SUPREME COURT OF QUEENSLAND

CITATION:	*De Tournouer v Chief Executive, Department of Environment and Resource Management* [2009] QCA 395
PARTIES:	**MARGARET FRANCES DE TOURNOUER** (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT** (respondent)
FILE NO/S:	Appeal No 7971 of 2009 LAC No 773 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Land Appeal Court
ORIGINATING COURT:	Land Appeal Court at Brisbane
DELIVERED ON:	18 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2009
JUDGES:	McMurdo P, Fraser JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs**
CATCHWORDS:	ENERGY AND RESOURCES – WATER – WATER MANAGEMENT – WATER USAGE RIGHTS – WATER ALLOCATION – OTHER CASES – where applicant applied to respondent for a licence to take 715 megalitres of water per annum from her land – where the respondent granted a licence for only 80 megalitres per annum – where applicant sought internal review and judicial review of the respondent's decision but was unsuccessful – where applicant was also unsuccessful on appeal to the Land Appeal Court – whether the principles in *House v The King* applied to the appeal to the Land Appeal Court – whether the Land Appeal Court erred in finding that the Land Court did not fail (a) to determine the real issue in the appeal (b) to provide sufficient reasons for its decision or (c) to consider all of the elements in s 210(1) of the *Water Act* 2000 (Qld) *Land Court Act* 2000 (Qld), s 55, s 56, s 64, s 74 *Water Act* 2002 (Qld), s 210, s 211, s 864(2), s 877(1)(b), s 882(1) *Water Resource (Barron) Plan* 2000 (Qld), s 11(2), s 51(2)(b)

Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40, cited
CDJ v VAJ (1998) 197 CLR 172; [1998] HCA 76, cited
De Tournouer v Chief Executive, Department of Natural Resources and Water [2008] QLC 0151, cited
De Tournouer v Chief Executive, Department of Natural Resources and Water [2009] QLAC 0006, affirmed
Dwyer v Calco Timbers Pty Ltd (2008) 234 CLR 124; [2008] HCA 13, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Lujans v Yarrabee Coal Co Pty Ltd (2008) 83 ALJR 34; [2008] HCA 51, cited
Stockland Property Management P/L v Cairns CC & Ors [2009] QCA 311, cited
Sun Alliance Insurance Ltd v Massoud [1989] VR 8, distinguished
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: D L Gore QC for the applicant
W L Cochrane, with S P Fynes-Clinton, for the respondent

SOLICITORS: Preston Law for the applicant
Crown Law for the respondent

[1] **McMURDO P:** The respondent, the Chief Executive Department of Natural Resources and Water, refused the applicant, Margaret Frances De Tournouer's application for a water licence to take 715 megalitres per annum from her land in Yungaburra on the Atherton Tableland in North Queensland, although he granted a licence to take a much lesser amount. She unsuccessfully appealed to the Land Court against the respondent's decision.[1] The hearing in the Land Court took place over six days. She then unsuccessfully appealed from the Land Court's decision to the Land Appeal Court.[2] She has applied for leave to appeal to this Court from the decision of the Land Appeal Court. For the reasons given by Fraser JA, she has not demonstrated any error or mistake in law on the part of the Land Appeal Court warranting this Court's grant of leave to appeal.[3]

[2] The application for leave to appeal should be refused with costs.

[3] **FRASER JA:** The applicant has applied pursuant to s 74(2) of the *Land Court Act* 2000 (Qld) ("the Land Court Act") for leave to appeal against a decision of the Land Appeal Court made on 12 June 2009.[4] That Court dismissed the applicant's appeal against a decision of a Member of the Land Court made on 22 July 2008.[5]

Background

[4] In early 2003 the applicant applied under the *Water Act* 2000 (Qld) ("the *Water Act*") for a licence to take 715 megalitres of water per annum (ML/a) from her land within the "Atherton Basalt Sub-Artesian Area (Management Area B)" as described

