SUPREME COURT OF QUEENSLAND

CITATION:	*Crowther v State of Qld* [2005] QCA 47
PARTIES:	**CLAIRE CROWTHER** (applicant) v **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	CA No 8551 of 2004 P & E Appeal No 2377 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	4 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2005
JUDGES:	McMurdo P, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal dismissed** **2. Leave to adduce additional evidence refused** **3. In all other respects, the applicant's applications should be dismissed**
CATCHWORDS:	ENVIRONMENT AND PLANNING – POLLUTION - NOXIOUS AND OFFENSIVE TRADES AND PREMISES – OFFENCES – OTHER OFFENCES – where applicant successful in proving offences against the *Environmental Protection Act* 1994 (Qld) in Planning and Environment Court (Qld) – where orders made requiring respondent to carry out works designed to contain offensive emissions ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT – RIGHT AND AVAILABILITY OF APPEAL – where application for leave made under s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) – where applicant alleged lack of jurisdiction – where applicant alleged Judge in Planning and Environment Court was biased in favour of the respondent – where applicant alleged intimidation by Judge

in Planning and Environment Court – where applicant had to prove that there was a reasonable prospect of establishing an error or mistake of law – whether applicant satisfied this threshold requirement – whether there are grounds for leave to appeal

Environmental Protection Act 1994 (Qld), s 3, s 6, s 505, s 430, s 438(2), s 440
Integrated Planning Act 1997 (Qld), s 4.1.56
Uniform Civil Procedure Rules 1999 (Qld), r 667, r 668

Friends of Stradbroke Island Association Inc v Sandunes Pty Ltd [1998] 101 LGERA 161, cited
HA Bachrach Ltd v Caboolture Shire Council [1992] 80 LGERA 230, cited

COUNSEL: The applicant appeared on her own behalf
M Hinson SC for the respondent

SOLICITORS: The applicant appeared on her own behalf
Crown Law for the respondent

[1] **McMURDO P:** I agree with Mackenzie J that the application for leave to appeal should be refused. A party may appeal by leave of this Court from a decision of the Planning and Environment Court under s 4.1.56(2) *Integrated Planning Act* 1997 (Qld). The grounds of appeal are limited to error or mistake of law or absence or excess of jurisdiction (s 4.1.56(1)). For the reasons given by Mackenzie J, Ms Crowther has failed to make out her contentions of legal error or absence of jurisdiction. It follows that she has not established any reason for this Court to grant leave to appeal. I agree with the orders proposed by Mackenzie J.

[2] **JERRARD JA:** In this application I have read and respectfully agree with the reasons for judgment and orders proposed by Mackenzie J.

[3] **MACKENZIE J:** This is an application for leave to appeal against a decision of Senior Judge Skoien, constituting the Planning and Environment Court, on 24 September 2004 varying an order of Judge Robin made on 27 February 2003 in that Court. The applicant had been aggrieved by certain activities carried on at the Yeronga Institute of TAFE (YIT). In reasons delivered on 20 December 2002, Judge Robin found that offences had been committed against sections 430, 438(2) and s 440 of the *Environmental Protection Act* 1994 (Qld) and that further offences would be committed unless restrained.

[4] On 27 February 2003 formal orders were made. There was a declaration that the offences were proved and an order was made requiring the respondent State of Queensland to carry out works designed to contain offensive emissions within the relevant blocks C and D or parts thereof and to provide for their safe dispersal. There was a further requirement to install systems to warn of and limit the consequences of failure of the containment measures. Some of those measures were required to be implemented by 31 May 2003 and some by 31 July 2003. There were also the following orders:

> "3. Order that the respondent ensure that after January 2005, in respect of any processes of welding, cutting, machining or grinding of metal conducted at the Yeronga Institute of TAFE, any outlet for odour emissions be located further than 100 metres from Park Road, Yeronga.
> 4. The parties shall have liberty to apply."

