LOEL v WARRINGAH COUNCIL - BC201201935

Land and Environment Court of New South Wales
Pepper J

60877 of 2011

20, 21 February 2012

Loel v Warringah Council [2012] NSWLEC 11

APPEAL -- Appeal against severity of sentence and costs order -- Nature of appeal -- Sentencing factors -- Mental state of offender at time of commission of the offence -- Effect of mental illness on determination of sentence -- Financial capacity of offender to pay fine -- Absence of mitigating factors.

(NSW) Crimes (Appeal and Review) Act 2011 ss 33(1), 37(1), 39(4)

(NSW) Criminal Procedure Act 1986 ss 257B, 257G

(NSW) Crimes (Sentencing) Procedure Act 1997 ss 3A, 21A, 22, 23, 54B

(NSW) Environmental Planning and Assessment Act 1979 ss 5, 81A(2)(a)

(NSW) Fines Act 1996 s 6

Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357 at 366; *Ayshow v R* [2011] NSWCCA 240; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 ; (2006) 145 LGERA 234; *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280 ; (2001) 115 LGERA 304; *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683; *Campbelltown City Council v Mhanna* [2010] NSWLEC 57; *Canterbury City Council v Daoud* [2007] NSWLEC 135; *Cessnock City Council v Bimbadgen Estate Pty Ltd* [2011] NSWLEC 136; *Courtney v R* [2007] NSWCCA 195 ; (2007) 172 A Crim R 371; *Director-General, Dept of Environment and Climate Change v Rae* [2009] NSWLEC 137 ; (2009) 168 LGERA 121; *Environment Protection Authority v Barnes* [2006] NSWCCA 246; *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419 ; (2006) 148 LGERA 299; *Garrett v Freeman (No 5)* [2009] NSWLEC 1 ; (2009) 164 LGERA 287; *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 ; (2006) 145 LGERA 189; *Hili v R; Jones v R* [2010] HCA 45 ; (2010) 272 ALR 465; *Hurstville City Council v Naumcevski* [2011] NSWLEC 226; *JJ & ABS Investments Pty Ltd v Environment Protection Authority* [2011] NSWLEC 199; *Keir v Sutherland Shire Council* [2004] NSWLEC 754; *Kirzner, Alex v Manly Council; Kirzner, Natalia v Manly Council* [2009] NSWLEC 13; *Lahood v Strathfield Municipal Council* [2007] NSWLEC 714; *Lane Cove Council v Wu* [2011] NSWLEC 43; *Markarian v R* [2005] HCA 25 ; (2005) 228 CLR 357; *MDZ v R* [2011] NSWCCA 243; *Mosman Municipal Council v Menai Excavations Pty Ltd* [2002] NSWLEC 132 ; (2002) 122 LGERA 89; *Muldrock v R* [2011] HCA 39 ; (2011) 281 ALR 652; *Pittwater Council v Scahill* [2009] NSWLEC 12 ; (2009) 165 LGERA 289; *Plath v Glover* [2010] NSWLEC 119; *Plath v Hunter Valley Property Management Pty Ltd* [2010] NSWLEC 264; *Plath v Rawson* [2009] NSWLEC 178 ; (2009) 170 LGERA 253; *R v Biddle* [2011] NSWSC 1262; *R v Thomson; R v Houlton* [2000] NSWCCA 309 ; (2000) 49 NSWLR 383; *Terrey v Dept of Environment, Climate Change and Water* [2011] NSWLEC 141; *Veen v R* [1979] HCA 7 ; (1979) 143 CLR 458; *Veen v R (No 2)* [1988] HCA 14 ; (1988) 164 CLR 465

Pepper J.

Ex tempore

Mr Loel Builds a Driveway and Car Parking Area Without a Construction Certificate

[1] Mr Russell Loel appeals pursuant to s 33(1) of the Crimes (Appeal and Review) Act 2011 ("the Review Act") against the severity of a sentence imposed by the Local Court in proceedings brought by Warringah Council ("the council") for building without a construction certificate as required by s 81A(2)(a) of the Environmental Planning and Assessment Act 1979 ("the EPAA"). He also appeals against a costs order imposed against him by that court.

[2] Section 81A(2)(a) of the EPAA states that:

> The erection of a building in accordance with a development consent must not be commenced until a construction certificate for the building work has been issued by the consent authority, the council (if the council is not the consent authority) or an accredited certifier.

Mr Loel Builds a Childcare Centre

[3] On 27 November 2007, the council issued Development Approval 2006/0339 ("the DA") to Mr Loel, authorising the following works at a property he owns in Oxford Falls:

> Erection of Childcare Centre, associated Outdoor Play Areas, Car park, Staff Rooms and Gardener's Shed.

[4] The childcare centre is to cater for both disabled and non-disabled children.

[5] On 26 June 2009, Mr Loel applied to modify the DA. This application sought approval for changes to, amongst other things, the landscaping and car parking facilities.

[6] The modification application was granted on 5 November 2009 as Development Approval 2009/0177. The modified development approval included condition 49, which read as follows:

> **CONDITIONS THAT MUST BE ADDRESSED PRIOR TO ANY COMMENCMENT**
>
> 49. **Construction Certificate**
>
> A Construction Certificate is required to be approved and issued by either Council or an Accredited Certifier, prior to the commencement to any works on the site.

[7] On 15 July 2010, the council issued Construction Certificate CC2009/0177 to Mr Loel in relation to the development on the property. The certificate identified the work that was authorised to be carried out pursuant to it in the following terms (emphasis added):

> **Description of Work:** Erection of childcare centre building only, *excluding car parking* and associated retaining walls, staff cottage, play area, waste disposal enclosure, shed and associated works.