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1 *De Tournouer v Chief Executive, Department of Natural Resources and Water* [2008] QLC 0151.
2 *De Tournouer v Department of Natural Resources and Water* [2009] QLAC 0006.
3 *Land Court Act* 2000 (Qld), s 74.
4 *De Tournouer v Chief Executive, Department of Natural Resources and Water* [2009] QLAC 0006.
5 *De Tournouer v Chief Executive, Department of Natural Resources and Water* [2008] QLC 0151.

in a "water resource plan" called the *Water Resource (Barron) Plan* 2002 ("the Barron Plan"). Section 210(1) of the *Water Act* sets out the criteria for deciding such an application (I have emphasised the directly relevant parts):

> "**210 Criteria for deciding application for water licence**
>
> (1) In deciding whether to grant or refuse the application or the conditions for the water licence, **the chief executive must consider** the following—
>
> (a) the application and additional information given in relation to the application;
>
> (b) if notice of the application has been published—all properly made submissions made about the application;
>
> (c) **any water resource plan**, resource operations plan and wild river declaration **that may apply to the licence**;
>
> (d) existing water entitlements and authorities to take or interfere with water;
>
> (e) any information about the effects of taking, or interfering with, water on natural ecosystems;
>
> (f) any information about the effects of taking, or interfering with, water on the physical integrity of watercourses, lakes, springs or aquifers;
>
> (g) strategies and policies for the sustainable management of water in the area to which the application relates;
>
> (h) the sustainable resource management strategies and policies for the catchment, including any relevant coastal zone and regional aquifer systems;
>
> (i) the public interest.
>
> …"

[5] Under s 210(1)(c) of the *Water Act* the chief executive was obliged to consider the *Barron Plan*, ss 11(2) and 51(2) of which provide (again with the relevant parts emphasised):

> "**11 General outcomes**
>
> …
>
> (2) Both surface water and subartesian water are to be allocated and managed in a way that seeks to achieve a balance in the following outcomes—
>
> (a) to allow water to be used for the following—
>
> (i) agriculture;
>
> (ii) aquaculture;
>
> (iii) industrial needs;
>
> (iv) small scale uses;

(v) stock and domestic purposes;

(vi) tourism and recreational uses;

(vii) urban needs;

(b) to provide for the continued use of all water entitlements and other authorisations to take or interfere with water;

(c) **to encourage the efficient use of water**;

(d) to maintain areas of significant tourism and recreational value, including the Barron Falls, Barron Gorge and Tinaroo Falls Dam;

(e) to allow cultural use by Aboriginal or Torres Strait Islander communities;

(f) to provide water to support natural ecosystems.

…

51 Decisions about taking subartesian water

…

(2) In deciding the application, **the chief executive must have regard to** –

(a) the availability of an alternative water supply for the purpose for which the water is required; and

(b) **the efficiency of the proposed water use practices**; and

(c) whether the proposed taking or interfering is likely to have a direct adverse effect on surface water flows; and

(d) the cumulative impact of taking or interfering with subartesian water on surface water flows and groundwater flows."

[6] Section 211(1) of the *Water Act* provides that if the chief executive is satisfied the application should be granted, or granted in part, the chief executive must grant all or part of the application for a stated period, with or without conditions. Section 211(2) provides that if the chief executive is not satisfied the application should be granted, the chief executive "must" refuse the application.

[7] In November 2006 the chief executive granted the applicant a licence to take only 80 ML/a. The applicant thought that rate was so inadequate that it did not justify even the expense of properly equipping and running the necessary bores. She sought internal review of the decision in December 2006. In February 2007, the reviewer made a decision under s 864(2) of the *Water Act* confirming the chief executive's decision.

[8] The applicant decided to exercise the right to appeal to the Land Court, which was conferred by s 877(1)(b) of the *Water Act*. Section 880(2) provides that such an

appeal is "by way of rehearing, unaffected by the reviewer's decision." Section 882(1) conferred extensive powers upon the Land Court including, in s 882(1)(e), a power to set aside the review decision and substitute it with a decision that the court considered appropriate. In summary, the Land Court was empowered to exercise afresh the statutory power to grant or refuse to grant a water licence on the applicant's application.

