder of a licence for Bayswater which authorised the generation of more than 4000 gwh of electricity per annum from burning coal. Its licence was subject to conditions which covered, among other topics, the emission into the atmosphere of identified pollutants, but not C02, the monitoring of C02 emissions, and the disposal of solid and liquid waste.

8 The licence did not include an express condition limiting the generation of electricity, the consumption of coal, or C02 emission. Macquarie denied the existence of any implied condition limiting any of these matters.

9 Sections 64(1) relevantly provided:

> "(1) Offence
>
> If any condition of a licence is contravened by any person, each holder of the licence is guilty of an offence ...
>
> (2) The holder of a licence is not guilty of an offence against this section if the holder establishes that:
>
> > (a)the contravention of the condition was caused by another person, and
> >
> > (b)that other person was not associated with the holder at the time the condition was contravened, and
> >
> > (c) the holder took all reasonable steps to prevent the contravention of the condition ...".

10 Section 115 relevantly provided:

> (1)Offence
>
> If a person wilfully or negligently disposes of waste in a manner that harms or is likely to harm the environment:
>
> (a)the person, and
>
> (b)if the person is not the owner of the waste, the owner, are each guilty of an offence.
>
> (2)Defence-1 awful authority
>
> It is a defence in any proceedings against a person for an offence under this section if the person establishes that the waste was disposed of with lawful authority.

11 Macquarie relied on its licence as lawful authority under s 115(2).

12 The Act's Dictionary defines environment as components of the earth and expressly includes air and any layer of the atmosphere. Harm to the environment is defined as including:

> "... any direct or indirect alteration of the environment that has the effect of degrading the environment and, without limiting the generality of the above, includes any act or omission that results in pollution".

13 Pollution is defined as including air pollution, and waste is defined as including any gaseous substance "discharged [or] emitted ... in the environment in such volume, constituency or manner as to cause an alteration in the environment...".

14 By a motion filed on 11 September 2009, Macquarie sought summary dismissal of the proceedings under UCPR Pt 13 r 13.4(1). The applicants opposed that application and by a motion filed in November 2009 sought to amend their points of claim by introducing new paragraphs 54A and 54B. Macquarie's application was heard by Pain J (Judge). Following the delivery of reasons on 22 March 2010, the Judge ordered on 31 March 2010 that the proceedings be dismissed except for the proposed claims formulated in paragraphs 54A and 54B of the proposed amended points of claim (WB 1/251): Gray v Macquarie Generation (No 1) [2010] NSWLEC 34 (Gray No 1). By Order 2 the Judge directed the applicants to file and serve any motion seeking leave to file a further amended summons and further amended points of claim in relation to the claims made in paragraphs 54A and 54B.

15 On 15 June 2010 the applicants filed a motion for leave to further amend. That application was opposed by Macquarie and heard by the Judge on 5 August 2010. The Judge delivered reasons on 1 February 2011 and on 4 March 2011 made orders granting the applicants leave to file a further amended summons and further amended points of claim. Her reasons are: Gray v Macquarie Generation (No 3) [2011] NSWLEC 3 (Gray No 3). That

interlocutory judgment is the subject of Macquarie's application for leave to appeal.

16 The Judge held that it was reasonably arguable that the authority conferred by the licence was subject to an "implied" or "common law" limitation or condition preventing Macquarie emitting C02 in excess of the level it could achieve by exercising "reasonable regard and care for the interests of other persons and/or the environment". It was alleged that this level had been exceeded giving rise to offences under s 64(1). Offences under the air pollution provisions in ss 124-132 were not alleged.

17 The new pleading also sought a declaration that Macquarie had wilfully and negligently disposed of waste in breach of s 115(1) by emitting C02 in a manner that harmed, or was likely to harm, the environment. An injunction was sought restraining Macquarie from burning more than an average of 7 million tonnes of coal a calendar year.

18 The Court has heard full argument on Macquarie's proposed appeal and can dispose of the case finally. At the end of the hearing of the application for leave, the Court granted leave to appeal, directed the filing of the notice of appeal, and reserved judgment.