[8] On 15 July 2010, Mr Clint Mills, a Development Control Officer employed by the council, sent a letter to Mr Loel stating the following (emphasis added):

> Council refers to the issued construction certificate against the above mentioned property.
>
> You are advised that the Construction Certificate related to: *Erection of childcare centre building only.* This *excludes* but is not limited to: *the car park area*, associated retaining walls, staff cottage, play area, waste disposal enclosure, shed and associated works.
>
> *You are advised to give proper consideration to the consequences that may result should you fail to comply with the Construction Certificate. Such examples are: Notice of Intention, Orders, Penalty Infringement Notices and the commencement of legal proceedings without notice.*

[9] On 6 August 2010, the council issued an amendment to the construction certificate. The amended construction certificate authorised the construction of a stormwater retention pit. Relevantly, the description of the work included in the construction certificate was as follows (emphasis added):

> **Description of Work:** Erection of childcare centre building along with the storm water retention pit, *excluding car parking and associated retaining walls* , staff cottage, play area, waste disposal enclosure, shed and associated works.

[10] On 13 August 2010, the council received a handwritten letter from Mr Loel which forwarded additional drawings of the proposed parking lot, a staff building and wheelchair ramps for the development.

[11] On 18 August 2010, Ms Mandy McKay, a building surveyor employed by the council in its Building Assessments and Compliance Team, responded in writing and attended the property at around 4.00pm in order to deliver her letter to Mr Loel in person.

[12] During the course of the visit, she had a conversation with Mr Loel where she said to him:

> Mr Loel, you may not start work on the internal driveway or the car parking area until all the matters in this letter have been satisfactorily addressed. You can continue work only on the childcare centre building itself. You are not to pour any concrete either in the car parking area or for the garden shed.

[13] However, on 20 August 2011, Mr Loel was observed by another council officer, Mr Michael Davies, the Development Compliance Co-ordinator at the council, pouring the concrete kerbing for the driveway. Mr Davies also observed persons in the area engaged in excavating and grading the driveway leading into the property and the car parking area. Mr Davies asked the persons whether or not they were contract workers, to which one of the workers responded, "no, we have been employed directly by the owner of the property, Mr Russell Loel." Mr Davies proceeded to take a number of photographs of the works he observed that day.

[14] After taking the photographs, Mr Davies had a conversation with Mr Loel in the following terms:

> I said: Are you directly employing the workers on the site today?
>
> RUSSELL LOEL said: Yes I am.
>
> I said: You do not have a construction certificate for the works that have been carried out in the driveway and car parking areas.
>
> RUSSELL LOEL said: Mandy McKay and Patrick Boyce of council have given the approval to do this work.
>
> I said: That's not my understanding of the discussions they have had with you. I will make enquires. However, if I determine that you don't have approval, I will be issuing fines and notices to you in relation to this work.

[15] On 24 August 2010, Mr Davies carried out his threat and issued a Penalty Infringement Notice to Mr Loel for carrying out building works without a construction certificate. Also issued on that day was a Notice of Intention to Give an Order to Mr Loel in relation to the construction works that Mr Davies had observed.

[16] It is this Penalty Infringement Notice that gave rise to the proceedings before the Local Court and gives rise to the appeal.

[17] On 25 August 2010, Mr Loel telephoned Ms McKay asking whether or not he could pour the concrete for the driveway. The following conversation took place:

> I said: Until you have the construction certificate you will not be able to pour concrete. Do you understand this or not?
>
> RUSSELL LOEL said: Yes I do.
>
> I said: The reason I am asking if you fully understood is because on 18 August 2010, when Patrick Boyce and I inspected the site, we also advised you not to carry out any construction works. Yet on 20 August 2010, you continued, against our advice, to pour concrete out for the curve of your driveway.
>
> RUSSELL LOEL said: I won't pour any concrete until I get approval.
>
> I said: If you attempt to pour concrete again without approval you will be faced with another infringement and a Notice of Intention to Give an Order to Demolish the Driveway. Is this clear to you?

RUSSELL LOEL said: Yes.

Proceedings Before the Local Court

[18] Mr Loel elected to challenge the penalty infringement notice issued by the council. It is not in dispute that, had he not done so, Mr Loel would have been liable for a fine totalling only $750.

[19] Mr Loel did not obtain legal advice before electing to challenge the Notice. Similarly, he was not represented when the matter came before the Local Court for hearing on 8 August 2011.

[20] Before the learned Magistrate the council officers gave evidence, as did Mr Loel.

[21] Throughout both Mr Loel's evidence-in-chief and during his cross-examination, Mr Loel consistently stated that he had been given approval and had been issued with a construction certificate to build the childcare centre. Mr Loel expressed the view that because the construction certificate had never been rescinded, he was entitled to undertake the construction of the driveway and car parking area. Mr Loel stated that he had spoken with a person at the council by the name of Mr Maurice Flexus, who had indicated to him that the construction certificate remained in force and that he was permitted to complete the childcare centre, including the building of the driveway and car parking area. Mr Maurice Flexus was not a witness in the proceedings before the Local Court. Mr Loel informed that court, "I don't think he is with the council anymore".

[22] The learned Magistrate found beyond reasonable doubt that the prosecution had proved its case and held that Mr Loel was guilty of the charge. In so holding, her Honour found that Mr Loel had been given five warnings, written and oral, not to commence the construction of the carpark or driveway area without first obtaining a construction certificate to do so. Her Honour was satisfied that Mr Loel "could have been under no confusion about that issue given the very clear warnings given both orally and by way of documentation provided by the council". The Local Court further noted that the only construction certificate in existence specifically excluded any commencement of the car park and driveway area.

[23] These warnings were clearly influential on the learned Magistrate in assessing Mr Loel's culpability as moderate, and therefore, in fining Mr Loel an amount of $35,000. The court also ordered Mr Loel to pay the council's costs of the proceeding in the sum of $4,356.

Disposition of the Appeal

[24] I have determined that the appeal against the severity of the sentence imposed in the court below should be allowed. Having regard to the pattern of sentencing in this court for comparable offences, it is my view that the fine imposed by the Local Court was too severe and that the appropriate penalty to be imposed in lieu is a fine of $20,000.