[9] On 22 July 2008 the Land Court dismissed the applicant's appeal and affirmed the review decision. It is useful here to summarise the reasons given by the Member of the Land Court.

[10] The Member referred to ss 210(1)(c) and (g) of the *Water Act* and s 11(2) of the *Barron Plan* and said:

> "At their broadest, cases of this nature are concerned with three elements: the availability of water for allocation; the potential environmental impacts of making the allocation sought; and the use to which allocated water is to be put. Sections 11(2)(b) and (c) of the *Barron Plan* are concerned with the third element."

[11] Extensive and complex expert evidence was adduced in the Land Court in relation to disputes about the first element, the "availability of water issue". There was a complex dispute in the expert evidence adduced for each side on that issue. The Land Court did not make any finding about it although the Member did hold that the opinion evidence provided by the respondent's expert hydrologist Dr Prendergast could not safely be relied upon. (That is not in issue in this Court, in which the respondent asked this Court to decide the application for leave to appeal on the basis which in this respect was most favourable to the applicant, that there was abundant water available to allow for allocation of the statutory maximum to the applicant, if that is otherwise appropriate.)

[12] The appellant lost for the different reason that she failed to provide evidence which would allow the Member to consider the third element, concerning the use to which allocated water was to be put. That element comprehends both efficiency of water use practices in terms of ss 11(2)(c) and 51(2)(b) of the *Barron Plan* and the continuous use of water issue in s 11(2)(b) of that plan. In conformity with those provisions, the application form (in "Part F Water Requirement") required the applicant to describe "the proposed water scheme". Under a sub-heading "Irrigation Requirements", the form called for information about "Crop Type", "Proposed Area", "Maximum Weekly Application", "Maximum Monthly Volume", and "Time of Year Required". The applicant left all of those spaces blank, save that under the heading "Crop Type" the form records, "Pasture Hay", "Maize" and "Potatoes". The form contained no information which would allow for any decision about the efficiency of proposed water use practices or whether the water would be used continuously.

[13] In the Land Court the Member noted that the following evidence was provided by the appellant's son, Mr De Tournouer, who managed the property: his primary purpose for making the application was to drought-proof the property; he also would grow winter crops such as winter rye grass and clover and thereby almost double the carrying capacity of the land for cattle; and he intended to grow crops such as vegetables (potatoes) as an option if beef prices declined. Long after the original application was made but before the hearing in the Land Court Mr De Tournouer met with Mr McQuillam of "Malanda Rural Supplies".

Mr De Tournouer said that Mr McQuillam told him the appropriate crops that could be planted and the amount of water necessary to sustain those crops.

[14] The Member found that: there was no evidence as to how much water was necessary to drought-proof the property, the area to be sown for the winter crops, or the water needed for such plantings; doubling the carrying capacity was inconsistent with such evidence as there was about the volume of water required; the water volume attributed to Mr McQuillam assumed an intensive use of the appellant's land for cropping and the dedication of part of it to permanent tree crops; those uses were inconsistent with Mr De Tournouer's stated intention to drought-proof the property as a grazing enterprise and his expectation of doubling the grazing capacity; cropping was an option but Mr De Tournouer was not committed to it; a document in evidence (on Malanda Rural Supplies letterhead but in fact typed by Mr De Tournouer's wife) about this proposal was not and did not purport to be a cropping and water usage plan based on the appellant's intentions but represented suggested water usage if the cropping assumed by Mr McQuillam (potatoes, corn (silage), hay – grass seed and orchard trees) eventuated; the figure of 633 ML/a ultimately sought by the appellant was derived from a calculation by Mr McQuillam which was not fully explained; accordingly the evidence did not show that the water sought by the appellant would be used for the purposes assumed by Mr McQuillam; and the volume of water sought in the appellant's licence application was not estimated by reference to a plan of productive and effective usage but was instead the maximum volume that might be allowed.

[15] The Member concluded that the appellant had not demonstrated that there would be a continued use of the water entitlement sought or of any identifiable amount and that he had not been given material from which he could ascertain what would constitute the efficient use of any particular water entitlement. He dismissed the appeal for that reason.