[5] In reasons that accompanied the making of the order on 27 February 2003 it is apparent that Judge Robin remained uncertain whether the orders, and particularly that in paragraph three, would be fully effective to eliminate the problem. He specifically adverted to making the order on the basis that it was one which the court may set aside or vary under r 667 or r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) or under the analogous principles of the general law, although perhaps, with more focus on protecting the interests of the applicant than those of the respondent. He also said the following with regard to paragraph three:

> "I appreciate that paragraph three is contentious and expect that the Court may be asked to revisit it. Ms Crowther has indicated that 100 metres is inadequate. The respondent may be able to show that it is excessive. Bearing in mind anything that could be required after the proposed works are implemented, the respondent may also, depending on the circumstances, reasonably require extra time or some refinement of this order which, unlike the others, of course, was not suggested by it."

[6] On 24 September 2004, Senior Judge Skoien heard an application by the respondent State of Queensland, the effect of which was to extend by six months the time within which to comply with Judge Robin's order. As explained by counsel, the respondent was relying on Judge Robin's intimation that circumstances enlivening a basis for an application under UCPR r 668 might subsequently become apparent in view of the uncertainty expressed at the time about the feasibility of paragraph three when it was included. This application was opposed by the Ms Crowther, who herself raised issues concerning alleged non-compliance by the respondent with Judge Robin's orders, which involved a request in an affidavit by her for leave to admit new evidence and for this Court to review and re-exercise the discretion exercised in the court below. She also sought to apply for an order that existing stacks on C and D blocks be dismantled "after January 2005" and that no variation of paragraph three be granted. The application insofar as it relates to dismantling the existing stacks involves revisiting and altering the measures to be taken under the original order. That is not a matter upon which the court can pronounce in the present proceedings.

[7] The matters raised by the applicant in her own application led to discussion of whether decommissioning of the foundry (which the respondent said it had done) required only cessation of its use as a foundry or whether its complete removal was necessary. His Honour, correctly in my view, accepted the former meaning. He also referred to the need for strict proof when an allegation was made that contempt of court had been committed. The sufficiency of evidence upon which the applicant wished to rely to achieve such proof, including a statement to the effect that foundry-like emissions capable of being smelt were still occasionally issuing from the premises, was discussed. The record shows that ultimately the applicant accepted there was no basis for any orders to be made in relation to those matters. That concession was realistic. While there are passages in the submissions touching

on aspects of alleged non-compliance with containment obligations, there is no ground of appeal directly relevant to those aspects of the case. They are therefore not in issue before us directly but are mentioned as part of the context in which the allegation of a denial of natural justice must be resolved.

[8] In support of the application, the respondent relied on an affidavit of Ms Crisp, Director of Business Services at YIT, outlining what had already been done for the purpose of complying with the orders and, in particular, difficulties encountered in complying with paragraph 3. Amongst other things, Ms Crisp's affidavit referred to advice received by YIT from expert consultants that it was impracticable and very costly to build a stack with an outlet 100 metres from Park Road. (This evidence was not expressly challenged when Ms Crisp gave oral evidence; the applicant's complaint that there was no evidence of costings loses force because of this). Then the option of relocating engineering classes had been explored with only partial success. Then the option of seeking commercial premises in industrial areas to be leased for the short to medium term was implemented. Her affidavit contains the following paragraph:

> "12 Locating suitable alternative premises has to date proved difficult. At this time, it appears extremely unlikely that relocation can occur by the end of January 2005."

[9] During subsequent discussion with the respondent's counsel, Senior Judge Skoien referred to paragraph 12 and observed that Ms Crisp had said simply that it appeared unlikely that the relocation could be achieved by the relevant date. His Honour expressed concern that there were still three months left before the prescribed time elapsed and pointed out that Ms Crisp had not said that matters had reached a stage where it would be impossible to set up alternative locations in January 2005. It was not surprising that he had reservations about the sufficiency of such a vague statement to found an extension of time. He tentatively suggested that he was prepared to adjourn the matter for about a month to keep the pressure on and to reconsider the matter at that point. He said he was loth to extend the time when it was only deposed that it would be difficult to achieve the deadline.