Jurisdiction

19 The applicant Peter Gray died while these proceedings were pending. His interest in them is not an asset of his estate and the Court ordered that his name be struck out and that the proceedings continue in the name of Naomi Hodgson.

20 The Judge held that the Court had jurisdiction under s 20 of the Land & Environment Court Act to hear cases under s 252(1), which covered the breaches of ss 64(1) and 115(1) pleaded in the proposed further amended points of claim: [88]-[89].

21 Section 252(1) provides:

> "Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations."

22 Mr Lancaster SC, who appeared with Mr Livingston for Macquarie, submitted that ss 64(1) and 115(1) created offences and did not impose duties and that s 252(1) only applied to breaches of statutory duty. Reference was made to the reporting duties imposed by s 148 and the duties to maintain control equipment imposed by s 167(1) and (2). The corresponding offences were created in ss 152 and 167(4). Section 129(1) also creates a duty in terms.

23 This submission should be dealt with at the outset because if it is upheld the Court below lacked jurisdiction, the applicant lacked standing, and the other points are moot.

24 Mr Lancaster relied on the statement of Lloyd J in Meriton Apartments Pty Ltd v Sydney Water Corporation [2004] NSWLEC 699; 138 LGERA 383, 389 [15] that proceedings under s 252 "are brought... to enforce any public duty imposed under [the] Act". This is clearly correct, but the question is whether statutory offences create statutory duties.

25 Mr Lloyd QC, who appeared with Mr Stafford for the applicant, relied on EPA vAlkem Drums Pty Ltd [2000] NSWCCA 416; 113 LGERA 130, 146 where Smart AJ, giving the principal judgment said, without citing authority:

> "Any statute which creates an offence, by necessary implication, imposes a duty on the person covered by its terms not to commit an offence (or a breach of the statute) by engaging in conduct which amounts to an offence."

26 This decision was followed in Blue Mountains Conservation Society Inc v Delta Electricity [2011] NSWLEC 145 at [28], [30] where Pepper J said, after referring to s 120[27]:

> "... implicit in the words 'a person who pollutes any waters is guilty of an offence' is the imposition of a duty or obligation not to pollute waters. I do not consider... that it was necessary for the legislature to expressly state that any person 'must not' or 'shall not' pollute waters to create a duty or obligation sufficient to enliven s 252 ... To hold otherwise would be, in my opinion, to elevate absurdity above common sense."

27 These cases are correct in principle and are supported by long-standing authority to which this Court was not referred. In Cope v Rowlands (1836) 2 M&W 149 [150 ER 707] Parke B said (at 157 [710]):

> "It is perfectly settled, that where the contract... is expressly or by implication forbidden by ... statute law, no court would lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, Bartlett v Vinor (1692) Carthew 252 [90 ER 750]."

28 This passage was cited by Jacobs J in Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd [1978] HCA 42; 139 CLR 410, 430. The judgment of Parke B was also cited by Gibbs ACJ (at 414, 416) and by Mason J (at 424).

29 Long-standing authority establishes the related proposition that where a statute inflicts a penalty for not doing an act "the penalty implies that there is a legal compulsion to do the act": Redpath v Allen (1872) LR 4 PC 511, 517; cited by Williams J in BMA v The Commonwealth [1949] HCA 44; 79 CLR 201, 289.

30 Macquarie's jurisdiction point therefore fails.

Res Judicata and Abuse of Process

31 Macquarie also relied on issue estoppel and abuse of process based on Gray (No 1). The issue estoppel fails because the decision in Gray (No 1) was interlocutory and not final. In Kuligowski v Metrobus [2004] HCA 34; 220 CLR 363, 375 the Court said:

> "A 'final' decision ... is one which is not of an interlocutory character... it must be final and conclusive on the merits ...".

32 The decision on an application for summary dismissal does not finally decide any question: Spencer Bower and Handley "Res Judicata" 4th ed 2009 at pp 82, 84-5, 86-7.

