



Office of the Ombudsman 2007

700-0603033

29 January 2007

Mr Paul Watson
Obo Watill Investments Pty Ltd
182 Fourfoot Road
GEEVESTON TAS 7116

Dear Mr Watson

Complaint: Crown Land Services & Huon Valley Council

I write to advise that our preliminary enquiries into your complaints are now completed. Enquiries were made into two allegations, one concerning Crown Land Services as part of the Department of Primary Industries and Water and the other against the Huon Valley Council. As you are aware, you also made a number of other complaints that were not accepted by the Ombudsman for a number of reasons which are discussed further below. Each issue of complaint is dealt with separately and each public authority has been advised of the outcome of the complaint made against them. In what follows I refer to yourselves as the complainants both in the interests of clarity and for ease of transposing the substance of the findings into correspondence to the relevant public authority. This letter is addressed to you as the contact person for all complainants.

Background

The complainants in this matter are directors of the company Watill Investments Pty Ltd (Watill), which purchased the Kermandie Hotel at Port Huon in February 2004, as well as Mr Paul Watson who is licensee of the hotel. There have been a number of ongoing problems with the running of the hotel that the complainants assert arise as the result of errors made and incompetence by Crown Land Services (CLS) and the Huon Valley Council (HVC).

The previous owner of the hotel, Granny Investments Pty Ltd (GI), owned the parcel of land on which the hotel and adjoining motel were located. The company also leased a portion of Crown land on the other side of the Huon Highway that comprised a marina. Historically, visitors to the Kermandie Hotel had parked on the area adjoining the marina, on the opposite side of the highway from the hotel. In 1999 GI applied for a planning permit to subdivide the land on which the hotel and motel were located. GI and Huon Valley Council entered into a development agreement under s.71 of the *Land Use Planning and Approvals Act 1993* (the Part 5 Agreement) making approval of the subdivision conditional on GI obtaining a parking easement over the portion of Crown land at that time being used as car park, within 12 months of separate title issue.

The easement was to be over an area of land sufficient to have a total of one hundred (100) car parks.

GI did not obtain the parking easement for reasons that remain unclear. In April 2003 GI transferred the foreshore lease over the marina to another company, Margraff Pty Ltd, while still retaining ownership of the hotel. The motel, now on a separate title after subdivision, had been sold in 1999. The complainants expressed interest in purchasing the hotel in October 2003 and engaged a firm of solicitors in Sydney to assist them. They also had the hotel inspected in December 2003 by a firm of independent property valuers and consultants. The valuers apparently reported that the Crown Lease had not yet been formally apportioned between the marina and the hotel but that all of the top car park would be allocated to the hotel. According to the complainants, their solicitors made attempts to purchase or lease the car park area on Crown land between October 2003 and February 2004, without success.

On 1 February 2004 GI was granted a three month temporary licence over the car park area by CLS, which the HVC accepted as satisfying the condition in the Part 5 Agreement. The purchase of the hotel by the complainants settled on 23 February 2004, since they were now apparently satisfied that the issues concerning car parking had been resolved.

In May 2004 a renewal notice for the licence arrived at the hotel addressed to GI. The complainants returned the form with the one hundred dollar (\$100) fee and notified CLS of the change in ownership of the hotel. The complainants say that they received another renewal notice in December 2004 or January 2005, still addressed to GI and they again paid the renewal fee and notified CLS of the change of ownership. In January 2005 CLS notified the complainants via their solicitors that they did not hold a valid licence, as the only licence issued had been to GI and that licence had been issued in error. The error arose as the licence had been issued over an area of Crown land already leased by the operators of the marina since April 2003, and was therefore in the exclusive possession of the marina operators and not available to licence.

Between January 2005 and February 2006 the complainants and/or their solicitors engaged in correspondence and negotiations with both CLS and HVC in an attempt to resolve the parking problem. In the meantime, the marina operators transferred the marina lease to another company in November 2005 and CLS advised the complainants that the car park area might be surplus to the new marina operators' requirements. Nothing ultimately eventuated from this. Various solutions were proposed, none of which were accepted by the complainants as they had ongoing concerns about the requirements of the Part 5 Agreement and the need to have a final solution to the parking problem. The complainants now claim to be unable to keep the bar and restaurant/function facilities trading due the ongoing concerns about lack of parking, and since February 2006 have only been operating the hotel bottle shop.

The complainants made a complaint to the Ombudsman in March 2006 raising a number of issues arising from the purchase of the hotel that they believed were the fault of CLS and the HVC. The Ombudsman did not accept several of these issues as they were either out of jurisdiction or did not raise any issues of potentially deficient administrative action. This is discussed in more detail below.