[10] Senior Judge Skoien then explained to the present applicant that he was proposing that the respondent try for another couple of months because he was not persuaded that he should extend time simply because it had been said that it was unlikely that compliance would be achieved by January 2005. She agreed that she wanted the relocation to occur as soon as possible but then said: "I just wish that you weren't giving them a caveat until November, that you would be able to say today, 'you must comply by the Court order' ". She questioned whether the evidence was sufficient to justify an extension at all and asked for the opportunity to cross examine Ms Crisp on her affidavit. Senior Judge Skoien then agreed to give leave for Ms Crisp to give oral evidence and be cross examined.

[11] This resulted in Ms Crisp giving more detailed evidence than was in her affidavit about steps taken to relocate students engaged in the activities that were still of concern. She said that at the time of giving evidence, a property that met zoning, spatial and proximity to transport requirements had been located and that discussions with the owners were ongoing. However, using the site would involve modifying an industrial building to suit the needs of an educational facility, obtaining town planning approval for a change of use and relocating equipment. The indicative timeline provided for relocation at about the end of June 2005. There

is an allegation in the written submissions that the applicant was denied the opportunity to have an adjournment to prepare evidence to rebut this evidence. However, there is nothing on the face of the record to suggest that she sought one.

[12] The applicant asked Ms Crisp, amongst other things, why it had taken twelve months to decide that relocation was necessary. She replied that all issues had to be worked through. The applicant also asked why relocation to an existing facility at Salisbury was not possible. Ms Crisp said that it was a centre of excellence for building and construction and that heavy metal fabrication of the kind that required to be relocated was not done there. It had been possible to relocate sheet metal work, where some aspects were allied to building and construction work. It was also a question of availability of space to house the remaining activities there.

[13] By this time, Senior Judge Skoien was emphasising to the applicant that the issue was whether the process of complying with the order could be completed by the time required and invited her to question Ms Crisp with a view to testing the evidence as to that. Aspects of relocating to other existing facilities, contractual obligations to carry out training and the consequences of disruption of training for the students were touched upon.

[14] The applicant gave evidence in which, amongst others things, she stressed that an extension of time would expose her and other nearby residents to further emissions and consequential harm and inconvenience. She suggested, in effect, that the respondent was delaying compliance for its own purposes.

[15] Senior Judge Skoien, in allowing the State of Queensland's application, said that the intent of Judge Robin's order was that it was hoped that an engineering solution would succeed. That had been investigated; from his experience of cases involving engineering issues, that the process would have necessarily been time consuming and expensive. He said that a public institution did not have the same capacity as private enterprise to make decisions quickly. He was satisfied that the engineering solution was beyond the means of YIT, which was a taxpayer funded organisation. Relocation of the activity that might create a residual nuisance to another TAFE had been considered but had proved to be unworkable. Then the process of identifying a suitable site to lease in an industrial area had been explored. He also referred to the number of people who had to be relocated and the potential for disruption of training with possible economic consequences. He saw no evidence of wilful misconduct in the process. He was satisfied, on the evidence before him, that it was physically impossible to effect relocation by the time required by paragraph 3 of the order.

[16] For the purpose of determining the present application for leave to appeal against Senior Judge Skoien's decision, events subsequent to the hearing before him are irrelevant. The application must be determined on the evidence as it was at the time of his decision. However, relevant events after that date will be important in the event that any further extension of time for compliance with the orders is sought.

[17] In any situation like that underlying the present case, where it was recognised that there was a need to allow a reasonable time for technical investigations as to the feasibility of ways to comply with an order, a decision making process to be completed, and to do things necessary to implement the chosen solution, the question of what is a reasonable time for compliance must be determined in the first

instance. Any subsequent application to extend the time for compliance must be judged by weighing efforts already made to complete the process and the difficulties in completing it within the prescribed time against the interests of the person entitled to the benefit of the order, in this case, a person who has established a right to have a nuisance abated. The quality of efforts to achieve compliance, in the context of the degree of complexity of complying within the time initially allowed, will be one relevant factor. If efforts in that regard are judged not to have been as timely as they should have been, it is likely that the longer the period sought to enable completion of the abatement, the less the merit of an application to extend time further is likely to have. The longer the process takes, the more the balance will shift in favour of the person resisting the extension. As time goes by, the more likely it is that reliance by a respondent on adverse economic consequences to it will become less cogent. A point will come when the proper view is that they are the result of the respondent's failure to act with reasonable expedition. Eventually, the proper disposition of an application to further extend the time for compliance will be to refuse it. When that prospect looms, the sensible response would be to accept that a greater sense of urgency must be injected into efforts to bring about compliance.