[16] In the applicant's Notice of Appeal to the Land Appeal Court from the Member's decision, she relied upon the following grounds of appeal:

> "1. The member erred in failing to decide the second and third elements of the case (as identified by the member in [9] of his reasons for judgment), particularly given that:
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> (a) the only conclusion which he expressed on either element (namely, that the opinion evidence provided by Dr Prendergast could not be safely relied upon) was favourable to the appellant;
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> (b) findings on the first and second elements (particularly findings which were favourable to the appellant) were relevant to any determination on the third element.
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> 2. The member erred in deciding the third element adversely to the appellant, particularly given that:
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> (a) no determinations had been made on the first and second elements;
>
> (b) the evidence of Mr De Tourneour [sic] was relevantly uncontradicted;

(c) the member failed to take into account that the volume applied for had been suggested by an officer to the respondent."

[17] The Land Appeal Court rejected each ground of appeal. The Land Appeal Court did hold that the Member had erred in attributing decisive significance to the absence of evidence on the continuous use issue but concluded that the applicant's appeal nevertheless must be dismissed because the Member had correctly found that there was no material from which he could ascertain what would constitute the efficient use of any particular water entitlement.

[18] Section 74(1) of the *Land Court Act* limits the available grounds for an appeal from the Land Appeal Court's decision to this Court to complaints about jurisdiction or, relevantly here, error or mistake in law on the part of the Land Appeal Court. The applicant's draft Notice of Appeal contends that the Land Appeal Court erred in law in the following ways:

"(a) in holding that the principles to be applied were those set out in *House v R 1936 55 CLR 499*, even though the appeal to that Court was by way of rehearing on the evidence on the record of the proceeding below (*Land Court Act 2000 s 56*), and so a proceeding which involved the exercise of both original and appellate jurisdiction;

(b) in concluding that the Land Court did not fail to determine the real issue in the appeal and did not fail to give sufficient reasons for its decision;

(c) in failing to conclude that the Land Court did not comply with the mandatory requirement in s 210(1) of the *Water Act 2000* to consider each of the matters there enumerated."

[19] I turn now to consider those grounds of the proposed appeal.

(a) Application of House v The King

[20] Section 64 of the *Land Court Act* conferred upon the applicant a right to appeal to the Land Appeal Court against all or part of the decision of the Land Court. Section 57 empowered the Land Appeal Court to remit the matter, with or without directions, to the Land Court to act according to law, to affirm, amend, or revoke and substitute another order or decision for the order or decision appealed against, or to make an order that the Land Appeal Court considered appropriate. Under s 56 the appeal fell to be decided on the evidence on the record of the proceedings in the Land Court, subject to the Land Appeal Court's power to admit new evidence if (a) it was satisfied that admission of the further evidence was necessary to avoid grave injustice, (b) that the party applying to have further evidence admitted gave an adequate reason for the evidence not previously having been given, and (c) if the application for the admission of further evidence was made before the hearing of the appeal. Under s 55 the Land Appeal Court was not bound by the rules of evidence, might inform itself in the way it considered appropriate, and was obliged to act according to equity, good conscience and the substantial merits of the case, without regard to legal technicalities and forms or the practice of other courts. As the Land Appeal Court concluded, under those provisions the appeal to it was by way of re-hearing which, as the parties accepted, was to be decided on the evidence on the record of the proceedings in the Land Court.

[21] The applicant contended that the Land Appeal Court incorrectly applied as the applicable test in that re-hearing the principles set out by the High Court in *House v The King*.[6] That argument was founded upon the Land Appeal Court's reference early in its reasons to the following well known passage in the reasons of Dixon, Evatt and McTiernan JJ in *House v The King* at 504 – 505:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[22] The applicant's senior counsel cited authority[7] for his proposition that those principles were necessarily inapplicable in an appeal to the Land Appeal Court. But although the appeal to the Land Appeal Court was by way of re-hearing rather than by way of a strict appeal as in *House v The King*, under the governing statutory provisions the applicant could succeed only if she established that the Member's decision resulted from factual, legal or discretionary error.[8] I see no reason to doubt that in a particular case a challenge in the Land Appeal Court against the refusal of a water licence might require the application of principles analogous to those expressed in *House v The King*,[9] but that does not fall for decision in this application. The applicant's appeal to the Land Appeal Court was not dismissed as a result of any application of those principles. The Land Appeal Court dismissed the appeal for reasons which I would paraphrase as follows:

> (a) Since the Land Court was required to consider the applicant's application afresh, it was obliged to consider all of the criteria set out in s 210 of the Act; s 210(c) required the decision maker to consider any water resource plan that might apply to the licence, thus the *Barron Plan* must be considered; s 11(2)(c) required sub-artesian water to be

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6 (1936) 55 CLR 499.

7 Including *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, *Allesch v Maunz* (2000) 203 CLR 172, *Fox v Percy* (2003) 214 CLR 118 at [25], *Lujans v Yarrabee Coal Co Pty Ltd* (2008) 83 ALJR 34 at [2], and *Warren v Coombes* (1979) 142 CLR 531 at 552.

8 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23] per Gaudron, McHugh, Gummow and Hayne JJ, citing *CDJ v VAJ* (1998) 197 CLR 172 at 201 – 202 [111] per McHugh, Gummow and Callinan JJ. There is nothing in this legislative scheme which is analogous to s 134AD of the *Accident Compensation Act* 1985 (Vic), upon which *Dwyer v Calco Timbers Pty Ltd* turned.

9 And see *Dwyer v Calco Timbers Pty Ltd* at [39], where Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ referred to the similarity between those principles and the principles developed in the public law.

allocated and managed in a way that achieved the balance between, amongst other things, encouragement of the efficient use of water and s 51(2)(b) of the *Barron Plan* required the chief executive to have regard, amongst other things, to the efficiency of the proposed water use practices.[10]

(b) Nothing in the legislation suggested that the proposed use of the water was a subsidiary issue. The statutory requirement to have regard to the efficiency of the proposed water use was a mandatory requirement. The proposed use of the water therefore required consideration despite the applicant's successful challenge to the credibility of one of the respondent's main witnesses on the issue of the availability of water. For the same reasons, if the Land Court had found that ample water was available in the system that did not significantly diminish the need to scrutinise the proposed use of the water.[11]

(c) In light of ss 51(2)(b) and 11(2) of the *Barron Plan*, if there was no evidence or no sufficient evidence about the efficiency of the proposed water use practices or how allocation would encourage the efficient use of water, it would not be possible for the Land Court to undertake the necessary balancing exercise; it followed that the absence of adequate evidence on that issue would have the effect that "this criterion, that is otherwise but one in a list of matters to be considered, assumes a determinative significance."[12]

[23] I record my respectful agreement with the Land Appeal Court's reasons. The legislation, and particularly s 51(2)(b) of the *Barron Plan*, obliged the chief executive to have regard to the efficient use of water criterion in deciding an application for a water licence, yet both the application for a licence and the evidence adduced in the Land Court failed to address that criterion in any meaningful way. There was no error of law in the Member's decision that the appeal should be dismissed for that reason.

(b) The real issue in the appeal to the Land Court and the sufficiency of reasons; (c) The mandatory requirement in s 210(1) of the Water Act;

[24] The Land Appeal Court's reasons summarised under the preceding heading explain why that court rejected the argument that the Member erred in thinking that the efficient use of water point was not the "real issue". In this application the applicant repeated her argument that the efficient use of water issue was "subsidiary" and not "the real issue in the appeal" because the other issues, particularly as to the availability and extent of the water resource, occupied nearly all of the time and incurred nearly all of the heavy expense in the litigation. That provides no ground for overlooking the statutory language. The mandatory requirement in s 210 of the *Water Act* that the chief executive consider all of the specified criteria simply

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10 [2009] QLAC 0006 at [25].
11 [2009] QLAC 0006 at [25].
12 [2009] QLAC 0006 at [29].

confirms that the absence of satisfactory information about one mandatory criterion precluded the Member of the Land Court from being satisfied that the application should be granted wholly or in part, with or without conditions. Section 211(2) of the *Water Act* therefore left the Member with no option other than to dismiss the appeal.

