SUPREME COURT OF QUEENSLAND

CITATION:	*Burns v State of Queensland & Croton* [2006] QCA 235
PARTIES:	**CATHERINE ELIZABETH BURNS** (applicant/appellant) **v** **STATE OF QUEENSLAND & LUKE CROTON** (respondent/respondent)
FILE NO/S:	Appeal No 526 of 2006 SC No 515 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time / General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 June 2006
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2006
JUDGES:	Jerrard JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Application for extension of time dismissed** **2. Parties have 14 days within which to make written submissions as to costs**
CATCHWORDS:	CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION AND LEGISLATIVE POWERS – LEGISLATIVE POWERS – GENERAL LEGISLATIVE POWERS – whether requirement to obtain a permit to clear native vegetation affects the "use" to which land may be put or is related to a proposed change in the appearance or character of land – whether State parliament has the legislative power to enact requirements related to a proposed change in the appearance of the land APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – whether a Supreme Court trial division judge has jurisdiction to review decisions of Planning and Environment Court APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED –

whether applicant's claim for order under s 181 *Property Law Act 1974* (Qld) has any substance – whether extension of time should be granted

HIGH COURT AND FEDERAL COURT – OTHER MATTERS RELATING TO FEDERAL COURTS – PROCEEDINGS BY AND AGAINST THE COMMONWEATLH AND STATES – PROCEDURE GENERALLY – PARTIES TO PROCEEDINGS – where Commonwealth Attorney-General declined invitation to appear – whether notice of appeal raised any matter arising under Commonwealth Constitution to justify adjourning hearing of application for an extension of time under s 78B *Judiciary Act 1903* (Cth)

Integrated Planning Act 1997 (Qld), s 3.5.15
Judiciary Act 1903 (Cth), s 78B
Property Law Act 1974 (Qld), s 181
Vegetation Management Act 1999 (Qld)

Bone v Mothershaw [2003] 2 Qd R 600; [2002] QCA 120; Appeal No 294 of 2001, 12 April 2002, followed
Dore & Ors v Penny [2006] QSC 125; SC No 564 of 2005, 5 May 2006, cited

COUNSEL: D J Walter appeared in order to assist applicant/appellant with written argument
D G Turnbull for the respondent

SOLICITORS: The applicant/appellant appeared on her own behalf with D J Walter assisting
Crown Law for the respondent

[1] **JERRARD JA: The Application** These proceedings, although difficult to characterise accurately, include an application for leave to appeal a judgment of de Jersey CJ given on 19 November 2004.[1] That application was filed on 20 January 2006, and the greater part of it consisted of lengthy reasons justifying the grant of leave.[2] It is appropriate to treat it as an application for an extension of time within which to appeal that decision. The application, which advises that Catherine Burns appeals the whole of the judgment of the Chief Justice on 19 November 2004, also advises that Mrs Burns further appeals a Decision Notice given under s 3.5.15 of the *Integrated Planning Act 1997* (Qld) (the "*IPA*") and the *Vegetation Management Act 1999* (Qld) (the "*VMA*"). It also contends the Chief Justice upheld a decision of the Planning and Environment Court (the "P & E Court") constituted by White DCJ, dismissing an appeal to that court by Catherine Burns.

[2] That purported further appeal against the Decision Notice is incompetent, as this Court has no jurisdiction to hear at first instance appeals against Decision Notices given under the *IPA*; and de Jersey CJ did not purport to hear, and either uphold or dismiss, the decision of the P & E Court in which White DCJ dismissed, on 2

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1 The application for leave appears at pages A1-A3 of Volume 1 of the applicant's indexed paginated bundle of documents.

2 Reproduced at A3-A31 of the applicant's indexed paginated bundle, Volume 1.

August 2004, Catherine Burns' appeal to that court from a Decision Notice dated 27 August 2002 refusing her application dated 4 July 2002[3] for approval of an application to clear native vegetation on land she owns south of Cardwell.[4]

Background

[3] Her application for a permit to clear native vegetation had been refused because her land was described as a known habitat for the endangered mahogany glider, as well as a known general habitat for the endangered cassowary. That 25 acre block was said to be in one of the key areas in which the maintenance and establishment of corridors of habitat was required in order to enable gliders to disperse within the fragmented habitats occurring in the area and hence to ensure their survival.

[4] White DCJ recorded in his decision that Mrs Burns was then approximately 70 years old, and she had purchased the land at a Crown auction in about 1968 for $525. A Deed of Grant of an estate in fee simple was issued on 12 November 1970[5], and that Deed reserves to the Crown various rights under specified legislation, essentially rights to gold, minerals, to access for searching for those, and for obtaining petroleum.