The Nature of an Appeal Against Sentence

[25] As was determined by this court in the decision of *Terrey v Dept of Environment, Climate Change and Water* [2011] NSWLEC 141 (at [33]-[51], followed recently in *JJ & ABS Investments Pty Ltd v Environment Protection Authority* [2011] NSWLEC 199 at [13]), the manner in which an appeal against sentence may be conducted is, on the face of s 37(1) of the Review Act, at large. That is to say, unlike an appeal against conviction, it is not limited by way of rehearing on the evidence given in the original Local Court proceedings.

[26] On this basis, the court permitted the tender of a medical report of Dr Robert Gertler dated 19 January 2012. Dr Gertler is a psychiatrist who assessed Mr Loel on 19 December 2011 for the purpose of the report.

[27] The report disclosed the following evidence:

(a) that on 19 November 2009, Mr Loel suffered a motor vehicle accident during which he was injured. Mr Loel struck his head on the steering wheel and injured his right knee and neck. These injuries have resulted in ongoing symptoms. In particular, Mr Loel complained of problems with his memory and concentration;

(b) that Dr Gertler has seen Mr Loel on two prior occasions, namely, on 11 May 2011 and on 5 October 2011. During the course of the three assessments Dr Gertler has observed that Mr Loel's emotional, cognitive and physical health has deteriorated;

(c) that Mr Loel initially saw Dr Gertler in relation to an assessment for the purposes of a possible negligence claim occasioned by the motor vehicle accident of November 2009;
(d) that prior to the accident in November 2009, Mr Loel enjoyed good physical and emotional health;
(e) that Mr Loel had previously worked in the building industry;
(f) that the development the subject of these proceedings was "the source of some ongoing stress" and that upon completion of the development it was Mr Loel's desire to retire to the North Coast to join a son who currently resides there;
(g) that there was no evidence of any psychotic thought disorder. Mr Loel was, at the time of the assessment, oriented for time, place and person, although his memory for past and present events was "patchy". More importantly, Dr Gertler expressed the opinion that "his fund of knowledge seemed appropriate. His capacity for insight and his judgment seemed fair. His general intellectual level appeared in the average range";
(h) that Mr Loel suffers from depression "which is major in type and associated with sleep disturbance, marked appetite and weight loss, lowered mood and social withdrawal. He also has cognitive problems which may be associated with the major depression as a form of pseudodementia or on the other hand may be part of a dementing process, possibly aggravated by the minor head injury which he sustained in the accident in November 2009, or alternatively is a function of his age";
(i) that Mr Loel has been seen by a neurologist and further investigations are being undertaken to determine the significance of the cognitive problems and their possible relation to the motor vehicle accident of 2009 or to the ageing process. This is because following the motor vehicle accident in November 2009 Mr Loel developed symptoms of depression, which have steadily worsened;
(k) that the ongoing cognitive problems impacting upon his memory and concentration have affected Mr Loel's reasoning and decision-making;
(l) that Mr Loel's determination to dispute the fine in the Local Court "is indicative of poor reasoning and judgment related to his depression, but may also be associated to the perseveration and obstinacy which may be seen in persons with dementia"; however,
(m) the need for Mr Loel to fight a relativity minor fine could equally be explained "on the basis of a certain obstinacy which may have been part of his personality type, aggravated by cognitive changes leading to the obstinacy becoming obsessional and being associated with an unwillingness to let go".

[28] Dr Gertler was not required for cross-examination.

[29] In addition to the report of Dr Gertler, Mr Loel tendered bank statements from the Commonwealth Bank and Westpac for bank accounts in his name. These bank statements demonstrated that as at 25 July 2011, he was in debt in the amount of $103,682 in respect of the Commonwealth Bank account and as at 28 June 2011, he was in debt by a total amount of $375,501 in respect of the Westpac accounts. No current bank statements issued to Mr Loel were put before the court.

[30] A Westpac Business One account issued to the Secretary of Panacea Health and Beauty Pty Limited, a company of which Mr Loel is a director, was also tendered showing that as at 9 February 2012, the balance of that account was $5,613.

[31] Mr Loel also gave oral evidence before the court, which revealed that:

(a) the loans evidenced by the Westpac and Commonwealth bank statements issued in his name had been entered into by him to build the childcare centre;
(b) Mr Loel had borrowed an additional $190,000 from his son to complete the development because he had applied for additional funds from "the bank" which had refused to loan him any further monies because of his age. No further circumstances of this loan application were given to the court;
(c) once the childcare centre was complete, Mr Loel envisaged that one of his sons would run the centre and that he would retire to the North Coast; and
(d) the development was located on a 5 acre lot at Oxford Falls. On this lot were two cottages and a flat. Mr Loel lived in the flat and rented out one of the cottages, deriving an income of approximately $390 per week. This was Mr Loel's sole source of income. Mr Loel acknowledged, however, that he could rent out the other cottage on the property for approximately the same amount of rent per week. All of the dwellings located on the property were on the one title.

[32] Mr Loel was then cross-examined, during which he disclosed that:

(a) he purchased the property upon which the childcare centre was being built approximately 40-45 years ago. While he did not know the current value of the property, it was his intention to leave the property to his two sons; and

(b) Mr Loel was currently constructing a small cottage on a property that he owned approximately 30 minutes south of Coffs Harbour. This was a large holding comprising approximately 30 acres. He had purchased the property 10 to 12 years ago for about $700,000 with the proceeds of the sale of a house he had inherited, such monies amounting to approximately $380,000. It was to this cottage that Mr Loel intended to retire once the childcare centre was completed.

Sentencing Principals and the Correct Approach to Sentencing in an Appeal Against Severity

[33] I respectfully agree with the observation of Craig J in *JJ & ABS Investments* that once a recipient of a penalty infringement notice elects not to pay the penalty imposed by that notice, with the consequence that the charge is heard by a court, the ordinary principals of sentencing apply assuming that the charge is proven and that the only relevance of the issuing of the notice is, perhaps, an implicit recognition that the circumstances of the offence to which the notice relates may be considered to be at the lower end of objective seriousness (at [25]).

