SUPREME COURT OF QUEENSLAND

CITATION:	*Baker v Chief Executive, Department of Natural Resources and Mines* [2019] QCA 128
PARTIES:	**MICHAEL VINCENT BAKER** (appellant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF NATURAL RESOURCES AND MINES** (respondent)
FILE NO/S:	Appeal No 14162 of 2018 QCAT No 155 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2018] QCAT 375 (Daubney J)
DELIVERED ON:	25 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2019
JUDGES:	Gotterson and Philippides JJA and Boddice J
ORDERS:	**The appeal be dismissed, with costs.**
CATCHWORDS:	STATUTES – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – where the appellant is the owner of a rural property – where the appellant was convicted of having contravened provisions of the *Sustainable Planning Act* 2009 (Qld) in respect of clearing undertaken on the property – where the appellant was convicted of a "vegetation clearing offence" as defined in the *Vegetation Management Act* 1999 (Qld) – where the respondent's authorised delegate issued the appellant with a restoration notice and issued a new property map of assessable vegetation – where the appellant sought to review those decisions in the Queensland Civil and Administrative Tribunal –whether the President erred in finding that a decision maker under s 54B(1) of the Act can reasonably believe that a person had committed a vegetation clearing offence even though the decision maker had actual knowledge that that person had been convicted of committing a vegetation clearing offence STATUTES – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – GENERALLY – where s 20B of the *Vegetation Management Act* 1999 (Qld) provides separate and distinct circumstances in which the

decision maker may make a property map of assessable vegetation under the Act – where the word "or" is at the end of each separate consideration under s 20B – whether the President erred in finding that a decision maker was entitled to rely upon multiple subsections of s 20B in making a property map of assessable vegetation

Sustainable Planning Act 2009 (Qld)
Vegetation Management Act 1999 (Qld), s 20B, s 54B

Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56, cited
Commissioner of Police v Flanagan [2018] QCA 109, cited
Commissioner of Taxation v Industrial Equity Ltd (2000) 98 FCR 573; [2000] FCA 420, cited
George v Rockett (1991) 170 CLR 104; [1990] HCA 26, cited
Minister for Immigration and Ethnic Affairs v Baker (1997) 73 FCR 187; [1997] FCA 105, cited
Prior v Mole (2017) 261 CLR 265; [2017] HCA 10, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Ruddock v Taylor (2005) 222 CLR 612; [2005] HCA 48, cited

COUNSEL: G R Allan for the appellant
P A Hastie QC, with G B Dann, for the respondent

SOLICITORS: Marland Law for the appellant
In-house Legal for Department of Natural Resources and Mines for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Boddice J and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** I agree with the reasons of Boddice J and the order proposed by his Honour.

[3] **BODDICE J:** The appellant is the owner of a rural property. In 2017, delegates of the respondent made decisions under the *Vegetation Management Act* 1999 (Qld) (***"the Act"***) which impacted on that rural property. Those decisions are the subject of an application for external review, brought by the appellant in the Queensland Civil and Administrative Tribunal (***"QCAT"***).

[4] On 23 November 2018, the President of QCAT determined jurisdictional questions raised by the appellant as preliminary issues in that application for external review.

[5] By amended notice of appeal, the appellant appeals those preliminary determinations. The appellant contends the President erred at law in the interpretation of sections 20B and 54B of the Act.

Background

[6] In March 2011, the appellant became the lease holder of a property at Eidsvold known as "Chess Park". Shortly after acquiring that lease, the appellant converted the holding to freehold tenure.

[7] In November 2016, the appellant was convicted of having contravened provisions of the *Sustainable Planning Act* 2009 (Qld) in respect of clearing undertaken on Chess Park. As a consequence, the appellant was convicted of a "vegetation clearing offence" as defined in the schedule to the Act.

Decisions

[8] On 23 February 2017, the respondent's authorised delegate issued the appellant with a restoration notice, pursuant to s 54B of the Act and issued a new property map of assessable vegetation (***"PMAV"***) in respect of Chess Park, under s 20B of the Act. That PMAV replaced an earlier PMAV issued by the respondent in August 2010.

[9] On 16 May 2017, another authorised delegate of the respondent issued review decisions pursuant to an internal review sought by the appellant. Those review decisions confirmed the initial decision to make the replacement PMAV in respect of Chess Park and amended the requirements under the Restoration Notice by issuing an Amended Restoration Notice.

