SUPREME COURT OF QUEENSLAND

CITATION:	*Sibelco Australia Ltd v Magistrate Graham C Lee & Anor* [2014] QCA 113
PARTIES:	**SIBELCO AUSTRALIA LTD** ACN 000 971 844 (appellant) **v** **MAGISTRATE GRAHAM C LEE** (first respondent) **GRAHAM BELL** (second respondent)
FILE NO/S:	Appeal No 10333 of 2013 SC No 3199 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	22 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2014
JUDGES:	Fraser and Gotterson JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – PREROGATIVE WRITS AND ORDERS – CERTIORARI – DISCRETION OF COURT AND MATTERS PRECLUDING RELIEF – GENERALLY – where the appellant sought review of the Magistrate's decision that it had a case to answer in respect of the second respondent's complaints – where the applicant sought certiorari for the purpose of quashing that decision, as well as declarations concerning statutory construction – where such relief was refused, inter alia, on discretionary grounds – where the primary judge considered that granting the declarations sought would amount to a collateral attack on the criminal proceedings – whether there was any miscarriage in the exercise of the discretion by the primary judge ADMINISTRATIVE LAW – JUDICIAL REVIEW – PREROGATIVE WRITS AND ORDERS – CERTIORARI –

– GROUNDS FOR CERTIORARI TO QUASH – ERROR OF LAW ON THE FACE OF THE RECORD– GENERALLY – where the appellant argued the error of law was the Magistrate's failure to hold that a "mining activity" could not also be a "Chapter 4 activity" – whether there were facts not disclosed on the record which were essential to establish the asserted error of law

ADMINISTRATIVE LAW – JUDICIAL REVIEW – PREROGATIVE WRITS AND ORDERS – CERTIORARI – – GROUNDS FOR CERTIORARI TO QUASH – EXCESS OR WANT OF JURISDICTION – GENERALLY – where the appellant argued the Magistrate made an error of law concerning the statutory construction of the offence – whether an error of law concerning an element of an offence, which if established means no offence could be made out, is a jurisdictional error

Environmental Protection Act 1994 (Qld), s 147, s 427
Justices Act 1886 (Qld), s 222

Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, applied

COUNSEL: P O'Shea QC, with G Handran, for the appellant
M A Wickramasinghe (*sol*) for the first respondent
A Glynn QC, with K Mellifont QC, for the second respondent

SOLICITORS: Sparke Helmore for the appellant
Crown Law for the first respondent
Department of Environment and Heritage Protection for the second respondent

FRASER JA: This is an appeal from a decision in the Trial Division dismissing an application for review of a Magistrate's decision which found that there was a case for the appellant to answer in respect of complaints made by the second respondent. The application for review in the Trial Division sought an order in the nature of certiorari removing to the Supreme Court that decision for the purpose of quashing it and declarations concerning the construction and application of statutory provisions, the determination of which might resolve a question whether or not an offence could be established.

The primary judge accepted a submission that the relief sought by the appellant in the Trial Division should be refused on discretionary grounds. It was pointed out in argument in this Court that the primary judge had remarked that her Honour "did not understand the

[appellant] to seek declarations (essentially in terms of its view of the statutory construction point), in the event that relief in the nature of *certiorari* was not granted". The appellant argued, and it should be accepted for present purposes, that in fact the appellant had sought to pursue the declarations even if relief in the nature of certiorari was not granted. However, the primary judge did not conclusively assert that declaratory relief was not sought, and indeed, went on to hold that there was good reason why the Court would not grant declarations in such circumstances, that being that to do so would amount to a collateral attack on the criminal proceedings.

The appellant challenges the exercise of the discretion by the primary judge. The appellant submits that it miscarried because the primary judge did not take account of cases in which declaratory relief had been granted in similar circumstances. It is, however, clear that the primary judge appreciated that there was a discretion to be exercised and that it could be exercised favourably to a party in the position of the appellant. I am not persuaded that there was any miscarriage of the discretion on the ground advanced for the appellant.

The primary judge took into account the Court's traditional reluctance to interfere with an existing criminal process, and the appellant does not contend that this was not a proper consideration to take into account. The primary judge noted that the appellant had argued that the matter was unusual in that there was little dispute about the facts, and that the error asserted was an error of statutory construction which could be determined by a Court which had not heard the witnesses. The primary judge also noted the submission that, because the Magistrate had adjourned the remainder of the trial for reasons unconnected with the application, determination of the application would not itself fragment the summary trial before the Magistrate. The primary judge accepted that, in those respects, the instant case was unusual.

I interpolate here that this Court gave leave to the appellant to file additional evidence. The additional evidence shows that since the decision of the Magistrate that there was a case to answer, the matter has proceeded and the appellant has elected to call evidence in

its defence in the Magistrates Court. Insofar as that is a relevant consideration, it does not assist the appellant's argument that the discretion should be exercised favourably to it.