Jurisdiction

The Ombudsman has jurisdiction to investigate any administrative action taken by or on behalf of a public authority. The Department of Primary Industries & Water (DPIW), of which Crown Land Services is a part, is clearly a public authority as defined by section 3 of the *Ombudsman Act 1978*, as a State Service Agency is a public authority in accordance with section 4(a) of that Act. The Huon Valley Council is also a public authority for the purposes of the Act as it is a

local authority as defined by section 3. The action complained of was administrative action in the sense contemplated by section 12 of the *Ombudsman Act 1978*.

Under section 20A of the *Ombudsman Act 1978*, the Ombudsman may make preliminary enquiries in order to establish whether investigation is necessary and may also resolve the matter expeditiously if possible and appropriate. Both CLS and HVC were co-operative and provided access to documentation and files, as well as providing specific responses to the issues of complaint. It was determined that sufficient information was obtained by way of preliminary enquiries to resolve the complaints without further investigation.

Preliminary Enquiries

After careful assessment of the complaint, the Office of the Ombudsman accepted one allegation against CLS for preliminary enquiries as follows:

- That a mismanagement of the complainants' occupational rights over the Crown land foreshore area opposite the Kermandie Hotel has occurred. This includes the issuing of invalid licences to the complainants during 2004, as the area had already been leased to a third party.

One allegation against the Huon Valley Council was also accepted, being as follows:

- In February 2004 Council found that a temporary licence issued to the previous owner of the Kermandie Hotel (Granny Investments Pty Ltd) satisfied the existing Part 5 Agreement subdivision condition requiring an easement over foreshore Crown land for car parking. Council was aware, or ought to have been aware from its own records, that this area had already been leased to a third party (Margraff Pty Ltd) and therefore Council should not have made such an administrative decision given that a temporary licence could not satisfy the existing condition.

1. Complaint Against Crown Land Services

That a mismanagement of the complainants' occupational rights over the Crown land foreshore area opposite the Kermandie Hotel has occurred. This includes the issuing of invalid licences to the complainants during 2004, as the area had already been leased to a third party.

A letter outlining the issue of complaint was sent to the Secretary of DPIW and he was asked for a response. A letter of response was received and further clarification sought, which resulted in a second letter of response. Senior Investigation Officer Clare Hopkins then met with CLS' Policy & Project Officer, Mr Kristian Clayton, to discuss the issues and to view relevant documents.

Discussion

The responses from DPIW clearly acknowledge that an error was made in respect of issuing and subsequently transferring the licence over the car park area opposite the hotel. The Secretary observed that all transfer and licence fees incurred by the complainants had been refunded in May 2006, although it is noted here that this did not occur until application was made by the complainants.

The Department confirmed that a temporary licence over the relevant land was first issued to GI on 10 February 2004 and at this point CLS failed to identify that there was an overlap of the licensed area and the area leased to Margraff. Margraff raised the issue with CLS in 2004 when it was negotiating with the Crown to extend its lease. Correspondence provided by the

complainants shows that Margraff also raised the matter with the complainants' solicitors in January 2005 due to concerns about public liability cover in the area being used as the hotel car park. The complainants allege that they purchased the hotel, at least partly, on the basis of a written "guarantee" provided by CLS to their solicitors that the licence would not be revoked. Having viewed this correspondence, I am not satisfied that it constitutes a guarantee or undertaking of any kind, but rather is a statement of normal CLS policy not to revoke a licence unless for substantial breach.

The Department states that as soon as it became aware of the problem with the licence it endeavoured to resolve the issue and correspondence viewed by the Office of the Ombudsman confirms this. At one stage it seemed likely that the area of land in question would be surrendered by Margraff and the land was surveyed for this purpose, however negotiations ultimately proved unsuccessful. When the survey was completed, it revealed that the bulk of the land that comprised the car park did not lie within the lease/licence boundary but was in fact in the adjoining road reserve for the Huon Highway. CLS sought to create a parking easement over a section of the road reserve in favour of the hotel and to this end purchased two small pieces of remnant freehold land in mid-2005. The relevant survey has been sighted and the two parcels of freehold were small triangular remnants of the original freehold title held by GI and were purchased for the sum of five hundred dollars (\$500).

The Department of Infrastructure, Energy and Resources (DIER), the managing authority of the road reserve land, had no objection to an easement being created to support twenty two (22) cars with the possibility of expanding the easement in the future and this option was pursued with the complainants' solicitors in 2005. The Crown remains willing to create such an easement but states that it has become apparent in the interim that such an easement is no longer necessary, as the condition contained in the Part 5 Agreement is now redundant and unenforceable. This is discussed further below in the analysis of the complaint against the HVC.

The Department stated that the complaint has highlighted a problem in CLS' processes which should have accurately identified, in all cases, pre-existing tenure. It said that there was no problem in most cases but in a small percentage of matters such as this one, accurate identification has not been made. In order to remedy this problem, CLS now uses the professional services of the Surveyor-General to assess, where required, lease and licence applications, which includes boundary and tenure checks.

