

## Local Authorities – Exercise Of Discretionary Powers

*Pyrenees Shire Council v Day;*

*Eskimo Amber Pty Ltd v Pyrenees Shire Council*, High Court, January 1997.

A recent High Court decision means that Australia's local authorities are now more likely to be found liable for failing to exercise their discretionary statutory powers.

In *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council*, the High Court found a local authority liable of failing to exercise a discretionary power even though there was no public expectation that the power would be exercised and the person affected did not rely on the local authority to do so.

### The case

The decision followed a case in which a council officer in the small Victorian town of Beaufort had investigated a fireplace after a minor fire had been reported in a building that was part fish and chip shop and part residence. The council's building inspector found the fireplace was faulty and created a substantial risk of fire. He alerted the building's tenant and advised him not to use the fireplace under any circumstances.

Subsequently, the local authority sent the tenant a letter confirming the hazardous state of the fireplace. That letter repeated the warning not to use the fireplace unless and until it was repaired. However, the council did not follow up the letter in any way. Nor did it attempt to ensure that the tenant complied with the warning.

In due course, the tenant moved out and a new one moved in. However, the outgoing tenant did not tell the new tenant about the defective fireplace, nor did he mention the letter he had received from the council. Unaware of the danger, the new tenant used the fireplace and a resulting fire destroyed the building and part of an adjoining shop. The new tenant, the building owner and the owner of the adjoining shop sued both the previous tenant and the council for property damage which the fire had caused.

At the trial, the council's building inspector gave evidence that the fireplace was very dangerous and a resulting fire could threaten the whole township. Although the previous tenant was found liable in negligence, the appeal to the High Court concerned only the council's liability.

In the circumstances of this case, the local authority had a statutory power to issue a written notice requiring the building's owner or occupier to alter the fireplace so that it would be safe to use. The council also had powers to enforce the notice by carrying out the works itself or prosecuting the owner or occupier for failing to comply with the notice. However, the relevant statute did not compel the council to exercise any of these powers.

### The decision

All five High Court judges held that the council was liable to the adjoining property owner for damage caused to his building. However, the court was divided on the council's liability to the owner and the new tenant – and a 3:2 majority found that the council was liable for damages suffered by both these parties.

The two dissenting judges held that the owner and the new tenant could not establish they had placed "general reliance" on the council to exercise its statutory powers to ensure the action in its letter to the tenant had been complied with. Both could have inspected the building themselves or undertaken searches with the council to ensure the fireplace was not defective. The adjoining owner, however, did not have such an opportunity. He placed "general reliance" on the council to exercise its powers to ensure any fire danger such as this was rectified or removed. The dissenting judges said that council's failure to follow up the letter sent to the tenant was a breach of this duty of care owed to the adjoining owners.

The three majority judges reject the "general reliance" test. Chief Justice Sir Gerard Brennan held that, in this instance, the council had a public law duty to exercise its statutory power. He said Council was aware that the consequences of its failure to do so was "extreme for lives and property in the neighbourhood" and added that there was no reason to justify council's failure to follow up the letter.

Justice William Gummow found that the council had breached its duty of care by failing "to take steps in the further exercise of its powers which were required by the circumstances". He emphasised the fact that the council was aware that if the situation was not remedied the possibility of fire was great and there was significant risk of damage.

Justice Michael Kirby found that the council did have a duty of care which it had breached, even though the resources and personnel to exercise the discretionary powers were limited. He came to this conclusion based on:

- the dangers to human life and property which the council was aware of from its inspection;
- the substantial risk of harm if the fireplace was not repaired;
- the latent nature of the danger; and
- the inability of the tenant, the owner and the adjoining owner to detect the danger and protect themselves from it.

Where local laws give councils statutory discretions, the council may have an obligation to exercise them. Failure to do so may lead to the council being held liable.