[34] Section 3A of the Crimes (Sentencing) Procedure Act 1997 ("the CSPA") sets out the purposes of imposing a sentence on an offender. The most relevant purposes for which a sentence is to be imposed on Mr Loel are those contained in s 3A(a), (b), (d), (e), and (f) of that Act.

[35] It is a basic principle of sentencing law that the sentence imposed by the court for an offence must both reflect, and be proportionate to, the objective circumstances of the offence and the personal or subjective circumstances of the offender (*Veen v R* [1979] HCA 7 ; (1979) 143 CLR 458 at 490 and *Veen v R (No 2)* [1988] HCA 14 ; (1988) 164 CLR 465 at 472).

[36] The correct method of sentencing is the instinctive synthesis method whereby the judge identifies all the factors relevant to the imposition of the sentence and weighs their significance in determining an appropriate sentence (*Markarian v R* [2005] HCA 25 ; (2005) 228 CLR 357 at [35]-[39], [50]-[84] and [136]-[139] and *Muldrock v R* [2011] HCA 39 ; (2011) 281 ALR 652 at [26]).

[37] Section 21A of the CSPA further identifies matters that the court must take into account when sentencing, including those in aggravation (s 21A(2)) and those in mitigation (s 21A(3)).

The Objective Seriousness of the Offence Committed by Mr Loel

[38] The primary factor the court must consider when determining sentence is the objective seriousness of the offence. In determining the objective gravity of the offence, the circumstances of the offence to which the court may have regard include (*Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 ; (2006) 145 LGERA 234 at [163], *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 ; (2006) 145 LGERA 189 at [110] and *Plath v Rawson* [2009] NSWLEC 178 ; (2009) 170 LGERA 253 at [48]): the nature of the offence; the maximum penalty for the offence; the harm caused to the environment by the commission of the offence; Mr Loel's state of mind in committing the offence; Mr Loel's reasons for committing the offence; the foreseeability of the risk of harm to the environment; the practical measures available to Mr Loel to avoid harm to the environment; and Mr Loel's control over the causes of harm to the environment.

[39] Furthermore, a fundamental consideration of relevance to an environmental offence is the degree to which the offender's conduct would offend against the legislative objectives expressed in the statutory offence (*Director-General, Dept of Environment and Climate Change v Rae* [2009] NSWLEC 137 ; (2009) 168 LGERA 121 at [15] and *Rawson* at [49]).

[40] The actions of Mr Loel in carrying out the work absent a construction certificate eroded the planning controls under the EPAA and offended against the legislative objectives in s 5 of that Act, namely, to encourage the promotion and co-ordination of the orderly and economic use and development of land (s 5(a)(ii) of the EPAA).

[41] As Biscoe J opined in *Campbelltown City Council v Mhanna* [2010] NSWLEC 57 with respect to the importance of construction certificates (at [46] and [47]):

> 46 The principal approval for the carrying out of development under the Act is a development consent, relevantly under Part 4 of the Act, which, in this case, had been obtained. The carrying out of works without a development consent (not this case) is objectively more serious than the carrying out of works without a construction certificate (this case), because the former offence undermines the approval system in a more material manner than the latter, by subverting the proper assessment of the proposed development and by prejudicing the opportunity for the public participation afforded at that stage of the approval process as contemplated under the Act.
>
> 47 The construction certificate is a secondary phase of approval. By this stage, the primary assessment of the appropriateness of the development has already been undertaken. Nevertheless, the obtaining of a construction certificate is a necessary and important pre-requisite to the commencement of building works to ensure the integrity of the construction works, the prior notification of the works to the consent authority and the putting into train of a proper mechanism for the overseeing and certification of the building works by suitably qualified, independent and accredited persons.

The Maximum Statutory Penalty

[42] The maximum statutory penalty is of significance in determining the objective gravity of the offence (*Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698).

[43] The maximum penalty for the offence is $110,000, which demonstrates the degree of seriousness with which Parliament views such an offence.

The Extent of Harm Caused to the Environment by the Commission of the Offence

[44] The extent of harm caused by the commission of the offence can increase the objective seriousness of the offence (*Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419 ; (2006) 148 LGERA 299 at [145]-[147]).

[45] It was agreed between the parties that no actual harm was caused to the environment by the commission of the offence. Further, there was no evidence that any residential occupant nearby had suffered any diminution to the amenity of their land as a consequence of the unlawful works, which were relatively small in scale and were confined to Mr Loel's property.

[46] However, as was submitted by the council, the commission of the offence by Mr Loel clearly had the effect of undermining the planning controls enshrined in the EPAA (*Lane Cove Council v Wu* [2011] NSWLEC 43 at [45], *Mosman Municipal Council v Menai Excavations Pty Ltd* [2002] NSWLEC 132 ; (2002) 122 LGERA 89 at [35] and *Cessnock City Council v Bimbadgen Estate Pty Ltd* [2011] NSWLEC 136 at [62]).

[47] But against this harm, it must be noted that at no point has it been suggested that the childcare centre has not been properly constructed, in full compliance with all relevant building codes and standards, or that Mr Loel's failure to obtain a construction certificate in respect of the unlawful works in any way compromised human safety.

Mr Loel's State of Mind

[48] A strict liability offence, such as the offence in question, that is committed intentionally, negligently or recklessly will be objectively more serious than one committed inadvertently (*Rae* at [42], *Gittany* at [123] and *Garrett v Freeman (No 5)* [2009] NSWLEC 1 ; (2009) 164 LGERA 287 at [68]).

[49] It was a matter of controversy whether Mr Loel, as the council submitted, committed the offence intentionally, or whether, as Mr Loel submitted, the commission was inadvertent insofar as he believed that he had a construction certificate that permitted him to carry out the building works.

[50] Mr Loel submitted that the court could reasonably infer from Dr Gertler's report that at the time of the commission of the offence he suffered from a major depressive illness, caused by the motor vehicle accident in November 2009 and that this provided a possible explanation as to why he did not comply with the instruction given by Ms McKay on 18 August 2010, forbidding him to construct the driveway and car parking area. Put another way, he submitted that the existence of his mental illness at the time of the commission of the offence meant that this court could not be satisfied beyond reasonable doubt that he had consciously chosen to disregard the warning given to him by the council on that day.