[18] Section 4.1.56 of the ***Integrated Planning Act*** **1997** is as follows:

> "**4.1.56 Who may appeal to Court of Appeal**
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> (1) A party to a proceeding may, under the rules of court, appeal a decision of the court on the ground-
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> (a) of error or mistake in law on the part of the court; or
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> (b) that the court had no jurisdiction to make the decision; or
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> (c) that the court exceeded its jurisdiction in making the decision.
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> (2) However, the party may appeal only with the leave of the Court of Appeal or a judge of Appeal."

[19] The decision by Senior Judge Skoien was essentially an exercise of a discretionary power to vary an order previously made. The present applicant's submissions included reliance on alleged disregard of the objects of the *Environmental Protection Act* in s 3 to s 6 and the provisions of s 505 of it to found an argument that there was a lack of jurisdiction to vary the order of Judge Robin. A fundamental difficulty with the argument is that it was accepted by Senior Judge Skoien that the preconditions for relief remained in existence. All he did was extend time for doing what had already been ordered. He did so in a case where the making of the order in the terms of paragraph three was acknowledged by Judge Robin to be of uncertain feasibility, liberty to apply was given, and it had at least been foreseen as a possibility that circumstances arising after it was made might make it necessary to revisit its terms. It was in this sense that Senior Judge Skoien referred to paragraph three as being a "guesstimate", which may have been a little hyperbolic, but, in context, was not an erroneous description. I am satisfied that UCPR r 668(1)(b) gave Senior Judge Skoien jurisdiction to make the order that had the effect of giving a longer period in which to remedy the nuisance.

[20] Senior Judge Skoien appeared to have thought during the course of the hearing that paragraph 12 of Ms Crisp's affidavit was insufficient to establish that an extension of the period sought should be granted immediately. He suggested tentatively an

adjournment for a short period to see if compliance with the time allowed by the third paragraph of the order might be achieved. He then acceded to the applicant's request to cross-examine the deponent who gave oral evidence. That oral evidence, which supplemented the evidence in the affidavit considerably, plainly persuaded Senior Judge Skoien that, by the end of the hearing, the case for an extension had been made out. On the evidence as it stood at the end of the hearing, it was clearly open to him to make the findings referred to above and to exercise his discretion in favour of extending the time. The decision was not one that no reasonable tribunal of fact could make. There is no error of law demonstrated.

[21] Ground (iv) of the Amended Notice of Appeal, as the applicant formulated it at the hearing before us, raised both questions of jurisdiction to make the order and sufficiency of evidence. Grounds (i) and (v) raise issues of denial of natural justice. Ground (i) alleges bias by the judge towards the State of Queensland and against the applicant, preventing her as a lay advocate from conducting her case by due process of law. Ground (v) alleges a denial of natural justice because "there are no grounds for any presiding Judge to intimidate or examine the applicant at the Bar Table". There is also a variety of matters described in the applicant's written submissions as denials of natural justice. Sufficiency of the evidence to justify making the order, denial of the fruits of victory obtained in the hearing before Judge Robin and the fact that the order was varied although there was no appeal against his findings fall into this category. The matters just mentioned are not properly characterised as denials of natural justice as that term is understood for present purposes. What has been said in paragraph [20] is germane to them.