[25] The applicant argued that the Land Appeal Court was wrong in thinking that there was no evidence relating to the use of any entitlement granted and thus in finding that the water use issue, considered in isolation, could be determinative. On that topic the Land Appeal Court gave the following reasons:

> "[30] Was there sufficient evidence before the Land Court to enable the learned Member to balance the criteria set out in s.210 of the Act, including the requirements in ss.51(2)(b) and 11(2)(b) of the *Barron Plan* that he have regard to the efficiency of the proposed water practices?
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> [31] The learned Member found, in respect of Mr Tournouer's statement that he intended to drought proof the property, that there was no evidence as to how much water would be needed to drought-proof the property. Nor did Mr De Tournouer refer to any plans as to how the drought-proofing would be achieved including how much water would be needed. Mr De Tournouer did say that he would grow and irrigate winter pasture crops and thereby double the carrying capacity of the property, but there was no evidence as to the area to be sown or the water needed for such plantings.
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> [32] Those findings were not directly challenged in the notice of appeal filed in this Court. Relevantly, ground (2) was that –
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> 'The member erred in deciding the third element adversely to the appellant, particularly given that:
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> …
>
> (b) the evidence of Mr De Tournoeur was relevantly uncontradicted;
>
> (c) the member failed to take into account that the volume applied for had been suggested by an officer to the respondent.'
>
> Nor were we taken to any evidence at the hearing of the appeal to this Court, indicating that there was any error in the Land Court's findings.
>
> [33] The only evidence lead before the Land Court as to the volume of water required by the appellant related to non-forage crops and orchard trees. The learned Member found that that evidence was not produced to serve a plan of land use intended by the appellant but was probably produced for the purpose of providing evidence at the hearing and to give Mr De Tournouer some idea of what cropping might be carried out on the land should he discontinue or modify the

> current cattle grazing use. The learned Member therefore concluded that he was not satisfied that the volume of water sought would be used for those purposes. Further he had been presented with no way of ascertaining what would constitute 'the efficient use of' any water entitlement he might order.
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> [34] Mr Gore pointed to the trouble and expense incurred by the appellant and Mr De Tournouer in their pursuit of a suitable water allocation and submitted that theirs was not the behaviour of persons who do not propose to make proper and efficient use of any water allocation obtained.
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> [35] We acknowledge that the appellant has incurred considerable expense in connection with the licence application and appeals, that Mr De Tournouer's evidence as to usage was not contradicted and that there is some evidence that he was encouraged by a departmental officer to expect an allocation based on the maximum entitlement for the area to be irrigated. However, none of those factors demonstrate that there was any error by the learned Member in his findings as to the proposed use of the water. In those circumstances we agree with the learned Member that there was no evidence before him as to what would constitute the efficient use of any entitlement. It follows, that in the absence of adequate evidence, the learned Member could not carry out the balancing exercised required by s.210(1) of the Act, and ss.11(2) and 51(2) of the *Barron Plan*."

[26] In challenging this reasoning the applicant's senior counsel pointed to evidence to the following effect: the application had a long history going back over five years; the applicant and her son had invested a large amount of money in seeking a suitable water allocation, including drilling bore holes and engaging and paying large amounts of money to experts and lawyers; the applicant's son, upon whose evidence the applicant relied, was an experienced man of the land; and an officer of the respondent encouraged him to make an application based on the statutory maximum of 5 ML/ha if he was able to locate good bores (which he did). None of that justified an inference that the water allocation would be efficiently used. As I have mentioned, that topic was simply not addressed in any meaningful way in the application or in the evidence.

