UPDATE: Serving Notices under s 408 of the Environmental Protection Act (QLD)

Authors // Paul O'Dea and Matthew Armstrong November 2018

In late September, the Queensland Court of Appeal handed down its judgement in *Albion Mill FCP Pty Ltd v FKP Commercial Developments Pty Ltd* [2018] QCA 229. This came in response to an appeal by Albion Mill FCP Pty Ltd ("FCP") against the Supreme Court's findings in *FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd* [2017] QSC 322.

The appeal clarifies the requirements for vendors serving a notice under s 408 of the *Environmental Protection Act 1994* (Qld) ("EPA") and highlights the broad discretion that Courts are willing to give.

On both matters, the Court of Appeal affirmed the findings of Justice Jackson at first instance and dismissed the appeal.

Facts

For a more detailed outline of the facts and our assessment of implications of the Supreme Court's judgement at first instance, please see our earlier alert *Serving Notices under s 408 of the Environmental Protection Act (QLD)*.

The appellant and respondent entered into negotiations in May 2015 to sell 12 lots in Albion to Fridcorp Projects Pty Ltd ("Fridcorp"), who later nominated the appellants FCP (a related entity) as buyer. The parties established an electronic 'dropbox' for Fridcorp (and later FCP) to conduct its due diligence. Amongst the files uploaded to the 'dropbox' by FKP Commercial Developments Pty Ltd ("FKP") was one titled 'Land Contamination Folder'. This included a contamination report and site management plans for the relevant lots. Evidence showed that the folder had been accessed using the access credentials of a Mr Roche; Fridcorp's Development Director and later the sole director of FCP.

In July, 2015, FKP and FCP entered into a 'Put and Call Option Deed' for the sale of the land.

In December 2016, FCPattempted to rely on its right to rescind the contract under section 421(3) of the EPA (now section 408(3)) and reclaim money paid to FKP. It was argued that FKP had failed to provide notice of the contaminated land under s 421(2) of the EPA.

The Supreme Court rejected FCP's claim, finding that they had wrongfully terminated the contract and awarded judgement in favour of FKP, ordering FCP to pay compensation for the loss of value of the land. FCP appealed the decision.

Notice under s 408

The Court of Appeal held that notice under section 421(2) of the EPA required that:

1. notice was written;

2. it stipulated the particulars of the land are recorded in the Environmental Management Register; and

3. the notice contained the details of site management plan.

It was held that while there was no 'formal notice' per say, the Register searches, land contamination reports and site management plans contained within the folder upload to the dropbox, were sufficient to bring the 'essential facts' to the knowledge of FCP.

In doing so, they distinguish the notice requirement under s 421 from other notices within the EPA that required notices to either be an 'approved form' or subject to other formalities.

It was noted that a different conclusion may have been reached had it been shown that FCP either; did not read, or understand the significance of the documents. However, the findings of Supreme Court were affirmed on this point. It was highlighted that Mr Roche's notice of the contaminated land during his time as a representative for Fridcorp remained relevant when he was appointed as the sole director of Fridcorp (a related company of FCP).

The Court of Appeal affirmed the decision of the Supreme Court, holding that the appellants had properly received notice under s 421 despite not being the nominated buyer at the time that notice was served.

Assessment of Damages

The Court was also required to consider the value of the damages awarded by the Supreme Court. At trial, FKP was awarded $5,250,000 in damages, as the difference between the contract price ($25,000,000) and the market value of the land as of 31 March 2017 ($17,000,00), less deposits already made.

FCP questioned the credibility of FKP's market valuation report, submitting that the expert evidence at times lacked an explanation of some of the conclusions. The Court of Appeal rejected this and held that there were no grounds to reject the expert evidence, noting that; 'There is no hard and fast rule by which a valuer can draw the line that clearly separates sales that are comparable from those that are not. It is a matter of degree.' Likewise, the appellants had also failed to provide any contrary evidence at trial.

The Court of Appeal upheld the findings of Justice Jackson as to damages and subsequently dismissed the appeal with costs.

Lessons for Vendors

The case has highlighted that notices served under s 408 of the EPA do not have to comply with the strict formality requirements that some other notices under the EPA do, provided that they are:

1. in writing;

2. stipulate the particulars of the land recorded in the Environmental Management Register;

3. contain the details of a site management plan; and

4. given **before** disposal of the land.

The case serves as a reminder for vendors wishing to avoid disputes, that notice should be clear and unequivocal and, where possible, should specify that they are being served pursuant to section 408 of the EPA.

Vendors should also be mindful that notice is served upon the **nominated** buyer, especially where related companies are concerned.

This case also highlights the costly ramifications of failing to comply with section 408 of the EPA and the willingness of Courts to award damages for loss of value, particularly in a volatile market.

For queries regarding EPA notices and what it means for vendors and purchasers, please contact Paul O'Dea and Matthew Armstrong in our Property & Projects team.

For more information, please contact:

Paul O'Dea //
Partner

T 61 7 3001 9243

E P.Odea@clarkekann.com.au

Matthew Armstrong //
Senior Associate

T 61 7 3001 9256

E M.Armstrong@clarkekann.com.au