Legislative Provisions

[10] Section 20B of the Act relevantly provides:

> "(1) The chief executive may make a PMAV for an area if –
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> (a) the area becomes a declared area; or
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> (b) the area becomes an offset area; or
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> (c) the area becomes an exchange area; or
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> (d) the area has been unlawfully cleared; or
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> (e) the area is subject to –
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> (i) a restoration notice; or
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> (ii) an enforcement notice under the Planning Act containing conditions about restoration of vegetation; or
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> (f) the area has been cleared of native vegetation and in relation to the clearing a person has been found guilty by a court, whether or not a conviction has been recorded, of a clearing offence; or
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> (g) the chief executive reasonably believes –
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> (i) a person has committed a vegetation clearing offence in relation to the area, whether before or after the commencement of this section, or a vegetation clearing offence is being committed in relation to the area; or
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> (ii) the area was cleared of vegetation in contravention of a tree clearing provision under

the *Land Act 1994* as in force before the commencement of the *Vegetation Management and Other Legislation Amendment Act 2004*, section 3; or

(iii) prohibited development under the repealed Moratorium Act, part 5 was carried out in relation to the area; or

(h) the area is a Land Act tenure that is to be converted under the *Land Act 1994* to another form of tenure; or

(i) the chief executive reasonably believes there is an error in the part of the regulated vegetation management map for the area.

(2) the chief executive must give each owner of land to be included in the PMAV an information notice about the decision to make the PMAV."

[11] The schedule to the Act defines "unlawfully cleared" as cleared of vegetation by a person in contravention of:

"(a) a vegetation clearing provision, or the repealed *Sustainable Planning Act 2009*, section 578(1), 580(1), 581(1), 582 or 594(1) if the person –

(i) has not contested an infringement notice for the contravention; or

(ii) has been convicted of the contravention, whether or not the conviction is recorded; or

(b) a tree clearing provision under the *Land Act 1994*, as in force before the commencement of the *Vegetation Management and Other Legislation Amendment Act 2004*, section 3."[1]

[12] Section 54B of the Act provides:

"(1) This section applies if an official reasonably believes –

(a) a person has committed a vegetation clearing offence, whether before or after the commencement of this section; and

(b) the matter is capable of being rectified;

(2) The official may give the person a notice (a ***restoration notice***) requiring the person to rectify the matter.

(3) The restoration notice must state –

(a) that the official believes the person has committed a vegetation clearing offence; and

(b) the vegetation clearing offence the official believes has been committed; and

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1 *Vegetation Management Act* 1999 (Qld) schedule, as amended by the *Planning (Consequential) and Other Legislation Amendment Act* 2016 (Qld).

(c) briefly, how it is believed the offence has been committed; and

(d) the matter the official believes is reasonably capable of being rectified; and

(e) the reasonable steps the person must take to rectify the matter; and

(f) the stated reasonable period in which the person must take the steps.

(4) The restoration notice must be accompanied by or include an information notice about the decision to give the notice.

(5) The person must comply with the restoration notice unless the person has a reasonable excuse.

(6) In this section –

step includes any action or other measure the official believes is necessary to rectify the matter."

Primary Decision

[13] The questions of law sought to be determined by way of preliminary issues were:

(a) Whether the original decision made on 23 February 2017 to issue a restoration notice under s 54B(1) of the Act was beyond power and is unlawful and invalid and s 54B(1) of the Act does not apply in circumstances where, based on the facts that are not in dispute, the areas identified in the Restoration Notice:

(i) Have been unlawfully cleared (as that expression is defined in the schedule to the Act); or

(ii) Have been cleared of native vegetation and, in relation to clearing, a person has been found guilty by a Court;

(b) Whether the Review decision made on 16 May 2017 under s 63A(1)(b)(ii) and s 54B(1) of the Act to issue an Amended Restoration Notice was beyond power and is unlawful and invalid because s 54B(1) of the Act does not apply in circumstances where, based on the facts that are not in dispute, the areas identified in the Amended Restoration Notice:

(i) have been unlawfully cleared (as that expression is defined in the Schedule to the Act); or

(ii) have been cleared of native vegetation and, in relation to the clearing, a person has been found guilty by a court;

(c) If the answer to question 2(b) above is yes, whether in the exercise of its review jurisdiction under ss 19 and 20 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (***"QCAT Act"***), the Tribunal:

(i) does not have power under s 20(2) of the QCAT Act to hear and review the reviewable decision to issue the Amended Restoration Notice by way of a fresh hearing on the merits; and

(ii) if the Tribunal decides that it does not have power to undertake a merits review, whether it does have power to set aside the review decision and substitute its own decision under s 24(1)(b) of the QCAT Act.

(d) Whether, in respect of the Internal Review Decision made on 16 May 2017 to confirm the original decision to issue the new PMAV relying on s 20B(1)(d) and s 20B(1)(e)(i) and s 20B(1)(g) of the Act was unlawful but not invalid in circumstances where, on the facts not in dispute, the areas of the new PMAV has been "unlawfully cleared" (as that expression is defined in the Schedule to the Act);

(e) In the alternative, whether the Internal Review PMAV Decision was unlawful and invalid, to the extent the decision maker purported to rely on s 20B(1)(e) and s 20B(1)(g) in addition to s 20B(1)(d) in circumstances where, on the facts not in dispute, the areas in the new PMAV had been "unlawfully cleared" (as that expression is defined in the Schedule to the Act);

(f) Any further questions that potentially affect the exercise of the Tribunal's review jurisdiction by reason of (a) to (e) above that the Tribunal decides should also be determined.