[27] The applicant's senior counsel referred to the fact that the chief executive had originally granted some entitlement, albeit at the very modest rate of 80 ML/a. But it is clear from the "Information Notice" given to the applicant under s 211(3) of the *Water Act* that this decision conveyed nothing about the efficient use of water practices issue:

> "In view of the considerable investment made by applicants to locate and test possible ground water supplies it was decided to grant some entitlement in the Peterson Creek sub-area based on the mean entitlement of other licensees. This results in a possible entitlement of 80 ML/a for each applicant in this sub-area."

[28] In any case, once the matter reached the Land Court the Member was bound to consider the application afresh and in the manner required by the legislation.

[29] The applicant also pointed to the draft conditions of a licence proposed by the applicant aimed at ensuring that there were no unacceptable adverse impacts and which would allow for monitoring data to be given to the respondent at regular intervals to facilitate the taking of any necessary remedial action. Neither those matters nor the fact that the licence would subsist only for a short time bears on the question whether the applicant's proposed use of water would be efficient.

[30] The Land Appeal Court did not err in finding that the Member's reasons on the efficient use of water issue were adequate. Those reasons were clear and persuasive. The applicant's senior counsel argued though that the Member erred by failing to make findings concerning the other two "elements", as to the availability of water for allocation and the potential environmental impacts of making the allocation sought. In the applicant's written outline this argument seemed to be inextricably bound up with the applicant's argument that it was legally impermissible to decide the case on the efficient use of water issue. I have already rejected that argument.

[31] In oral submissions, the applicant's senior counsel argued that even if this Court concluded that the courts below correctly rejected the applicant's case for the reasons they gave, this Court should find an error of law in the Member's failure to make findings about the other issues. He accepted that any order this Court made if it found such an error of law could not lead to any different decision but he argued that the matter should be remitted to the Land Court for the purpose of making findings on those other issues. I would refuse leave to appeal on that ground because the purpose of the proposed appeal is to argue for an extravagant exercise in futility.

[32] Furthermore, findings on those issues were not required to ensure that justice was seen to have been done. Justice was seen to be done when the Member decided that the appeal should be refused for the comprehensive reasons he gave in relation to the efficient use of water issue. A flaw in the applicant's contrary contention is sufficiently illustrated by reference to the decision upon which the applicant's senior counsel placed some emphasis, *Sun Alliance Insurance Ltd v Massoud*.[13] In that case a trial judge had found for an insured plaintiff on his claim for indemnity on a fire insurance policy, rejecting the insurer's defence that the plaintiff had himself set fire to his shop and dwelling. The trial judge did not explain why he rejected important parts of the evidence led by the insurer which provided apparently powerful support for its defence. In a passage emphasised in this application by the applicant's senior counsel, Gray J said:

> "The defendant, having led a weighty body of incriminating evidence was entitled to have the evidence weighed by the Court, and, if rejected, the grounds of its rejection expressed in reasoned terms. To have a strong body of evidence put aside without explanation is likely to give rise to a feeling of injustice in the mind of the most reasonable litigant."

[33] The "incriminating" evidence about which there were no adequate findings in that case was not merely relevant to one of the issues in the case. It bore directly upon the central issue for decision. *Sun Alliance Insurance Ltd v Massoud* provides no support for the applicant's argument that the Member erred in law in making no findings upon an issue which it was unnecessary to resolve in order to decide the

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13 [1989] VR 8 at 18.

appeal. It is not necessary to discuss the numerous other decisions cited for the applicant in which an error of law was found in inadequacy of reasons. Whether a judge should make findings on an issue the resolution of which is not necessary to finalise the litigation depends upon a judgment which takes into account a variety of factors, including considerations of efficiency in the overall litigious process.[14] In this case the Member gave more than adequate reasons for holding that the appeal failed on one issue and correctly decided that it was not necessary to deal with other issues. That did not involve any error of law or otherwise justify appellate intervention.