[5] That land had been bought as an investment for the retirement of Mr and Mrs Burns; Mr Burns was a police officer who had some 26 years of service in the Queensland Police Force when he passed away in 1978. After her husband's death, Mrs Burns had sole responsibility for raising her son, and could not afford to keep a house she had inherited in Innisfail. She lives there still in a rented house, and her only asset of any significance is the subject land a few kilometres south of Cardwell. She had decided to sell that land in about 2002 to get money on which she might live, and thought that clearing it would help increase the price. It was that decision that led her, as White DCJ described, into the web of intricacies of the *IPA.* He said that the decision refusing her permission to clear native vegetation has resulted in substantial hardship to Mrs Burns, and has substantially reduced the market value of her land. She had been singled out to bear a very substantial cost of preserving the habitat of the mahogany glider, and White DCJ held with regret that the appeal rights she exercised to the P & E Court did not allow that court to do justice to her.

Appeal from the P & E Court

[6] Subsequent to White DCJ's dismissal of her appeal to the P & E Court, Catherine Burns lodged a Notice of Appeal in this Court, on 26 August 2004, appealing the decision of the P & E Court.[6] That Notice of Appeal is a lengthy document, described in it as researched and prepared by David J Walter, giving his address, on behalf of Catherine Burns of Innisfail. It is signed by both Mrs Burns and David Walter, in August 2004. The essence of the argument made in that Notice of Appeal is that the Queensland Parliament could not validly legislate to restrict Mrs

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3 A portion of that application is reproduced at A222 and 223 of Volume 2 of the applicant's indexed paginated bundle.

4 The decision of the P & E Court is at pages R61-R77 of Volume 1 of the respondents' bundle of documents.

5 Reproduced at A126 of Volume 1 of the applicant's bundle of documents.

6 That notice appears at pages R11-R30 of Volume 1 of the respondents' bundle of documents.

Burns' otherwise existing right as an owner of her land in fee simple to clear native or other vegetation on it.

[7] That appeal from the P & E Court (Appeal Number 7419 of 2004), was ultimately dismissed by consent in this Court, following a good deal of correspondence between Mr Walter and a lawyer employed in the office of the Crown Solicitor for the State of Queensland. That correspondence is annexed to the affidavit of that lawyer, Letitia Marshall, filed on 25 May 2006 in this application for leave to appeal from the judgment of de Jersey CJ. Ms Marshall's affidavit paints the picture that Mr Walter had been conducting those appeal proceedings on Mrs Burns' behalf, advising Mrs Burns, obtaining her signature on relevant documents, preparing the contents of the Notice to Appeal and supporting documents and arguments, filing documents, and dealing with Ms Marshall on Mrs Burns' behalf. The Notice of Agreement to Dismiss Appeal Number 7419 of 2004 is signed by Mrs Burns and dated 8 March 2005.

[8] It is clear that Mr Walter had also prepared the original Notice of Appeal to the P & E Court[7], signed by both Mrs Burns and David Walter, whose signatures are dated 10 December 2003. The notice advises that Mrs Burns asks that Mr Walter, "who wrote my appeal that is now lodged before this Court", be allowed to act as "a Friend of the Court at the time of my appeal on my behalf." That did happen, as the transcript of the proceedings in the P & E Court records that Mr Walter appeared as Mrs Burns' agent.[8] The order made by the P & E Court on 2 August 2004 records that the court heard Mr Turnbull of counsel for the respondent State of Queensland, and Mr Walter on behalf of the appellant Catherine Burns. White DCJ's reasons for judgment record that Mr Walter appeared as Mrs Burns' agent, and had represented her interest with passion and vigour, accompanied by unfailing courtesy to the court and persons representing opposing interests.

[9] It seems there is no dispute about any matters stated in the judgment of White DCJ. The decision to refuse her application was made ultimately in reliance on the provisions of the *VMA* in force as at 27 August 2002, the date of the Decision Notice. The applicable development code was Appendix 2 to the State Policy for Vegetation Management on Freehold Land – September 2000[9] which, unlike a regional vegetation management plan as then described under that legislation (now termed a regional vegetation management code), did not require public notice of its preparation. The position may be different under the current version of the *VMA*, which is in Divisions 3 and 4 of Part 2 of that Act, dealing respectively with what are now termed regional vegetation management codes and declarations of areas of high nature conservation value, require public notice of proposals to approve regional codes or declare areas to be of high nature conservation value. Mrs Burns might benefit from properly qualified advice which examines the current form of the *VMA*, the steps taken to approve any applicable regional vegetation management code or declaration, and the availability of judicial review of, or appeal to the P & E Court from, a negative decision on a fresh application.

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7 That Notice of Appeal, itself a lengthy document, is reproduced at R31-R49 of Volume 1 of the respondents' bundle of documents.