[14] The President answered those questions:

(a) No.

(b) No.

(c) Not necessary to answer.

(d) No.

(e) No.

(f) Not necessary to answer.

[15] The President found a decision maker under s 54B(1) of the Act can reasonably believe that a person had committed a vegetation clearing offence even though the decision maker had actual knowledge that that person had been convicted of committing a vegetation clearing offence. Knowledge of the fact of the conviction was in itself apt to induce the requisite belief and the fact of the conviction in itself provides a reasonable ground for the holding of the requisite belief. The President found that on the uncontested and uncontroversial evidence, each decision maker had proceeded under s 54B on the basis of facts in addition to the actual knowledge of the conviction.

[16] The President further found that each decision maker was entitled to rely upon multiple subsections of s 20B in making a PMAV. Each subsection of s 20B was intended to identify a circumstance which enlivened the requisite discretion. The subsections were to be read as alternatives, not as mutually exclusive alternatives.

[17] Finally, the President found that as the appellant's contentions for the proper interpretation of s 20B and s 54B of the Act were not correct, there was no basis to support the appellant's ultimate contention that QCAT's review jurisdiction was limited to deciding whether the internal review decision to issue the PMAV was lawful because the areas had been unlawfully cleared.

Appellant's submissions

[18] The appellant submits the President erred in the construction of s 54B of the Act. A distinction is to be drawn between a suspicion or belief, which concern states of mind, and knowledge as to the existence of a particular fact. Suspicion and belief are concerned with circumstances as they appear to be, whilst knowledge concerns circumstances as they actually are at that time.

[19] Section 54B must be construed in accordance with principles of statutory construction. Those principles require a construction in the statutory context, consistent with the language and purpose of the provisions as a whole. Here, the legislature chose the state of mind of "reasonably believes" thereby excluding from consideration actual knowledge of the facts in contention.

[20] The appellant submits that to interpret s 54B as meaning "knows or reasonably believes" creates inconsistency with the terms of s 20B and results in potential injustice. It allows for the issuing of a restoration notice to a person who has been convicted of an offence.[2] That person is already susceptible to the imposition of a restoration notice by the Court as part of that conviction. This constitutes double punishment.

[21] The appellant submits a correct reading of s 20B of the Act supports a conclusion that the subsections are to be read as mutually exclusive alternatives. The purpose of s 20B was to specify a number of different circumstances or criteria that attach to a particular area of land which, if satisfied, conferred power to make a PMAV for that particular land.

[22] The appellant submits that support for that construction arises from a consideration of the terms of a subsequent amendment to s 20B of the Act. That amendment included an express provision that nothing prevented the making of a PMAV for two or more of the circumstances mentioned in the subsection over the same or different areas.

Respondent's submissions

[23] The respondent submits a proper construction of s 54B of the Act supports the President's conclusion that a decision maker can have a reasonable belief, within the meaning of s 54B, that a person has committed an offence where the decision maker had actual knowledge that the person had been convicted of that offence. Such a conclusion is in accordance with the purpose and the policy of the section.

[24] The intention of the legislation is to empower a decision maker to issue a restoration notice when the decision maker reasonably believes that a person "has committed the requisite offence". It is the existence of that belief that provides the power. Knowledge that the person has been convicted of the relevant offence merely strengthens the reasonableness of the belief.

[25] The respondent submits that such a conclusion does not give rise to the risk of a double punishment. The power to issue a Restoration Notice is an administrative power which attaches to the land. It may only be issued if the decision maker also reasonably believes the matter is capable of being rectified. It is not a punishment. It is a regulatory power for the protection of the environment.

[26] Finally, the respondent submits there was no error of law in the proper construction of s 20B of the Act. The circumstances in each subsection provide an independent basis for the exercise of power. More than one may be relied upon by the decision

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2 See s 599 of the *Sustainable Planning Act* 2009 (Qld).

maker. The subsequent amendment was merely a clarification. It did not amend, change or alter the proper construction of s 20B.

Discussion

Section 54B

[27] The applicable principles of statutory construction are not in dispute. Section 54B is to be construed in its statutory context and consistently with its language and purpose. The construction must be consistent with the legislative intent. It must also give effect to the words of the provision, avoiding a construction that would produce an unjust or capricious result.[3] In undertaking the process of statutory construction, regard must be had to the particular words used by the legislature.