33 In any event Gray (No 1) did not decide that Macquarie's licence was unlimited.

34 There was no abuse of process in seeking leave to file the further amended points of claim. The applicant was not making a second application for the same relief on the same grounds. The first application had been by Macquarie. The second, dealt with by Gray (No 3) was for leave to plead a narrower case that had not been fully considered in Gray (No 1).

Implied condition

35 The applicant's case that Macquarie's licence contained an implied condition limiting the emission of C02 depended on the principle that negligence would ordinarily defeat a defence of statutory authority to a claim in nuisance. The principle was stated by Lord Wilberforce with his customary lucidity in Allen v Gulf Oil Ltd [1981] AC 1001, at 1011:

> "We are here in the well charted field of statutory authority. It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away ... To this there is made the qualification, or condition, that the statutory powers are exercised

> without 'negligence' - that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons ... It is within the same principle that immunity from action is withheld where the terms of the statute are permissive only, in which case the powers conferred must be exercised in strict conformity with private rights."

36 The authority cited for the qualification in the last sentence, Metropolitan Asylum District v Hill (1881) 6 App Cas 193, should not be misunderstood. In that case the Board's powers were expressed in general terms without reference to the site in question.

37 In Allen v Gulf Oil Ltd (above) Lord Diplock said at 1014:

> "Clearly the intention of Parliament was that the refinery was to be operated as such, and ... in Metropolitan Asylum District v Hill... all three members of this House who took part in the decision would apparently have reached the conclusion that the nuisance caused by the small-pox hospital could not have been the subject of an action, if the hospital had been built upon a site which the Board had been granted power by Act of Parliament to acquire compulsorily for that specific purpose."

38 In the same case Lord Edmund-Davies said at 1016:

> "... it was ... a necessary implication of the Act that the company was thereby authorised to construct and operate the refinery which they in fact later constructed and operated ... and in acting as it did the company took and used the land for the sole purpose for which a power of compulsory acquisition had been conferred on it."

39 Thus the principle in Metropolitan Asylum District v Hill (above) does not apply where statutory authority has been given for an undertaking on the particular site. This is confirmed by Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171, 202, 215; and Manchester Corporation v Farnworth [1930] AC 171, 183, 199, 202.

40 The defence failed in Tate & Lyle Industries Ltd v Greater London Council [1983] 2 AC 509, 537-8 because the Council did not prove that its ferry

wharves had been constructed with all reasonable regard and care for the interests of others.

41 Those cases were applied in Van Son v Forestry Commission of New South Wales (1995) 86 LGERA 108, 129-30 where reference was made to Metropolitan Water, Sewerage and Drainage Board v OK Elliott Ltd [1934] HCA 57; 52 CLR 134, 143.

42 Those cases dealt with "statutory authority" as a defence to an action in tort where the question is whether the plaintiff's common law right has been taken away by the statute. There is no common law tort for causing harm "to the environment" which does not interfere with the rights of individuals.

43 The applicant seeks to enforce statutory rights, and the question is whether the licence contains the implied term relied on. That depends on the true construction of the statute and the licence. Common law rights are not relevant.

44 The limits on statutory immunity from liability in tort cannot apply to proceedings under a statute which do not invoke common law rights.

45 The applicant does not allege that C02 emissions from Bayswater have caused an actionable nuisance. This is not surprising because C02 is colourless, odourless and inert, and the Court has no jurisdiction in actions in tort.

46 The C02 emissions may not have caused an actionable nuisance to anyone and proceedings in tort may have failed on their merits. In those circumstances it would be remarkable if proceedings under the Act based on this implied common law condition could succeed.

47 In short the so-called "common law principles" protect private rights and are irrelevant if they have not been infringed.

48 The first question must be whether the asserted implied condition is consistent with the statutory scheme.

49 Section 53 provides that applications for this type of licence are made to the EPA as the regulatory authority (s 6). It may grant or refuse the licence but must take into consideration the applicant's submissions (s 55). The Act does not allow third parties to participate.

