SUPREME COURT OF QUEENSLAND

CITATION:	*Inkerman Station Pty Ltd As Trustee For The Inkerman Trust v Allan & Ors* [2017] QSC 147
PARTIES:	**INKERMAN STATION PTY LTD (ACN 111 342 495) AS TRUSTEE FOR THE INKERMAN STATION TRUST** (Applicant) **v** **KEVIN ALLAN, REGIONAL MANAGER LAND SERVICES AND AUTHORISED DELEGATE OF THE MINISTER FOR NATURAL RESOURCES AND MINES UNDER THE LAND ACT (MINISTERIAL) DELEGATION (NO 1) 2015** (First Respondent) and **MINISTER FOR NATURAL RESOURCES AND MINES** (Second Respondent) and **STATE OF QUEENSLAND** (Third Respondent) and **HARVEST HOMES HOLDINGS PTY LTD (ACN 074 967 169) AS TRUSTEE UNDER DEALING 710323641** (Fourth Respondent)
FILE NO/S:	SC No 209 of 2016; SC No 289 of 2016; SC No 17 of 2017
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	14 June 2017(ex tempore)
DELIVERED AT:	Cairns
HEARING DATE:	14 June 2017
JUDGE:	Henry J
ORDERS:	**No orders made.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – STATUTORY INTERPRETATION – JURISDICTIONAL FACT – whether or not a decision maker's power was contingent on the existence of a state of fact *Land Act* 1994 (Qld) ss 61(2)(b), 153, 154, 155(2)(c), 158(2),

164A

Australian Heritage Commission v Mount Isa Mines Ltd (1997) 187 CLR 297, cited
Chamwell v Strathfield C (2007) 151 LGERA 400, cited
Gedeon v NSW Crime Commission (2008) 236 CLR 120, followed
Timbarra Protection Coalition v Ross Mining NL [1999] 46 NSWLR 55, applied
Woolworths Limited v Pallas Newco Pty Ltd (2004) 61 NSWLR 707, applied

COUNSEL:	R N Traves QC and N Andreatidis for the applicant M T Hickey for the first, second and third respondents R W Haddrick for the fourth respondent
SOLICITORS:	Clayton Utz for the applicant Crown Law for the first, second and third respondents Preston Law for the fourth respondent

[1] **HENRY J**: In this application for a statutory order of review, a question has arisen as to whether the decision initially provoking the application required the existence of a jurisdictional fact. That is, was the decision-maker's power to proceed to exercise the discretionary decision-making power first contingent upon the actual existence of a state of fact, as distinct merely from the decision-maker's opinion that the state of fact existed?

[2] It is necessary to determine the question now, because the inquiry a question of jurisdictional fact provokes affects the conduct of the application. That inquiry's focus is not on decision-making error in law or process in the decision-maker being satisfied of the existence of the fact in question; its focus is on the actual existence of the fact.

[3] This affects the conduct of the application, because, contrary to the requirements of the usually confined approach to reviewing an administrative decision, it requires a merits review. Whether we here are concerned with the existence of jurisdictional fact therefore influences at least the focus and character of the argument to be undertaken before me. Further, it potentially gives rise to the consideration of a broader body of information than was before the decision-maker. Whether it would actually have that latter consequence in this case is a different question than the preliminary question which I now determine.

[4] The statutory provision containing the alleged jurisdictional fact is s 154 of the *Land Act* 1994 (Qld) which, relevantly for present purposes, provides:

> "**154. Minister may approve additional purposes**
>
> (1) The Minister may approve an application by a lessee that a lease be used for additional or fewer purposes.
>
> (2) However, the Minister may approve an application by a lessee that a lease be used for an additional purpose only if –
>
> (a) the additional purpose is complementary to and does not interfere with the purpose for which the lease was originally issued; ..."

[5] Is the existence of the additional purpose referred to in s 154(2)(a) a jurisdictional fact? The respondents emphasised the evaluative quality of the decision whether an additional purpose is complementary to and does not interfere with the purpose for which the lease was originally issued.

[6] It is necessary to pause and say something about the topic of the purpose of a lease. Leases under the Act must state their purpose pursuant to s 153. The purpose stated on the existing lease is "primary industry (grazing) – Crown land". The additional purpose was stated in short form in the reasons given to be "low-key tourism" and in the actual application to be "low impact ecotourism". The application contained more information, though, about that purpose, indicating how it was proposed to use the leased land for that purpose.

[7] Whether the additional purpose described in the application is complementary to and does not interfere with the lease's original purpose cannot sensibly be considered by reference solely to the short-form title allocated in the application to the additional purpose. It would not be possible to know, for example, whether low impact ecotourism interferes with primary industry (grazing) without knowing the proposed use pursuant to that short-form descriptor of purpose.

[8] It is uncontroversial that the purpose is the end which the proposed use of the land will serve, see *Chamwell v Strathfield C* (2007) 151 LGERA 400, 406. The proposed use to that end is the information which is needed in order to know whether the end is complementary to and does not interfere with the lease's original purpose. That there is

obviously a need to consider the additional purpose by reference to the substance of what is proposed lends substance to the respondents' submissions about the evaluative quality of the decision.

[9] Further to the evaluative quality of language, such as "complementary to" and "does not interfere with", the respondents also point to the content of s 4 of the Act's objects, seeking to add momentum to their argument. While the objects of the Act certainly list some detailed principles, they are not principles bearing upon the question arising from s 154(2); rather they bear upon the exercise of the discretion referred to in s 154(1) to follow, once it is determined the proposed purpose has the quality described in s 154(2). That is a distinction to which I will return. Nonetheless, setting aside the ill-fated s 4 argument, the respondents' point that the decision involves a degree of subjective evaluation about which reasonable minds may differ has some force in signalling that it is not a decision as to a jurisdictional fact.