Other matters

[34] The applicant's senior counsel argued that the Member erred by dismissing the appeal instead of adopting some procedure under which the deficiency in the evidence relating to the water use issue might be cured. This argument does not point to any arguable error of law, it was not comprehended by the Notice of Appeal in the Land Appeal Court, and it was not comprehended by the draft Notice of Appeal in this Court. I would reject it for those reasons, but I also think that it lacks merit. The applicant's senior counsel disavowed any contention that the applicant was not put on notice in the Land Court that her appeal might fail for want of evidence on the efficient use of water use issue or that she was otherwise denied procedural fairness in that respect. The applicant sought a decision from the Member and did not ask the Member to formulate any procedure to cure the deficiency in her evidence. No adjournment was sought for that purpose. The Member cannot be criticised for failing to take the course which the applicant now contends was appropriate when the applicant, who was represented by solicitors and senior counsel, made no submission that the Member should take any such course.

[35] The applicant contended that her grievance about the supposed inadequacy of reasons was exacerbated by the statement in the reasons of the Land Appeal Court that, "Unless there are submissions to the contrary, the appellant must pay the respondent's costs to be assessed on the standard basis."[15] Written submissions were subsequently made about costs and the respondent accepted that the effect of the legislation was that no power to award costs was enlivened in the particular circumstances of the case. The applicant submitted that, "it does not assist with an applicant's sense of grievance for the [Land Appeal Court] …to suggest (as it did) that it might have taken a different (but unspecified) view of the legislation." That was intended to refer to the following passage in the decision about costs given by the Land Appeal Court on 6 August 2009:[16]

> "[2] Both parties have submitted that the Land Appeal Court's power to award costs in an appeal from the Land Court is coextensive with (and therefore no greater than) the costs power of the Land Court at first instance. In those circumstances, it is submitted, s. 882(3) of the *Water Act* applies and therefore each party to the appeal to this Court must bear the party's own costs for the appeal.
>
> [3] While the Court might have taken a different view of the effect of the legislation in so far as it relates to the costs of

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14 See *Stockland Property Management Pty Ltd v Cairns City Council & Ors* [2009] QCA 311 per Keane JA at [54]-[56].

15 [2009] QLAC 0006 at [39].

16 [2009] QLAC 0009.

> an appeal to the Land Appeal Court, in the absence of an application for costs by the respondent it is not appropriate to elaborate those issues."

[36] For that reason the Land Appeal Court ordered that there should be no order as to costs. The quoted remarks were wholly unexceptionable. They appropriately conveyed that the court's costs orders should not be construed as reflecting its considered view about the proper construction of the legislation but instead reflected the absence of any issue between the parties upon that point.

Disposition

[37] I would refuse the application for leave to appeal with costs.

[38] **McMEEKIN J:** I have had the advantage of reading in draft the reasons for judgment of Fraser JA. He has comprehensively set out the relevant legislative provisions and issues. As his Honour demonstrates there was no meaningful evidence led of how the allocation sought was to be used.

[39] Essentially the arguments to this court and the court below were two-fold. First, it was contended that the question of the use of the water was a subsidiary issue. I cannot see why. There is nothing in the legislation or logic to suggest that it is.

[40] Second, it was contended that the Member cannot carry out the balancing exercise envisaged by the legislation unless all matters in dispute are expressly found. I disagree.

[41] Another way of putting the submission is to assert that in the absence of any meaningful evidence of how the water allocated was to be used, and assuming all else in favour of the applicant, the decision must necessarily be in favour of the allocation sought.

[42] Here the combined effect of s 210(1)(c) the *Water Act* 2000 (Qld) ("the Act") and ss 11(2) and 51(2) of the *Water Resource (Barron) Plan* 2002 was to render it mandatory for the Member to consider the efficiency of the proposed use of the water allocation sought. It is self evident that the legislature is concerned with the proper allocation of a scarce resource. The respondent's concession that there was abundant water, sufficient for the maximum allocation, was made in that context. Water, plainly, is not there simply for the asking. And importantly, as Fraser JA points out, the onus lay on the applicant to demonstrate that the allocation should be made, otherwise the legislation required that the application "must" be rejected: s 211(2) of the Act.

[43] The applicant is no more entitled to succeed in the absence of evidence of proposed use, and demonstrated efficient use, than she would be if she had failed to show there was any water there. Both are essential requirements under the Act.

[44] I agree with the reasons and the order proposed by Fraser JA.