50 The EPA may issue a licence unconditionally or subject to conditions (s 63(1)). It may vary a licence or its conditions (s 58(1)), on its own initiative or on the application of the holder (s 58(3)). If "the variation will authorise a significant increase in the environmental impact of the activity authorised or controlled by the licence" the EPA "is to invite and consider public submissions before it varies the licence" (s 58(6)). A licence continues until it is suspended, revoked or surrendered (s 77(1)).

51 The EPA is required to review each licence at intervals not exceeding 5 years (s 78(1)). A licence may be suspended or revoked on specified grounds (s 79) which include contravention of a condition (s 79(5)(b)).

52 The EPA may exempt any person from any provision of the Act (s 284(2)(b)) if satisfied that it is not practicable to comply with that provision or that non-compliance will not have any significant adverse effect on public health or the environment. It may revoke or vary any such exemption (s 284(7)).

53 Section 287(1)(b) enables an applicant for a licence, or its holder to appeal from a decision of the EPA to the Court. The Act does not provide for third parties to participate.

54 The implied condition relied on was not imposed by the EPA and Macquarie could not appeal against its imposition. If it was a condition within s 64(1) the EPA could remove it. If it was not within that section its

contravention would not be an offence under s 64(1) and it could not be enforced under s 252(1). Its anomalous nature is apparent.

55 A licence under the Act is a unilateral instrument, but its terms may reflect a compromise between what is desirable and what is practicable.

56 A decision that a contract contains an ad hoc implied term is an exercise in its interpretation: Codelfa Construction Pty Ltd v State Rail Authority of A/SI/I/[1982] HCA 24; 149 CLR 337, 345 per Mason J.

57 The recognition of such a term in a licence under this Act must also be an exercise in its interpretation.

58 The cover page of the current licence (WB 2/264) issued on 1 December 2008, identified the Scheduled Activity (i.e. Schedule 1) as "Electricity generation" and "Waste Activities", and the "Fee Based Activity" (s 57) as including Waste generation and "generation of electrical power from coal" in excess of 4000 gwh. This reproduced the substantive condition in cl A1.2 which contained those details and provided (WB 2/268):

> "This licence authorises the carrying out of the scheduled activities listed below at the premises specified in A2. The activities are listed according to the scheduled activity classification, fee-based activity classification and the scale of the operation. Unless otherwise further restricted by a condition of this licence, the scale at which the activity is carried out must not exceed the maximum scale specified in this condition."

59 The only maximum specified was that "Hazardous Industrial or Group Waste Generation or Storage" must not exceed 100 tonnes. Condition A4.1 provided that"... activities must be carried out in accordance with the proposal contained in the licence application, except as expressly provided by a condition of this licence." The applicant did not rely on anything in Macquarie's licence application to restrict the generality of the licence or support the implication relied on.

60 The "Limit conditions" (L1-L4) dealt with the load and concentration limits on "Assessable Pollutant(s)" discharged to the air. Condition L5 dealt with the solid or liquid waste generated on the premises (WB 2/277). The Monitoring and recording conditions required Macquarie to monitor the discharge of identified "pollutants" at various points at Bayswater, and to record and retain the results (M1.1). Its monitoring obligation with respect to C02, identified as a pollutant (WB 2/21-2), was to do so yearly. There were no load or concentration limits for C02.

61 The express conditions did not limit electricity generation, coal consumption, or C02 emissions. The question is whether any implied limitation can be identified by construing the licence. The requirements for the implication of an unexpressed ad hoc term in a contract were summarised by the Privy Council in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283:

> "... for a term to the implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

62 This summary was approved in Codelfa (above) at pp 347, 351, 403, 404, and 405, and has been cited by the High Court in later cases.

63 I see no reason why these principles should not apply by analogy to the implication of a term in a statutory licence, making due allowance for the differences the nature of the instruments. The requirements for the implication to be necessary, obvious, clear, and consistent with the express terms appear to be relevant.

64 The licence allows Macquarie to generate more than 4000 gwh of electricity each year from the burning of coal. The licence may not authorise the creation of a nuisance but this would not depend on

quantitative limitations on production, consumption, or emissions but on proof of the nuisance. The fact, if it be the fact, that the licence would not authorise a nuisance cannot matter if there is no nuisance.