Finally, while the Department acknowledges that CLS erred in licensing the portion of land, it asserts that it acted in good faith at all times and as soon as it became aware of the mistake it endeavoured to rectify the problem and resolve the matter in an amicable fashion.

Conclusion

This issue of complaint is found to be substantiated because clearly CLS issued the original licence in error and the subsequent transfer and renewals of the licence were therefore also in error. The Department has readily admitted the mistake and sought, in good faith, to rectify the ensuing problems. It argues that at no time has it sought to prevent the hotel from trading and that the complainants need neither an easement nor a licence in order to do so. Having viewed the relevant documentation and correspondence, it would appear that this is the case and further concerns held by the complainants in respect of future development and parking are matters about which they should seek legal advice. I am satisfied that Department has taken the necessary steps to prevent a similar error occurring in the future and that no further action by the Ombudsman is required at the current time.

2. Complaint Against Huon Valley Council

In February 2004 Council found that a temporary licence issued to the previous owner of the Kermandie Hotel (Granny Investments Pty Ltd) satisfied the existing Part 5 Agreement subdivision condition requiring an easement over foreshore Crown land for car parking. Council was aware, or ought to have been aware from its own records, that this area had already been leased to a third party (Margraff Pty Ltd) and therefore Council should not have made such an administrative decision given that a temporary licence could not satisfy the existing condition.

A letter outlining the issue of complaint was sent to the General Manager of the Huon Valley Council and he was asked for a response. A letter of response was received and further clarification sought, which resulted in a meeting between Senior Investigation Officer Clare Hopkins and Mr Geoff Cockerill, General Manager, and Mr Matthew Grimsey, Legal Officer, to discuss the issues and to view relevant documents.

Discussion

Council's response states that the issue of complaint as formulated is based on a presumption that HVC records sufficiently identify the land previously under lease to GI and subsequently to Margraff, but that this was not the case. GI acquired a Crown lease on the marina and car park sometime in the 1980's but there are no records from the former Esperance Council which reveal the date of commencement of the lease or the extent and area of the lease. The only records held by HVC relate to the payment of rates on the leased land. The Valuation List from 13 October 1993 simply provides the valuation on the land described as "Marina Jetty Car Park – 1.52ha". The valuation list from November 2002 has the land area as 0.1336ha but there is no record or explanation of the change in area although the value of the subject land is the same as previously.

The first HVC records relating to proposals for the leased area arise due to Margraff's wish to extend the lease when CLS wrote to Council seeking comment in March 2003. Official notification from CLS of the transfer of the lease was not received until 9 July 2004 and contained no reference to the area subject of the lease.

When HVC had discussions with GI about a licence for car parking it was of the opinion that the area to be licensed was outside of the area shown in the CLS correspondence relating to Margraff's request for a larger lease area and was therefore consistent with the lease. HVC claims that it was reasonable for it to rely upon the validity of the licence issued by CLS based on previous advice from CLS, its own limited records and the delays in formal notification of changes to the lease.

In respect of the issue of HVC accepting a licence as fulfilment of the condition in the Part 5 Agreement, some background was given by HVC to clarify the history of the matter and the reason this occurred. At the time of the initial subdivision application, the subdivision permit contained a condition requiring a parking easement on the motel's lot. This did not eventuate and the motel owner ultimately built a reception area on that part of the land. The applicant (GI) then applied for a variation of the permit to delete the condition requiring a car parking easement. The HVC planning officer at the time wanted more substantial compliance with the Planning Scheme and so GI entered into discussions with CLS about the land on the other side of the highway. The sealed plan was sent to the Land Titles Office but it would not register the plan as the Crown needed to sign off on the Schedule of Easements. The advice from HVC is that the Crown could not do that at that time. Advice from CLS is that the agreement regarding the easement appeared to be going ahead but CLS received a telephone call from Mr Mike Wilson of GI on 9 October

1999 telling them to hold the application because he did not wish to proceed. There is no explanation for this but CLS accordingly proceeded no further with the application. The parking easement was then deleted from the sealed plan with the consent of HVC and the Part 5 Agreement was entered into instead. Council noted that all this occurred in 1999, some two (2) years before Mr Mike Wilson was elected to Council.

Nothing happened in the interim until a letter was received from GI's solicitors in February 2004 proposing a licence over the Crown land as satisfaction of the Part 5 Agreement. The proposal was accepted by a council officer with the appropriate delegation to make such a decision. There is no reasoning on the file as to why this was deemed acceptable and there is no explanation for the lack of action between 1999 and 2004. Both of the HVC officers who were involved in the matter at the time have left the employ of HVC and cannot be asked for an explanation. HVC noted that there are some Crown licences in the municipality that have been running for over thirty (30) years and it may have been assumed that this licence would be the same. However, this is supposition only.

