SUPREME COURT OF QUEENSLAND

CITATION:	*Burns v State of Queensland* [2004] QSC 434
PARTIES:	**CATHERINE ELIZABETH BURNS** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	SC 515 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	19 November 2004
DELIVERED AT:	Cairns
HEARING DATE:	15 November 2004
JUDGE:	de Jersey CJ
ORDER:	**1. Order, on the cross application of the respondent, the State of Queensland, filed on 9 November 2004, that the application of Mrs Burns filed on 12 November 2004 be dismissed. Costs reserved** **2. In the event that a further order on costs be sought, the parties make written submissions within 14 days to the Chief Justice's Chambers in Brisbane**
COUNSEL:	Fitzgibbon for the applicant Turnbull for the respondent
SOLICITORS:	The applicant appeared on their own behalf Crown Law for the respondent

[1] The applicant Mrs Burns seeks relief in respect of land near Cardwell. She purchased the land at a Crown auction in about 1968. In 1970 a deed of grant of an estate in fee simple issued. In the year 2001 or 2002, Mrs Burns decided to sell the land, and in order to maximize the sale price, to substantially clear it first. For that purpose, it was necessary that she secure a development permit, because of the requirements of the *Integrated Planning Act* 1997 (see also the *Integrated Planning Regulation* 1998 and the *Vegetation Management Act* 1999). That was because she proposed "the clearing of native vegetation on freehold land". Accordingly she applied to an assessment manager for a permit but it was refused. She then appealed against the refusal to grant the permit, to the Planning and Environment Court. White DCJ, constituting that court in Cairns, dismissed her appeal. Mrs Burns then appealed further, to the Court of Appeal (though the necessary leave was not first obtained). Her grounds of appeal raised most of the points to be agitated on the hearing of her application before this court. When I pointed to that

circumstance, her Counsel, Mr Fitzgibbon, said that Mrs Burns undertook to abandon the appeal to the Court of Appeal.

[2] I have of course read the reasons for judgment of White DCJ, given when he dismissed the appeal to the Planning and Environment Court. I agree with those reasons. I do not propose to recapitulate them. What must be accepted is that I have no jurisdiction to review the decision of White DCJ, whether by some process of appeal to me, or application for judicial review. Neither of those avenues is available. The only avenue for challenge to the decision of White DCJ would be by way of appeal (subject to a grant of leave), as Mrs Burns has previously acknowledged by purporting to institute an appeal to the Court of Appeal.

[3] When the application came on for hearing before me, Mr Fitzgibbon said that the applicant abandoned the claims for relief covered in paras one to eight of her application, and pursued only the claim for relief set out in para nine. The respondent, the State of Queensland, had filed an application, to be heard at the same time as the hearing of Mrs Burns' application, for summary dismissal of Mrs Burns' application, on the basis that it did not disclose any course of action, or was an abuse of process, etc. But when I emphasized to Mr Fitzgibbon that the absence of the need to consider the claims for relief covered in paras one to eight would substantially preclude his client's challenging the Queensland Parliament's legislative authority (as applicable here, to oblige Mrs Burns to obtain a development permit to facilitate the intended clearing), he withdrew the abandonment of those claims for relief.

[4] Paragraphs one to eight cover a number of matters which, though disparate, come down to a challenge to the State's legislative power to impose this requirement, or the Planning and Environment Court's statutorily endowed jurisdiction to hear the appeal entertained by White DCJ. The paragraphs contend, for example, that upon Mrs Burns acquiring the land, "it became Commonwealth land, owed by a citizen of the Commonwealth"; that the Planning and Environment Court had no jurisdiction in respect of it; that the "Supreme Court exercising federal jurisdiction" alone possessed such jurisdiction; and that that jurisdiction ousted any authority of public servants and others, such as was exercised by the assessment manager.

[5] These contentions are plainly untenable. Mrs Burns certainly has an indefeasible interest as registered proprietor of an estate in fee simple in the land. But the sovereign law making power of the Queensland Parliament, considered recently in a somewhat similar factual context in *Bone v Mothershaw* [2003] 2 Qd R 600, amply embraced its imposing this requirement as a prerequisite to her changing the complexion or presentation of her land in this way. In a different, though analogous way, the Parliament is clearly empowered to authorize planning schemes which restrict what the owners of estates in fee simple may lawfully do with their land. White DCJ disposed of the essence of these contentions in his reasons with which, as I have said, I agree: although, I emphasize, this is not an appeal or an occasion for what is termed judicial review.

[6] I turn to the claim for relief in para nine of the application, which is for an order under s 181 of the *Property Law Act* extinguishing the restriction said to burden the land, arising because of the need imposed on its registered proprietor to obtain the development permit. Because that right was "not reserved to the State of Queensland at the time of sale" (that is, in terms in the deed of grant), it should be

extinguished, it was submitted, in reliance on that provision. Certainly the deed of grant does not express this requirement. But as I have said, the broad legislative power of the State plainly authorized the establishment of the requirement, for the reasons expressed by White DCJ and consistently with the principles discussed in *Bone v Mothershaw*. The circumstances that the deed of grant did not refer to this requirement does not mean the landowner should be excused from the need to comply with it.

[7] Mr Fitzgibbon raised other points which I will briefly address. As to s 4(3)(g) of the *Legislative Standards Act*, and the contention that this requirement to obtain a permit adversely affected Mrs Burns rights, or imposed an obligation, retrospectively, the circumstance that she acquired the land before the obligation was statutorily introduced does not mean that the statute is to be regarded as operating retrospectively in relation to her: the burden was imposed on her prospectively from its enactment. It was a burden upon her, not the land. See *Bone v Mothershaw* para 25 per McPherson JA. (I need not deal with any significance in inconsistency with the requirements of that Act).

[8] Section 181 of the *Property Law Act* gives the court power to modify a "restriction arising under covenant or otherwise as to the user" of land. It would be unlikely were the court thereby authorized to negate a requirement imposed by Parliament through other legislation. But that aside, this is probably not, in any case, a restriction on the "use" of the land: it relates, rather, to a proposed change in the character or presentation of the land. Further, as I have said, it burdens the owner, not the land. As the list of matters of which a court must be satisfied before exercising the discretion arising under s 181 makes clear, the provision is concerned with adjusting rights as between individual land owners. This is quite a different case, where the requirement is directed broadly to what the legislature has considered to be the public interest. Mr Turnbull, who appeared for the State, primarily submitted that the provision was inapplicable because this requirement did not arise from a covenant. That is clearly correct. I raised during argument however the question of the scope of the words "or otherwise". I accept Mr Turnbull's submission that those words probably relate to restrictions implied, for example, by courses of conduct, rather than by express agreement between the parties to a covenant. I do not consider that the court could, under s 181, relieve a land owner of his or her obligation to apply for a permit under this statutory obligation.

[9] There is manifestly no substance to the applicant's claims (cf *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125). I therefore order, on the cross application of the respondent, the State of Queensland, filed on 9 November 2004, that the application of Mrs Burns filed on 12 November 2004 be dismissed.