[28] Authorities which have discussed the differences between the state of mind required by the expression "reasonably suspects" and the state of mind required by the expression "reasonably believes" are of limited assistance in the interpretation of the words "reasonably believes" in s 54B of the Act. Those authorities merely re-state the principle that a suspicion or belief concerns a state of mind as to the existence of things which may be satisfied without actual proof.[4] They may be contrasted with actual knowledge.

[29] Here, the relevant state of mind is "reasonably believes".

[30] The requisite state of mind applies to two matters. First, that a person had committed a vegetation clearing offence, and second, that the matter is capable of being rectified.

[31] The second matter is a matter about which a decision maker is unlikely to have actual knowledge. As to the first, knowledge of a conviction of a vegetation clearing offence is a fact relevant to the forming of the requisite belief that the person had actually committed a vegetation clearing offence. Knowledge of that fact provides a firm basis for a belief that the person has in fact committed the vegetation offence.

[32] Knowledge on the part of an official of the conviction of a person of a vegetation offence can comfortably co-exist with the holding of the requisite belief by the official that the person did in fact commit the offence. They are not mutually exclusive.

[33] Importantly, none of those authorities support the appellant's contention that actual knowledge of a particular fact prohibits the establishment of a requisite state of mind of a belief founded on reasonable grounds.

[34] This construction is consistent with the language of the section and its purpose in the context of the statute as a whole. There is also good reason why the section provides for the state of mind of "reasonably believes" rather than actual knowledge. It will rarely be the case that an official knows from his or her own observations of the conduct of a person that the person has actually committed the offence. Except for that rare circumstance, an official will rely on knowledge of a

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3 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [24]-[25], [75].

4 *Prior v Mole* (2017) 261 CLR 265; *Ruddock v Taylor* (2005) 222 CLR 612; *George v Rockett* (1991) 170 CLR 104; *Commissioner of Police v Flanagan* [2018] QCA 109.

conviction to inform a reasonable belief that the person actually committed the offence.

[35] This construction is also harmonious with a consideration of other sections of the Act. The construction does not create inconsistency in respect of the provisions in s 20B of the Act. The reference in s 20B(1)(d) to "the area has been unlawfully cleared" is but one circumstance that may be relied upon by the Chief Executive for the purposes of making a PMAV. Another circumstance is that the Chief Executive reasonably believes a person has committed a vegetation clearing offence in relation to the area.

[36] Whilst the definition of unlawfully cleared means cleared of vegetation by a person in contravention, relevantly, of sections of the *Sustainable Planning Act* 2009 (Qld) or of a vegetation clearing provision, subsection (d) concerns a determination in respect of the area, whereas subsection (g) concerns a belief based on reasonable grounds that a person has committed a relevant offence in relation to the area. Each is a separate and distinct circumstance.

[37] This construction also does not give rise to the risk of double punishment. The fact that a Magistrate may, upon finding a relevant offence proven, make a restoration order does not render the issuing of a restoration notice under s 54B the imposition of a penalty for the same act or offence.

[38] Section 54B provides an administrative regime for the issuing of restoration notices by a decision maker who has the requisite state of mind not only as to a person having committed a relevant offence. The decision maker importantly must also have the requisite state of mind as to the ability of the matter to be rectified. Such a scheme is consistent with protection of the environment in the public interest. It is properly a separate administrative scheme which does not constitute the imposition of a penalty upon a particular offender. The order relates to the land in question.

[39] The President's construction of s 54B was correct. No error of law has been shown in the President's conclusions in relation to the preliminary questions relevant to s 54B of the Act.

Section 20B

[40] The President also did not err in the interpretation of s 20B of the Act. That section provides separate and distinct circumstances in which the decision maker may make a PMAV under the Act. The use of the disjunctive "or" at the end of each separate consideration supports that construction. That construction is also consistent with a plain meaning of the words, in the context of the Act as a whole, and having regard to the purpose and intent of the legislation.

[41] The fact that subsequent to these events, the legislature passed an amendment to s 20B which provides specifically that nothing prevents the relevant decision maker from making a PMAV for two or more of the circumstances mentioned in subsections (1)(a) to (i) over the same or different areas, does not alter that conclusion. That provision did not change, alter or amend the power already existing in the decision maker. A decision maker given such a power was entitled at law to rely on more than one subsection as the source of that power.[5]

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5 *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187; *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573.

[42] A consideration of the explanatory memorandum to that legislation supports that conclusion. The amendment to s 20B was "to clarify that the Chief Executive can make a property map of assessable vegetation (PMAV) for more than one circumstance listed in subsection (1)(a)(ii)…".

[43] The appellant has not established any error of law in relation to the President's conclusions in respect to the operation of s 20B of the Act.

Conclusions

[44] No error of law has been established in the determination of the preliminary questions by the President.

[45] I would order that the appeal be dismissed, with costs.