

**MISCONCEIVED MISCONDUCT COMPLAINTS,
COMPLAINANTS BEWARE & REMEDIES FOR CERTIFIERS**

INTRODUCTION

Public officials or other council officials may need to apply a precise rigour when they chose to make a complaint. If a complaint were to be considered vexatious or outside one's authority then it could constitute the tort of public misfeasance.



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In the building certifying arena it has been the practice of some council officers to lodge misconduct complaints against their private sector peers under the *Environmental Planning and Assessment Act 1979* (NSW) and the *Building Professionals Act 2005* (NSW). Such complaints have grave consequences for the professional reputation of the certifiers concerned.

**NO STATUTORY IMMUNITY FOR
COMPLAINANTS**

Unlike the *Building Act 1993* (Vic) in Victoria, there is no statutory immunity granted to complainants in NSW. In Victoria, section 180A of the *Building Act* provides a blanket statutory immunity for complainants.

If it could be established that a council officer had overzealously focused upon a given certifier, in a fashion tantamount to victimisation, then the tort of public misfeasance could crystallise.

ELEMENTS OF THE TORT

The elements of the tort go beyond establishing that the abuse was invalid in a public law sense. The elements are:

- (i) an invalid or unauthorised act;
- (ii) done maliciously;
- (iii) by a public officer;
- (iv) in the purported discharge of his or her public duties;
- (v) which causes loss or harm to the plaintiff.¹

¹ *Dunlop v Woollahra Municipal Council* [1982] AC at 172 per Lord Diplock and applied in *Northern Territory of Australia and Others v Mengel and Others* (1995) 129 ALR 1 per Brennan J at 37.

Particular focus is upon the required mental element. Such malice will exist if the act was done with an actual intention to cause such injury. The requirement of malice will also be satisfied if the act was done with knowledge of invalidity or lack of power and with knowledge that it would cause or be likely to cause such injury.²

If the act was done with actual intention to cause injury, it is irrelevant whether he/she exceeded his/her powers or acted within the letter of the law.³

WHAT THIS MEANS

If a person purports to act on behalf of a council with specific intent to cause harm or injury to a person, then it will give rise to the operation of public misfeasance. Where there is specific intent then the question of authority is not required to be considered.

Alternatively, if a person acted on behalf of council outside their prescribed mandate and it was established that they had no power to act which resulted in probable injury to a person or persons, it could also establish the existence of public misfeasance.

PUBLIC OFFICIALS CAN BE PERSONALLY LIABLE

The tort of public misfeasance attracts a personal liability. Hence if an officer acted with intent to cause harm or acted outside his or her authority at the apposite time, it could be open for the council not to indemnify the complainant. If the council had any doubts, then it would need to have regard to the view of its insurer.

The council's insurance policy may exclude acts done without proper mandate. The effect may be that the complainant would be personally liable.

The scope of damages extend to exemplary or aggravated damages. The only limitation here is that the "defendant must have foreseen the losses to the claimant as a probable consequence."⁴

It would be difficult to perceive a situation where a public officer was to make a complaint and not realise how that would affect a person subject to a complaint, especially if the person happens to be a fellow building surveyor. A fellow practitioner would be well aware that the lodging of a complaint concerning professional misconduct would damage a peer's professional reputation and the ability to derive an income. It is submitted that it would be impossible for a complainant to honestly believe that he/she was oblivious to the consequences that

² *Northern Territory of Australia and Others v Megle and Others* (1995) 129 ALR 1 per Brennan J at 37.

³ *Three Rivers District Council v Bank of England* (No.3) [2001] 1 AC per Lord Millet at 23.

⁴ *Three Rivers District Council v Bank of England* (No.3) [2001] 1 AC per Lord Steyn at 196.

flow from the generation of a complaint.

CONCLUSION

Public officers in any position need to be aware of the limitation of their powers. Acting with the intent to cause injury or acting without authority could expose an officer to personal liability and exemplary damages.

If a private certifier feels that he/she has been on the receiving end of a campaign that appears to be actuated by pernicious intent then the certifier could consider this particular legal remedy.

There is an old saying those who live by the sword should be prepared to die by the sword and if a complaint is vexatious, misconceived and not actuated by public tenets then within a professional context grievous assault upon reputation follows.

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