8 The transcript is at pages R232-420 (all of Volume 2) of the respondents' bundle of documents.

9 Reproduced at A277 in Volume 2 of the applicant's indexed paginated bundles.

The application below

[10] Other steps were taken on behalf of Mrs Burns, in addition to the appeal filed in this Court from the decision of the P & E Court. On 12 November 2004 an application, signed by Mr Walter as Mrs Burns' agent, was filed in the Cairns Registry of the Supreme Court,[10] in which Mr Walter asked for various declarations to be made, and by paragraph 9 of that application for an order under s 181 of the *Property Law Act 1974* (Qld):

> "…extinguishing or otherwise holding the restrictions placed upon the freehold land of Catherine Elizabeth Burns to be invalid and without force, because they were not reserved to the State of Queensland at the time of sale, and Mrs Burns has indefeasible title, under section 169 *Land Titles Act 1994*."

[11] That application was the one heard by de Jersey CJ on 15 November 2004.[11] In the course of argument before the Chief Justice, Mr Fitzgibbon of counsel, who appeared for Mrs Burns, and who described Mr Walter as having done an incredible amount of work on the matter,[12] gave an undertaking to the court that the appeal from the decision of the P & E Court would be abandoned forthwith.[13] The Chief Justice had sought that undertaking, because the matters raised in the argument before him were substantially the same as those contended for in the Notice of Appeal to this Court in Appeal Number 7419 of 2004.

The decision now challenged

[12] The Chief Justice gave his decision on 19 November 2004, and that is the decision from which Mrs Burns seeks an extension of time in which to appeal. The judgment records that the paragraphs numbered 1 to 8 of the application heard by the Chief Justice covered a number of matters which, though disparate, came down to a challenge to the State's legislative power to impose the requirement that, before clearing native vegetation from her land, Mrs Burns first obtain a development permit to do that. The Chief Justice held that that issue had been decided against Mrs Burns in *Bone v Mothershaw* [2003] 2 Qd R 600[14], as Mr Walter recognised in various of the written submissions he filed in this Court on this application.

[13] Section 181 of the *Property Law Act* gives this Court power to modify or extinguish a "restriction arising under covenant or otherwise as to the user" of land. In *Bone v Mothershaw* McPherson JA wrote that a (local) law that prohibited the destruction of vegetation on specified land was not a law that directly determined the use that might be made of the land. Such a law took the vegetation on the land exactly as it found it, and sought to maintain the land in that condition. However such a prohibition might indirectly limit other uses to which the land might be put, it was not a development or change of use of that land that was within the conventional or defined meaning of that word under the *IPA* or earlier legislation in that tradition. The Chief Justice took the same approach in his reasons on the s 181 application in the judgment sought to be appealed, describing the provisions of the *VMA* as ones which did not impose a restriction on the "use" of the land, but rather

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10 The amended application is at R1-R3 of the Volume 1 of the respondents' bundle of documents.

11 *Burns v State of Queensland* [2004] QSC 434; SC No 515 of 2004, 19 November 2004.

12 At R128 in Volume 2 of the respondents' bundle of documents.

13 The undertaking is at R137 of Volume of the respondents' bundle of documents.

14 [2002] QCA 120; Appeal No 294 of 2001, 12 April 2002.

related to a proposed change in its character or presentation. I respectfully agree, although not persuaded to agree with his further observation, that the restriction on presentation burdened the owner and not the land. A development approval is not personal to the individual applicant who obtains it, but applies to the land, and binds the owner, the owner's successors in title, and any occupier of the land.[15]

[14] The Chief Justice accordingly upheld a cross-application filed by the State of Queensland, that her application (originally filed on 25 October 2004) be dismissed. Subsequently the Chief Justice ordered on 8 December 2004 that Mrs Burns pay the costs of the State of Queensland of and incidental to her originating application, including the State's costs of its application to strike out her originating application, such costs to be assessed on the standard basis. Mr Walter's undoubtedly well-intentioned and considerable efforts on Mrs Burns' behalf have cost her money.

The argument on this application

[15] The application for an extension of time within which to appeal the Chief Justice's decision was accompanied by two documents, one hand written and acknowledging that an extension of time was needed, and the other a document signed by Mrs Burns, asking that Mr Walter act as her agent "as per section 4.1.4 of this proceedings under the *Integrated Planning Act 1997*", and contending that Mr Walter "will represent me fairly in accordance with the law".[16] That document further asserts it is only with Mr Walter's assistance that Mrs Burns has been able to attempt to obtain justice, and that Mr Walter and his wife helped Mrs Burns in lodging the original application to the P & E Court, and in the Supreme Court, and in the application now being heard. That document, and the 61 page outline of argument filed and prepared by Mr Walter, show that he has maintained his considerable interest in the proceedings and an active participation in them.