[51] Another possible reason, Mr Loel submitted, to explain why he did not follow Ms McKay's direction not to commence construction of the driveway and car parking area, was his genuine belief that he was in possession of a con-

struction certificate that permitted him to do so, albeit mistakenly held. This belief, of which the transcript below was replete with references, was more likely to exist, Mr Loel contended, if a person was suffering from a dementing disease or some other disorder afflicting memory. Thus his mental illness, combined with his advanced age (he is currently 79 and was 77 when he committed the offence) affected his decision-making faculties at the time of the commission in the offence.

[52] Accordingly, Mr Loel asserted that the court would find on the balance of probabilities that by reason of: his age; the associated organic dementing process; his general loss of memory and loss of concentration accelerated following his involvement in the motor vehicle accident in November 2009; his diagnosis of major depression; his reduced cogitative functioning; his confusion; and his lack of experience in property development, meant that at the time of the commission of the offence, Mr Loel's decision making skills, and therefore his state of mind, were impaired and that he did not commit the offence intentionally.

[53] Following the decision of the High Court late last year in *Muldrock* (at [27] where the court said, "[t]he objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending") there has been some controversy concerning the extent to which, if any, the mental condition of an offender at the time of the commission of the offence can be taken into account in assessing the objective seriousness of that offence (compare *R v Biddle* [2011] NSWSC 1262, *Ayshow v R* [2011] NSWCCA 240 at [39] and *MDZ v R* [2011] NSWCCA 243 at [67]). Although the debate is framed in the context of a determination of the sentence to be passed for an offence carrying a standard non-parole period of imprisonment pursuant to s 54B of the CSPA, it is at least arguable that the High Court comments have present application. If they do, then it would appear that the view expressed in *Ayshow* and *MDZ* should prevail and that any affliction bearing upon the offender's mental state remains a relevant factor on sentence in an assessment of moral culpability.

[54] But in any event, the contest is not one that is required to be determined by me because, as a matter of fact, I cannot accept the submissions put by Mr Loel. In my view, Dr Gertler's opinion is too equivocal to permit the court to find, even as a matter of inference, that Mr Loel's state of mind was impaired in the manner suggested by him at the time he committed the offence. While it may be that there are ongoing cognitive problems impacting upon Mr Loel's memory and concentration that currently affect Mr Loel's reasoning and decision making processes, and that these problems are symptomatic of his depression that may have been caused by the motor vehicle accident (in this regard the court notes that further investigations by a neurologist are underway to determine this very issue), nowhere in his report does Dr Gertler indicate with sufficient precision what the likely mental state was of Mr Loel at the time he undertook the unlawful works. In my opinion, the inference Mr Loel invites the court to draw is premised on speculation by Dr Gertler that is too slender to sustain it.

[55] To the extent that Mr Loel sought to extrapolate what his mental state was at the relevant time by reason of his irrational behaviour in disputing the fine in the court below, Dr Gertler states that this can either be indicative of poor reasoning and judgment related to his depression or associated with the characteristics of a person with dementia, or alternatively the decision can be explained on the basis of Mr Loel's obstinate personality.

[56] This is not to say, however, that the court does not find that he is not currently suffering from a major depressive illness. The clear uncontested evidence of Dr Gertler is that he presently is.

[57] But for the reasons given above I do not find on the balance of probabilities that Mr Loel's current mental illness materially affected his state of mind at the time of the commission of the offence.

[58] However, for the council to succeed on this issue, I must be satisfied beyond reasonable doubt that Mr Loel engaged in the unlawful construction deliberately, that is to say, with the knowledge that no construction certificate had been issued in respect of those works and with the knowledge that one was required. While I do not accept that Mr Loel was a beneficiary of five warnings, as stated by the council in its submissions, I find that he did receive at least one clear warning given to him by Ms McKay at the property on 18 August 2010. During that conversation Mr Loel was told expressly, and in language that was tolerably plain and unambiguous, that he was not able to pour the concrete for the construction of the driveway. Notwithstanding this instruction, this is precisely what Mr Loel proceeded to do on 20 August 2010. Had he genuinely believed that he was entitled to proceed with the works, I am confident that he would have provided Ms McKay with a statement to that effect on 18 August 2010. Similarly, had he held this genuine belief on 20 August 2010 when he was observed by Mr Davies pouring the concrete, he would have communicated this understanding to him, rather than falsely assuring Mr Davies that Ms McKay and Mr Boyce had given him permission to commence the works.

[59] That Mr Loel understood the instruction that was given to him on 18 August 2010 is, in my opinion, also supported by the conversation that took place between himself and Ms McKay on 25 August 2010. If Mr Loel honestly thought that he was entitled to pour the concrete on either 18 or 20 August 2010 (contrary to what he told Mr Davies) then it would be reasonable to expect that this is what he would have told Ms McKay during his conversation with her on 25 August 2010. But this is not what he said to Ms McKay. On the contrary, he indicated to her that he understood that he did not have a construction certificate permitting him to pour the concrete. This, in my view, is the same understanding that he had on 18 and 20 August 2010.

[60] I therefore find beyond reasonable doubt that at the time the driveway and car parking areas were constructed Mr Loel was aware that he did not, as required, have the necessary construction certificate permitting him to engage in those building works.

[61] It follows that in rejecting Mr Loel's submission that the unlawful act should be characterised as the result of his mistaken belief, and in finding that he acted deliberately in committing the offence, the objective seriousness of the offence increases.

Reasons for Committing the Offence

[62] A factor by which the objective seriousness of the offence may be augmented is the reason for its commission (*Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 366; *Bentley* at [237]; *Gittany* at [140]; *Rae* at [47]). If the offence is found to be committed for financial gain this will increase its objective seriousness (*Gittany* at [141], *Bentley* at [246]-[247], *Pittwater Council v Scahill* [2009] NSWLEC 12 ; (2009) 165 LGERA 289 at [82] and CSPA s 21A(2)(o)).