HVC concedes that, although the original approval was appropriate, the amendment that resulted in the Part 5 Agreement was ill-conceived. The conditions in the Agreement were relevant to granting the application for the subdivision and not relevant to the ongoing use of the hotel or placing restrictions on the ongoing use. There are a number of problems with the Agreement which result in the conditions being redundant and unenforceable. There was apparently some discussion with the complainants' solicitors about removing the notation regarding the Part 5 Agreement from the title but this has progressed no further. HVC also noted that the area on the opposite side of the highway from the hotel has been used for car parking since the 1930's when the hotel first opened and so is an "existing use" as contemplated by the *Land Use Planning and Approvals Act 1993*.

Conclusion

Based on the information provided to it by CLS, it was not unreasonable for HVC to rely on the licence over Crown land as being valid. Although rates were paid on the leased area, the area was not clearly defined and changes to the area on the Valuation List did not affect the value of the land and therefore the rates.

The decision to accept a temporary licence as sufficient to fulfil the Part 5 Agreement is not clearly explained due to a lack of Council records and the fact that the Council officers involved are no longer employed by HVC. HVC's view now is that the Part 5 Agreement is unenforceable and that there is nothing preventing the complainants from making use of the relevant Crown land for car parking. New guidelines are being drafted to assist Council officers with future subdivision applications and the appropriate use and drafting of Part 5 Agreements.

It seems that HVC does not intend to rely on the Part 5 Agreement, which is likely to be unenforceable in any event, and asserts that at no time has it sought to prevent the hotel from trading. It also asserts that there is no current impediment to the restaurant and bar operating as part of the business. Criticism can be levelled at HVC for the decision to accept a temporary licence, its failure to ensure compliance with the Esperance Planning Scheme by taking no action over a period of years between 1999 and 2003 and inadequate record keeping at the time of the subdivision application. It is acknowledged, however, that the poorly drafted Part 5 Agreement appears to be at the root of the ongoing problems. These complaints have however, highlighted such issues and HVC is taking necessary action to improve practices in the future.

Additional Issues Not Subject of Preliminary Enquiries

As mentioned at the beginning of this report, the complainants raised a number of issues that they believe have impacted upon their ability to satisfactorily run the hotel. Some of the complaints concerned the director of GI, Mr Mike Wilson, who was elected as a Councillor to HVC in 2001. These complaints were declined due to being out of the Ombudsman's jurisdiction as they concerned Mr Wilson's actions as a private citizen rather than as a representative of HVC.

Concerns were also raised by the complainants about the subdivision's lack of compliance with the Esperance Planning Scheme. Namely, they raised issues about non-compliance in respect of siting and setbacks, about hotel fire exits exiting onto neighbouring land and about lack of access to the hotel bottle shop. At the time of the original complaints being made to the Ombudsman, the issues of complaint concerning the subdivision were declined. This was for two reasons, firstly that the complainants became aware of the issues more than two (2) years before they complained to the Ombudsman (s.19(3) *Ombudsman Act 1978*), but more importantly, due to the fact that ascertaining property and building compliance with wider law, including planning conditions, is a conveyancing responsibility of the purchaser. Diligent searches and checks should have revealed that there were problems with the subdivision and in fact one of the complainants did concede by telephone that they had been aware of the issues with access and fire escapes prior to purchasing the hotel. This issue of complaint was, as stated above, declined at the time the complaints were initially made but there appears to have been some confusion on the part of the complainants as to what issues were declined and whether recent events have somehow brought the subdivision complaint within jurisdiction. This issue has not been accepted and consequently has not been subject of enquiries by the Ombudsman.

In summary, these complaints have highlighted deficiencies in the administrative processes employed by both CLS and HVC. Both public authorities have acknowledged that there have been problems with the way they have dealt with the hotel car parking. CLS has conceded that an error was made with the issuing and renewal of the licence but has acknowledged the error and acted in good faith when attempting to help rectify the subsequent parking problems. HVC has acknowledged that the Part 5 Agreement was ill-conceived and caused problems, but it too has endeavoured to negotiate with the complainants to reach an appropriate solution. Both public authorities have implemented new procedures aimed at rectifying the problems that were identified as a result of these complaints. The Ombudsman's role is to investigate or enquire into complaints with a view to promoting good administrative practice. These enquiries have identified administrative deficiencies but the Ombudsman is satisfied that both public authorities have put procedures in place in order to remedy the problems identified. Outstanding issues that the complainants have with the ongoing operation of the hotel are matters about which they should seek legal advice.

Preliminary enquiries into these complaints are now completed.

Yours sincerely

Simon Allston

Simon Allston
Ombudsman