[16] That outline of argument lists, in the first three pages, the orders sought from this Court, which include that the decision in *Bone v Mothershaw* be reconsidered. The other orders sought can reasonably be described as ones this Court could not make, including orders refunding the cost of Mrs Burns' original application for her permit to clear her land, orders that her rates since she received the adverse Decision Notice be refunded, that the decision made in August 2002 be revoked by this Court, and that Mrs Burns be paid full compensation for the effect upon her land of the refusal to permit clearing of native vegetation.

[17] Mr Walter asked the Court to delay the start of the hearing of this application on 1 June 2006, because he was delayed travelling from Herberton. That request was granted, and the application was called on at 2.15 pm, to meet his convenience. Because he is unqualified, he was not given leave to appear on Mrs Burns' behalf and present oral arguments. Essentially that was because any further oral argument was unnecessary. He had already presented the Court with the 61 page written outline of argument setting out his contentions, and the voluminous appeal records prepared by each party include within them the lengthy written arguments he prepared for presentation to the P & E Court, the Court of Appeal in the abandoned appeal from that decision, and to the Chief Justice. It also includes the transcript of

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15 *IPA*, s 3.5.28.

16 Those documents are reproduced at pages 422-423 in Volume 3 of the respondents' bundle of documents.

the oral argument he made to White DCJ, and the transcript of the argument made to the Chief Justice.

Conclusion

[18] None of Mr Walter's extensive written arguments show any grounds for holding that de Jersey CJ was wrong in his reasons for judgment of 19 November 2004, or the orders he made. His Honour was correct in holding that it was necessary for Mrs Burns to secure a development permit to clear native vegetation on her freehold land, by reason of the requirements of the *IPA*, the *Integrated Planning Regulation 1998* (Qld), and the *VMA*. He correctly held that he had no jurisdiction to review the decision of White DCJ, and that the only avenue to challenge that decision was by an appeal to the Court of Appeal. The applications before him largely challenged the State's legislative power to impose planning requirements on Mrs Burns, or challenged the Planning and Environment Court's jurisdiction to hear the appeal. His Honour correctly held that those contentions were plainly untenable, because the sovereign law making power of the Queensland Parliament, considered in a somewhat similar context in the decision in *Bone v Mothershaw*, included the power to impose upon Mrs Burns the requirement that she have a development permit prior to changing the complexion or presentation of her land by clearing it. He remarked that in a different though analogous way, the Parliament was clearly empowered to authorise planning schemes which restricted what the owners of estates in fee simply might lawfully do with that land. I respectfully agree; if this challenge is correct, then there would seem no limit at all that a State Parliament could impose on the use to which a fee simple land owner put her or his land. Any such title holder could build, clear, or grow what they pleased; which activities would include growing cannabis, opium poppy, or noxious weeds, destroying historic buildings, or constructing buildings of any kind wherever they pleased.

[19] Regarding the claim for relief by an order under s 181 of the *Property Law Act* for an order extinguishing what was described as a restriction burdening Mrs Burns' land, arising because of the need to obtain the development permit, the Chief Justice held:

- the broad legislative power of the State plainly authorised the establishment of that requirement, consistently with the principles discussed in *Bone v Mothershaw*;
- the burden was prospective not retrospective; and
- it was not a restriction on the "use" of the land, but related to a proposed change in its presentation or character.

[20] His Honour held that there was no substance in Mrs Burns' claim, and accordingly dismissed it, and I agree. No grounds have been shown for extending the time within which to appeal from this decision, because there are no prospects of success on that appeal. No reason has been shown for departing from the conclusion or reasoning in *Bone v Mothershaw.* I respectfully agree with the reasoning in that decision, and in any event an application to the High Court for special leave to appeal from it was refused on 25 June 2003. The arguments on this application are

much the same as those rejected by Jones J in his authoritative judgment in *Dore & Ors v Penny* [2006] QSC 125[17].

Section 78B notices

[21] Mrs Burns issued notices under s 78B of the *Judiciary Act 1903* (Cth), on about 26 May 2006. The Commonwealth Attorney-General responded, declining the invitation to appear, and the terms of the notice dated 26 May 2006 come down to a complaint that the common law of Queensland was changed by the decision of this Court in *Bone v Mothershaw*. The notice does not sufficiently raise any matters arising under the Commonwealth Constitution to warrant adjourning the hearing of the application for an extension of time.

[22] I would order:

- that the application for an extension of time within which to appeal be dismissed; and
- that the parties have 14 days within which to make written submissions as to costs.

[23] **CULLINANE J**: I agree with what Jerrard JA has said in his reasons. I agree also with the orders proposed by him.

[24] **JONES J**: I agree with the reasons relied upon by Jerrard JA and with the orders he proposes.

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17 SC No 564 of 2005, 5 May 2006.