[63] For the reasons given above, I reject the submission by Mr Loel that he was confused at the relevant time as to his regulatory ability to undertake the impugned works. However, I accept that Mr Loel was, as the evidence before the Local Court demonstrates, frustrated in his dealings with the council and the length of time it had taken to obtain all of the necessary approvals to complete the development. In short, Mr Loel's reason for engaging in the unlawful activity was to ensure completion of the childcare centre.

[64] Accordingly there can be no suggestion that Mr Loel was motivated by financial gain in the commission of the offence. It follows that this factor is neutral.

Foreseeability Of The Risk of Harm

[65] The extent to which Mr Loel could have reasonably foreseen the harm caused to the planning regime by reason of the commission of the offence is a relevant factor to be taken into account in the determination of the sentence. Given the nature and extent of the construction works, given that Mr Loel was explicitly told that he needed a construction certificate in order to carry out these works and given Mr Loel's previous experience in the building industry, I find that the harm caused by the commission of the offence was reasonably foreseeable by him.

Control Over The Causes of Harm and the Practical Measures Available to Mr Loel to Avoid It

[66] There can be no doubt, in light of on the evidence of Mr Davies, that Mr Loel was the person responsible for engaging the employees who physically carried out the unlawful works, it follows that Mr Loel had complete control over the causes giving rise to the offence.

[67] Further, there were practical measures available to him to prevent the harm, namely, he could have obtained the necessary construction certificate prior to building the driveway and car parking areas.

The Offence is One of Low to Moderate Objective Gravity

[68] Having regard to the factors discussed above, and in light of Mr Loel's state of mind at the time of the commission of the offence, I find the offence committed to be one of low to moderate objective gravity, but not moderate seriousness as submitted by the council.

The Subjective Circumstances of Mr Loel

[69] When considering the appropriate penalty to be imposed, the court must take into account the aggravating and mitigating factors personal to Mr Loel (s 21A(2) and (3) of the CSPA respectively).

[70] The subjective circumstances of Mr Loel to be considered relevantly include: any prior criminal record (s 21A(3)(e)); any plea of guilty (s 21A(3)(k)); any contrition or remorse expressed (s 21A(3)(i)); Mr Loel's good character, if any (s 21A(3)(m)); any cooperation with, and assistance to, the council provided by Mr Loel (s 21A(3)(f)); whether or not Mr Loel will be liable for the council's costs of the appeal; and the financial capacity of Mr Loel to pay any fine imposed.

Prior Criminality and the Good Character Of Mr Loel

[71] Mr Loel has a criminal history, albeit one that does not involve the commission of any environmental offences. From 1993 to 2010 Mr Loel has been convicted of one count of assault, one count of stealing and three counts of shoplifting. In respect of each offence a nominal fine was imposed.

[72] Candidly, Mr Loel disclosed to the court that he has also been recently charged with and convicted on nine counts of the offence of conducting a fundraising appeal without approval. In summary, Mr Loel had been asking for discounted construction materials from various suppliers on the basis that he was building a childcare centre for disabled children. In respect of each offence he was convicted and fined $150.

[73] Not only do the antecedents of Mr Loel preclude the court from taking into account Mr Loel's prior criminality as a mitigating factor in respect of the determination of the appropriate sentence for this offence (s 21A(3)(e) of the CSPA), it also precludes a finding of good character (s 21A(3)(f) of the CSPA). Further, it suggests, in my opinion, that Mr Loel holds a somewhat caviller attitude in respect of adherence with the law.

Assistance to Authorities

[74] There is no evidence that Mr Loel has cooperated with the council throughout the conduct of this matter, and accordingly, this cannot be taken into account as factor in mitigation (ss 21A(3)(m) and 23 of CSPA).

Plea of Guilty

[75] Plainly, Mr Loel did not plead guilty to the offence and therefore is not entitled to any discount for the utilitarian value of the plea of guilty (*R v Thomson; R v Houlton* [2000] NSWCCA 309 ; (2000) 49 NSWLR 383 and ss 21A(3)(k) and 22 of the CSPA).

Contrition and Remorse

[76] The contrition and remorse of an offender is able to be taken into account as a mitigating factor in determining the appropriate sentence for an offence (s 21A(3)(i) of the CSPA). Mr Loel had two occasions, one before the Local Court and one before this court, in which to express remorse for the commission of the offence. He did not do so. Accordingly, I am unable take this into account as a mitigating factor.

Mr Loel's Liability for the Council's Costs

[77] There is no question that this court is empowered to order an offender to pay the prosecutor's costs as specified or as may be determined pursuant to ss 257B and 257G of the Criminal Procedure Act 1986. The payment of the council's costs is an aspect of punishment (*Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [78] and *Rae* at [68]) and may be considered in the determination of the appropriate penalty, including as a factor that acts in the reduction of any penalty to be imposed.

[78] In the present case, Mr Loel will not be required to pay the council's costs on appeal. However, the court takes into account the fact that he will have incurred legal costs in the preparation for and hearing of this appeal: costs that are not recoverable given the usual order in Class 6 appeals that even if the appellant is successful, each party bears their own costs. The court takes the additional financial burden that these costs will impose on Mr Loel into account in determining his sentence.

Capacity of Mr Loel to Pay the Fine Imposed

[79] It was asserted by Mr Loel that he lacked the capacity to pay anything other than a relatively modest fine imposed by the court as a penalty for the commission of the offence. In support of this contention, Mr Loel relied on the documentary evidence he tendered to this court disclosing the various debts in his name and his oral evidence that at present

his sole source of income is the $390 per week rent derived from the lease of one of the cottages on the property at Oxford Falls.

[80] An offender's means to pay is a relevant consideration that the court must take into account in any exercise of its discretion to fix an appropriate amount for a fine (s 6 of the Fines Act 1996).