65 On its face the licence, is relevantly unrestricted. It is not necessary to imply any condition to make it effective, and the condition relied on would contradict the licence.

66 On the other hand it was necessary to imply a term permitting Macquarie to emit C02 because a licence to burn coal would otherwise be ineffective.

67 The implied condition should be rejected and that disposes of the claim under s 64(1).

CQ2 as waste

68 The applicant also had a claim that C02 is waste within s 115(1), and Macquarie did not have a defence of lawful authority under s 115(2).

69 The claim struck out in Gray (No 1) was that Macquarie was in breach of s 115(1) because it had no lawful authority to emit waste in the form of C02. The claim that survived challenge in Gray (No 3) was that Macquarie did not have lawful authority under s 115(2) for emissions in excess of the level imposed by the implied condition [12], [13], [15], [62], [69], [78].

70 Rejection of the implied condition disposes of this part of the case as well, and it is not necessary to determine whether C02 is waste within s 115(1).

Implied condition limiting the consumption of coal

71 The claim that the licence contained an implied condition limiting coal consumption to 7 million tonnes a year was based on the development consent under the Environmental Planning and Assessment Act obtained

by Macquarie's predecessor from Muswellbrook Shire Council on 18 September 1980. This stated (WB 2/294):

> "... Council has agreed to the proposal by the Electricity Commission ... for the development of Bayswater Power station as described in the environmental impact statement and supplementary information volume dated June 1979 ...".

72 The environmental impact statement (EIS) (WB 2/296) comprised 76 pages, and the supplementary information volume contained a further 66. The former included the following (WB 2/317):

> " Coal Supply System
> The first stage of the station comprising Units 1 and 2 will require up to 3.5 million tonnes of coal per annum ... construction of Units 3 and 4 to bring the station to its full 2640 MW capacity will increase requirements up to 7 million tonnes of coal per annum."

73 The consent did not contain an express condition limiting coal consumption to 7 million tonnes a year. That condition, based on a few lines in the EIS, could not be implied by a process of incorporation.

74 Section 45(1)(i) requires the EPA to take into consideration, so far as relevant, when exercising its licensing functions, fourteen matters, including in connection with a licence application:

> "- any relevant environmental impact statement, or other statement of environmental effects, prepared or obtained by the applicant under the Environmental Planning and Assessment Act 1979."

75 The Act does not provide for the automatic incorporation of an EIS, or any part of it, in a licence.

76 The EPA must take the EIS into consideration, along with the other thirteen matters listed in s 45(1), and it should be inferred that it did. The absence of an express condition limiting coal consumption to 7 million tonnes indicates that it decided not to incorporate that in the licence. That decision was for the EPA and not the Court.

77 It would be remarkable if a few lines from an EIS and supplementary material of 142 pages prepared in 1979, which did not become a condition in the development consent, should be an implied term of a licence under the Act granted in 2008.

78 The licence authorises the generation of electricity in excess of 4000 gwh a year, but the EIS contemplated a "capacity" of 2640 MW. The evidence does not elucidate the relationship between these figures.

79 For these reasons, the claimed implied condition limiting coal consumption to 7M tonnes a year also should be rejected.

Conclusion

80 In my opinion therefore the appeal should be allowed. Mr Lloyd did not seek an opportunity to replead the applicant's case and, in any event, the decision on the construction of Macquarie's licence forecloses further reliance on ss 64(1), 115(1), and 252(1).

81 The following orders, which are additional to those in [18] should be made:

(1)Appeal allowed with costs;

(2)Orders 1 and 2 made by Pain J on 4 March 2011 be set aside;

(3)In lieu thereof, order that the applicant's notice of motion of 15 June 2010 be dismissed with costs;

(4)Order that the applicant's amended summons be dismissed with costs, but not so as to disturb any existing orders for costs in favour of the applicant;

(5)The respondent to have a certificate under the Suitors Fund Act.

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