[10] The twin components of jurisdictional facts are said to be their objectivity and essentiality, per Spigelman CJ in *Timbarra Protection Coalition v Ross Mining NL* [1999] 46 NSWLR 55, 64. As to objectivity, the more evaluative or complex the fact, the less objective and more subjective – the more it is a matter of opinion and degree – the decision ascertaining its existence will tend to be. See by way of illustration as to significant evaluative considerations, *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, 301, and as to complexity, *Woolworths Limited v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 719-720.

[11] However, two points warrant emphasis on this issue. Firstly, whatever the level of detail involved, all decision-making involves some degree of evaluation and choice. So the fact that a degree of detail needs to be considered is inevitably a relevant rather than determinative consideration. Secondly, objectivity and essentiality are interrelated concepts. That is because, as Spigelman CJ observed in *Timbarra Protection Coalition*, indicators of essentiality will often suggest objectivity.

[12] In the present case there are very strong indicators of essentiality, which in turn points to the objective character of the decision to be made. As much is supported by the

words of the specific section and the broader content of the Act within which it is found.

[13] As to the words of the section, I return to the distinction between s 154(1) and (2).

[14] The discretion to approve an additional purpose application of the present kind is conferred by s 154(1). However, the occasion for that discretion will not arise unless the additional purpose applied for under s 154(1) is, as s 154(2) requires, complementary to and does not interfere with the purpose for which the lease was originally issued.

[15] This heralds the importance of the distinction emphasised in *Woolworths Limited v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 where, at 718, Spigelman CJ observed:

> "[T]here is a distinction between a fact that is an "essential preliminary to the decision-making process" and a "fact to be adjudicated upon in the course of the inquiry" ... The word "preliminary" does not, in this context, refer to a chronological sequence of events, but to a matter that is legally antecedent to the decision-making process. A decision-maker may well determine whether or not s/he has jurisdiction at the same time as s/he carries out the substantive decision-making process.
>
> The extrinsic or ancillary or preliminary nature of the relevant fact makes it more likely that the fact is jurisdictional ... A factual reference that is appropriately characterised as preliminary or ancillary to the decision-making process or which is, in some other manner, extrinsic to the facts and matters necessary to be considered in the exercise of the substantive decision-making process itself, is a reference of a character that the parliament intended to exist objectively."

[16] While the conclusion of fact in s 154(2) may, in a practical sense, be made by a decision-maker at the same time as the substantive decision-making, it is nonetheless legally antecedent to it. This can be illustrated by the consequence which would flow from finding the fact contemplated by s 154(2) exists. If such a finding automatically meant the application should be granted, that would aid the respondents' position, because the factual conclusion would require no preliminary conclusion. But that would be to overlook the terms of s 154(1), particularly the word "may" therein. There might well be a case where the decision-maker concludes the fact referred to in s 154(2) is present, but there may be a variety of reasons why, nonetheless, the application ought not be granted. The s 4 objects to be applied in making such a decision in the

administration of the Act are of a kind which may obviously influence a decision-maker's discretion so that, even though the proposed purpose is complementary to and does not interfere with the purpose for which the lease was originally issued, the application should not be granted.

[17] Section 154 does not require the decision-maker to approve an application if the application's additional purpose is complementary to and does not interfere with the purpose for which the lease was originally issued. Rather it provides a decision-maker "may" approve an application of a particular kind. It is a discretion for the decision-maker to exercise as to whether or not the application is approved. But the occasion for deciding whether or not to exercise that discretion will not arise unless it relates to an application for approval for a lease to be used for an additional purpose which is complementary to and does not interfere with the purpose for which the lease was originally issued. This provides powerful support for the fact to be decided in s 154(2) being a jurisdictional fact.

[18] Another aspect of the section's words of significance is that it does not make the decision-maker's opinion about or satisfaction of the fact in s 154(2) the critical jurisdictional determinant; rather it is the existence of the fact. Words like "opinion" or "satisfaction" would be powerful indicators of the former, but they are not present here. The legislature could, for example, have worded s 154(2): "However, the Minister may approve an application by a lessee that a lease be used for an additional purpose only if satisfied or of the opinion that the additional purpose is complementary to and does not interfere with the purpose for which the lease was originally issued."

[19] This heralds the significance of the broader content of the Act. It contains a variety of examples of the legislature having done just that. See for example references to "in the opinion of" in s 61(2)(b) and s 155(2)(c), references to "in the Minister's opinion" in s 158(2) and reference to "only if the Minister is satisfied" in s 164A.

[20] These considerations suggest that both the wording of the individual section and the broader content of the Act support the conclusion sought by the applicant, notwithstanding the force I have earlier recognised in the argument advanced about the evaluative quality of the fact to be decided in respect of s 154(2)(a).

[21] Section 154(2)(a) carries what was described as the criterion of jurisdictional fact by the High Court in *Gedeon v NSW Crime Commission* (2008) 236 CLR 120, 139, namely, "a criterion, the satisfaction of which enlivens the exercise of the statutory power or discretion in question".

[22] As the High Court went on to observe:

> "If the criterion be not satisfied, then the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision-maker."

[23] In light of the considerations I have identified, I find in respect of s 154 that the fact in s 154(2)(a) is a jurisdictional fact. Thus the question whether the additional purpose applied for is complementary to and does not interfere with the purpose for which the lease was originally issued is a question of jurisdictional fact.