[81] The difficulty with Mr Loel's submission is, in my opinion, that, first, most of the documentary financial evidence that he relies upon is not current, and second, Mr Loel has substantial assets. While the present value of the property at Oxford Falls is not known, the court readily infers that, given its purchase date, its present value is likely to be significant. Further, Mr Loel appears to have substantial equity in the property holding he owns south of Coffs Harbour.

[82] While it may be the case that the bank was not willing to loan Mr Loel money on one occasion due to his age, this does not, in my view, assist Mr Loel because the terms of that loan request are not known to the court. For example, it may have been the case that the bank would have been willing to lend Mr Loel the required funds to complete the early learning childcare centre development if he had been willing to encumber the Oxford Falls property. This is not known.

[83] I therefore find to the requisite degree that Mr Loel has the capacity to pay any fine likely to be imposed for the commission of the offence the subject of this appeal.

Conclusion On Subjective Considerations

[84] The subjective considerations of Mr Loel do not operate to mitigate the penalty to be imposed by the court.

The Appropriate Sentence to be Imposed on Mr Loel

[85] The imposition of a sentence serves a number of purposes. As s 3A of the CSPA sets out, these purposes include retribution and denunciation, as well as deterrence, both specific and general.

Deterrence and Denunciation

[86] The sentence must be sufficient to specifically deter the offender from repeating the conduct that resulted in the commission of the offence in the future in the hope that only nominal penalties will be applied. There is also a need for the sentence to serve as a general deterrent to prevent others committing similar offences against the EPAA (*Plath v Hunter Valley Property Management Pty Ltd* [2010] NSWLEC 264 at [34], *Scahill* at [109] and *Axer* at 367).

[87] The council submitted that any penalty imposed by the court must have embedded in it an element of general deterrence to ensure that others engaged in the building trade do not carry out unlawful construction works (*Scahill* at [46] see also *Keir v Sutherland Shire Council* [2004] NSWLEC 754 at [12], [13] and [15] and *Lahood v Strathfield Municipal Council* [2007] NSWLEC 714 at [20]).

[88] Mr Loel submitted that by reason of his present mental impairment he was an inappropriate vehicle for any consideration of general deterrence (*Courtney v R* [2007] NSWCCA 195 ; (2007) 172 A Crim R 371 at [14]).

[89] Thus, Mr Loel argued that because of his present diminished mental capacity, as evidence by Dr Gertler's report, how he is sentenced may not be relevant to how others are sentenced for like offences in the future. That is to say, the sentence imposed on Mr Loel will have less of a general deterrent effect because of the mental illness that he presently suffers.

[90] It is correct that the court does not only assess an offender's mental condition at the time of the commission of the offence but also at the time of sentencing. As previously discussed, I have no hesitation in finding beyond reasonable doubt that Mr Loel presently suffers from depression as described by Dr Gertler. But while I am prepared to allocate a lesser role to the component of general deterrence in determining an appropriate sentence to be imposed on Mr Loel, I do not consider his mental incapacity to be so severe that this element can be ignored in its entirety.

[91] The council submitted that, and contrary to the argument advanced by Mr Loel, an element of specific deterrence was warranted. While the court also takes into account Mr Loel's mental illness in assessing specific deterrence, the court is also cognisant of the fact that Mr Loel is presently building a cottage on his property south of Coffs Harbour and it is my opinion that, as his prior criminal history reinforces, the risk, notwithstanding his age, of Mr Loel re-offending in the future cannot be completely discounted.

[92] The imposition of an appropriate sentence also serves the purpose of ensuring that retribution and denunciation are properly addressed. The sentence of this court is a public denunciation of Mr Loel and must ensure that he is held accountable for his actions and is adequately punished (*Rae* at [8]-[9], *Plath v Glover* [2010] NSWLEC 119 at [67] and s 3A(a) and (e) of the CSPA).

Consistency in Sentencing

[93] A relevant consideration in sentencing is the ascertainment of the existence of a general pattern of sentencing by the court for offences such as the offence in question (*Gittany* at [179]-[182] and *Rae* at [69]). The proper approach is for the court to look at whether the sentence is within the range appropriate to the gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence which merely forms part of that range (*Gittany* at [182]).

[94] Of course, care must be taken because each case is different and a sentence in one case does not demonstrate the limits of a sentencing judge's discretion (*Axer* at 365, *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280 ; (2001) 115 LGERA 304 at 312 and *Hili v R; Jones v R* [2010] HCA 45 ; (2010) 272 ALR 465 at [54]).

[95] There have been only a relatively small number of cases dealing with contraventions against s 81A(2) of the EPA Act. While recourse may be had to a broader class of penalty cases dealing with breaches of conditions of development consents or construction absent development approval, care must be taken when comparing those cases with breaches of s 81A(2) because the maximum penalty for offences under the EPAA is variable. Nevertheless, and with this caution in mind, recourse to these categories of cases remains of assistance.

[96] The council relied on the decision of *Canterbury City Council v Daoud* [2007] NSWLEC 135. In my view, limited assistance can be derived from this decision given that the activities carried out by the offender in *Daoud* were considerably more extensive than those in the present case and the case was decided under a statutory regime where the maximum penalty for the offence in question was $33,000. In *Daoud,* the offender commenced the erection of townhouses in accordance with development approval but absent a construction certificate. A number of subjective considerations operated to mitigate the penalty imposed, including an early plea of guilty. Further, the offence was not committed deliberately. The offender was fined $5,000 and ordered to pay the prosecutor's costs, agreed in the sum of $11,000.

[97] Both parties relied on the decision of *Hurstville City Council v Naumcevski* [2011] NSWLEC 226. In *Naumcevski,* the offending works involved the excavation of a 2.5m pit without development consent. The maximum penalty for the offence was $1,100,000. Although there was no actual harm to the environment caused by the excavation, there was harm done to the integrity of the planning system. The offence was committed recklessly and a number of mitigating factors were present. The court imposed a total monetary fine of $14,000 and the offender was ordered to pay to the prosecutor's legal and investigation costs.