Returning to the primary judge's reasons, her Honour was not persuaded that even if there were grounds for making an order akin to certiorari, that order should be made or that declarations should be granted. The primary judge took into account that the legislature had set out the processes for trial and appeal after trial of criminal contraventions such as the subject of the application, and that respect should be accorded to that structure and to that process. The primary judge expressed the view that it could not help but diminish that respect if the Court sat as a supervisory body overseeing the process and substituting its own view for the views of those entrusted to deal with those matters. That was a proper consideration to be taken into account. As the primary judge also observed, there may never be a conviction and there may never be an appeal, and if there is an appeal, s 222 of the *Justices Act* 1886 (Qld) provides that the appeal lies to the District Court of Queensland. As the primary judge apprehended, that there is an alternative remedy for the appellant by way of appeal in the event that there is a conviction is another factor militating against the exercise of the discretion.

In the result, I could see no error in the exercise of the discretion by the primary judge. On that ground alone, this appeal should fail.

In addition, the application for certiorari, or an order in the nature of certiorari, is, in my opinion, one which could not succeed. In order to explain why this is so, it is necessary to say a little bit about the complaint which was made in the Magistrates Court.

That complaint was based on s 427 of the *Environmental Protection Act* 1994 (Qld) which provides that a person must not carry out a Chapter 4 activity unless the person is a registered operator for the activity or is acting under a registered certificate for the activity. A Chapter 4 activity is defined in the Act as "an environmentally relevant activity" other than a mining activity. The appellant's case is that reference to the definitions of environmentally relevant activity and related provisions of the Act demonstrates that what the appellant did, having regard to the facts of the case, could not

be a Chapter 4 activity but was exclusively a mining activity. That case depends, in part, upon the definition of "mining activity" in s 147 of the *Environmental Protection Act*, which relevantly defined it as including activities which are for, amongst other matters, mining under the *Mineral Resources Act* 1989 (Qld), or an activity which is directly associated with, or facilitates or supports such an activity and may cause environmental harm.

The complaint charged the offence which I have mentioned and gave particulars. The particulars identified the dates of the alleged contraventions and identified or alleged that the contraventions had occurred "in conjunction with" the defendant's mining activity. The error of law asserted by the appellant was that what was a "mining activity" in substance could not be regarded as a "Chapter 4 activity".

The first question which arose in relation to certiorari was whether the asserted error appeared on the face of the record. It was accepted that the record comprised the decision made by the Magistrate rejecting the submission that there was no case to answer and finding that there was a case to answer in respect of the charges, the complaints, and the particulars of the charges.

The primary judge held that there were facts which were not disclosed on the record which were essential to establish the asserted error of law. Three of those facts were as follows: (a) mining for the relevant mineral, silica, at the pits in question entailed removal of topsoil and then, with front-end loaders, removal of an undifferentiated mass containing both silica and B grade sand; (b) it was impossible to remove silica from the pits without also removing B grade sand as part of that undifferentiated mass; and (d) removal of B grade sand in that fashion was an activity which "may cause environmental harm" within the meaning of s 147(2)(c)(ii) of the *Environmental Protection Act*. The primary judge held that the record did not reveal those facts.

In this appeal, the appellant argued that the facts were sufficiently disclosed by the contentions in the particulars that the extraction of the B grade sand, which was alleged to constitute the contravention, occurred in conjunction with the appellant's mining activities on the mining leases and that the sand was extracted from the same pit or quarries which

were used to carry out the mining activities. It seems clear that the reference to those activities being carried on in conjunction and in the same pits or quarries did not disclose that the mining for the mineral necessarily itself entailed removal of the sand which did not constitute the mineral, which is the subject of the offence. In other words, the error of law does not appear on the face of the record.

Secondly, I would respectfully endorse the decision of the primary judge that the asserted error of law was not a jurisdictional error. This primarily depends upon an analysis of the High Court's decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. The appellant argued that there was an error of law going to jurisdiction because the error of law concerned an element of the offence; if the error were established, no offence could be made out. It is apparent, however, that in *Kirk* the High Court required something more than that. The joint judgment, in paragraph 72, referred to the error as "misconstruction of the relevant statute, thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case."

The error led the Industrial Court to make orders which convicted and sentenced the appellants in a case where that court had no power to do so. Their Honours observed, in paragraph 74, that:

> "It had no power to do that because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced. And the failure to identify the particular act or omission, or set of acts or omissions, alleged to constitute the contravening conduct followed from the misconstruction of s 15. By misconstruing s 15 of the OH&S Act, the Industrial Court convicted Mr Kirk and the Kirk company of offences when what was alleged and what was established did not identify offending conduct."

In this case, it is not contended, and it could not be contended, that the offence alleged against the defendant was not alleged in the originating proceeding. For those reasons, as I have indicated, I would hold that certiorari could not go in this case.

For the reasons which I have just given, I would dismiss the appeal.

GOTTERSON JA: I agree.

ATKINSON J: I agree.

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FRASER JA: The appeal is dismissed with costs.