[22] With regard to the complaint about the way in which the hearing was conducted, at the present hearing the applicant presented her case with a structure and focus rarely achieved by a self represented litigant, although her written submissions are more discursive. Examination of the record below gives the impression that she also made the points in support of her case clearly before Senior Judge Skoien. It may be accepted that for most lay persons, conducting, on their own behalf, a case of great importance to them will be an experience that has its challenges. However, it may not be well understood by lay persons that it is a common and beneficial technique for a judge to ask questions of the person conducting the case, even where it is conducted by a legal practitioner, for the purpose of bringing the issues into focus. In cases where self represented litigants are involved it is likewise beneficial for a judge to engage in dialogue with the litigant, principally for the purpose of ensuring that the litigant's case is properly understood and that his or her case is analysed as fully as possible. The fact that such a dialogue is engaged in is not of itself indicative of bias. Nor is it indicative of bias that a litigant is restricted to matters relevant to the case. I have read the record below and am aware of the applicant's submissions in this regard. I am satisfied that Senior Judge Skoien did no more than engage in the normal practice just described. Having to engage in that process may be a subjectively intimidating experience for the litigant. However, that subjective feeling does not equate to bias or intimidation in the sense necessary to establish a ground upon which it may be said that the proceedings have been tainted. Examination of the record gives a clear impression that the judge conducted his dialogue with the applicant patiently and courteously. There is no basis upon which the applicant is entitled to be granted leave in relation to grounds (i) and (v).

[23] The remaining grounds, (ii) and (iii), complain respectively that material evidence was deemed inadmissible and that material affidavits could not be tendered. The precise ambit of these complaints is not as clear as it might be. However, there are two identifiable occasions where the applicant was stopped from asking questions. One concerned whether students had been told of the legal proceedings. This line of questioning appears to have been directed to furthering a case that the respondent was deliberately delaying compliance for its own purposes. In any event, before the judge intervened, an answer suggesting that no formal advice of a possible change of training venue had been given, although individuals might be aware of the situation. The relevance of this line of questioning was marginal at best, in my view.

[24] The other was when the judge ruled that questions about the consequences of a change in training plans for students, with particular focus on the financial consequences, were not relevant. Ms Crisp had deposed that contracts would have to be renegotiated, as provided for in the *Training and Employment Regulation* 2000 (Qld) and that prevention of training would cause a backlog. Any failure to deliver training within the normal duration of an apprenticeship could have financial consequences for the apprentices. Even if it was an error to restrict questioning on the subject, the consequences of inability to perform contractual arrangements and the likelihood of loss if they were not performed or there had to be renegotiation of them is so self evident that restriction of the line of questioning could not reasonably have affected the outcome.

[25] The ground that material affidavits could not be tendered was not the subject of any oral submissions. However, comment can be made about two matters. One is that there is nothing on the face of the record suggesting that any application was made by the applicant to read other affidavits. Once it was apparent that the kind of evidence she intended to rely on to suggest there had been contempt was inadequate and she accepted that it was so, there was no further issue in that regard. The second is that there was no request, on the face of the record, to have deponents of other affidavits cross-examined, nor any complaint on the record about their unavailability, alluded to in the written submissions.

[26] Where leave is sought to appeal to this Court under s 4.1.56 of the *Integrated Planning Act* 1997 (Qld), leave of the Court or a Judge of Appeal is necessary. It is necessary that an applicant for leave demonstrate that there is a reasonable prospect of establishing an error or mistake of law by the judge constituting the Planning and Environment Court (*Friends of Stradbroke Island Association Inc v Sandunes Pty Ltd* [1998] 101 LGERA 161). The error must be one that could have materially affected the decision (*HA Bachrach Ltd v Caboolture Shire Council* [1992] 80 LGERA 230, 237-238). Alternatively, there must be reasonable prospects of establishing that there was no jurisdiction to make the decision, or that the Court exceeded its jurisdiction.

[27] For the reasons given, I am satisfied that the applicant has failed to satisfy any of these threshold requirements for a grant of leave to appeal. The application for leave to appeal should be dismissed. Leave to adduce additional evidence should be refused and in other respects, the applicant's applications should be dismissed. Since the respondent does not seek costs, there should be no order as to costs.