[98] In *Naumcevski,* the court also summarised two additional decisions upon which Mr Loel relied (at [90]-[91]):

> 90 Mr Naumcevski also referred the Court to the decision in *Willoughby City Council v BCPD Pty* [2010] NSWLEC 163. However, again, the circumstances of that case disclose the commission of a more serious offence. There a builder, who claimed he had been misled by an architect concerning the scope of works that had received consent, demolished a California bungalow that was located in a designated heritage conservation area. Actual environmental harm plainly resulted. The penalty imposed by the Court was $30,000.
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> 91 Mr Naumcevski submitted that the case of *Holroyd City Council v Ghannoum* [2007] NSWLEC 351 was the closest on its facts to the present prosecution in terms of the nature and extent of the works involved. There the unauthorised works consisted of the excavation of an area of approximately 9m wide, 15m long and approximately 3-4m deep and included the construction and placement of concrete panels along the perimeter of the excavated area and the construction of a concrete slab on the base of the excavated area. The works were located beneath the footprint of a dwelling house for which consent had been granted. The Court held that the unlawful works had not caused significant environmental harm in terms of the visual or other amenity impacts on surrounding properties. The conduct was, however, more serious than that in the present case because in *Ghannoum* the Court held that there was an element of premeditation in the carrying out to the works. Further, the Court found that the defendant had given untruthful answers when he was questioned by council officers concerning the reason why he had carried out the unlawful building works. The Court fined the defendant the sum of $11,250 and ordered the defendant to pay the prosecutor's costs.

[99] Mr Loel submitted that in the present case the maximum penalty is only 10% of the penalty that Mr Naumcevski faced, and the unauthorised works conduced by Mr Loel were substantially less serious. Given that less weight should be accorded to the principles of general and specific deterrence by reason of Mr Loel's mental illness, Mr Loel submitted that his penalty should be significantly less that the fine imposed on Mr Naumcevski, even after accounting for Mr Naumcevski's plea of guilty and demonstrable remorse.

[100] The parties also relied on the decision of *Bimbadgen*. In that case the unauthorised development works consisted of excavation carried out to provide parking and to enlarge an amphitheatre for outdoor concerts. I accept the submissions of Mr Loel that the earthworks in that case were far greater in scope and severity than the works the subject of the present prosecution. In addition, the court found that there was a financial motive underlying the offence. The court imposed a fine of $20,000 after a discount was given for substantial mitigating factors and ordered that Bimbadgen pay the prosecutor's costs.

[101] In *Bimbadgen* I provided a summary of the relevant recent decisions of this court for similar offences (at [99]-[100]). I adopt, without repeating, that summary for present purposes.

[102] The council relied on the decision of *Mhanna*. In *Mhanna* the unlawful works involved excavation for the laying of a concrete slab, the construction of formwork and the laying of the slab, additional formwork and the placement of drainage lines and pipes. Not only was the offender aware that a construction certificate was required but he was also aware that it had not been obtained. The offender was fined $3000. However, as the council noted, the offender entered an early plea of guilty and had demonstrated contrition and remorse. Furthermore, the fine was low because of the offender's poor financial circumstances (at [58]).

[103] In my opinion, there can be no question that when the facts of this case -- even taking into account Mr Loel's state of mind at the time of the commission of the offence and the marked absence of any factors in mitigation that would reduce the penalty to be imposed -- are considered against comparable cases, the penalty awarded by the learned Magistrate is too high. Put another way, the fine imposed does not fall within the acceptable range of penalties awarded for similar offences.

[104] Having said this, it must be noted that the learned Magistrate did not have before her all of the evidence tendered before this court, nor did she have the benefit of the extensive oral and written submissions made on behalf of the parties, and in particular, the benefit of submissions of counsel retained by Mr Loel. I have no doubt that with this assistance, her Honour would have appreciated that the range of fines likely to be imposed was less than $35,000.

Monetary Penalty to Be Imposed

[105] Taking into account the objective circumstances of the commission of the offence, the subjective circumstances of Mr Loel and the general pattern of sentencing for offences such as the one in question, I find that a fine of $20,000 should be imposed.

The Appeal Against the Costs Order Below is Dismissed

[106] Mr Loel has also challenged the costs order of $4,356 imposed by the Local Court for the costs and disbursements of the council in the proceedings below. The basis for the challenge was Mr Loel's financial incapacity.

[107] Given my findings above about Mr Loel's ability to pay the monetary fine imposed by this court, I dismiss the appeal against the costs ordered below. I further add that, in my opinion, the costs ordered were entirely reasonable given the nature and scope of the proceedings in that court below.

Costs of the Appeal

[108] Mr Loel has not sought costs of the appeal despite his succes. This is appropriate. Although Mr Loel has been successful in having the fine imposed upon him reduced, it nevertheless comes to this court by reason of his breach of the EPAA, a breach that he does not challenge on appeal. In the circumstances, it is an appropriate exercise of the discretion afforded to me under s 39(4) of the Review Act that no order for costs be made (*Kirzner, Alex v Manly Council; Kirzner, Natalia v Manly Council* [2009] NSWLEC 13 at [42]-[46] and *JJ & ABS Investments* at [39]).

Orders

[109] The orders of the court are as follows:

(1) the appeal against the severity of the sentence imposed by the Local Court on 8 August 2011 is allowed;
(2) the fine of $35,000 imposed by the Local Court on 8 August 2011 is set aside;
(3) the appellant is fined the sum of $20,000 for the offence as charged;
(4) the appeal against the costs order imposed by the Local Court on 8 August 2011 is dismissed;
(5) a period of 3 months is permitted for the appellant to pay the fine of $20,000 and the costs order imposed by the Local Court; and
(6) with the exception of Ex 1 (the Local Court file) and Ex 2 (the transcript of the proceedings before the Local Court) the exhibits are to be returned.

Order

Appeal against severity of sentence allowed.

Appellant fined $20,000. Appeal against costs order dismissed.

Counsel for the appellant: *Mr K D Ginges* with *Mr J D Donnelly*

Counsel for the respondent: *Mr M Arch (Solicitor)*

Solicitors for the respondent: *Concordia Pacific*