SUPREME COURT OF QUEENSLAND

CITATION:	*Heslin & Ors v Director General, Department of Environment and Resource Management* [2010] QCA 347
PARTIES:	**RAYMOND ALLAN HESLIN and** **JUDITH ELLEN HESLIN** (first applicants/first appellants) **KENNETH WILLIAM FRY and** **GWENDOLYNE MAY FRY** (second applicants/second appellants) v **DIRECTOR GENERAL, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT** (first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 7584 of 2010 SC No 173 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2010
JUDGES:	Holmes, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed with costs.** **2. It is declared that the licence granted to the appellants on 20 July 1990, No. 49981, authorises them to use the weir described therein to take and use water therefrom.**
CATCHWORDS:	ENERGY AND RESOURCES – WATER – WATER MANAGEMENT – WATER USAGE RIGHTS – GENERALLY – where appellants were granted a licence in 1990 to build a weir, the stated purpose of which was "irrigation and stock watering" – where the licence was renewed in 1997 – where the stated purpose of the weir in the 1997 licence was "conservation" – where the 1997 licence was subsequently renewed in 2005 and 2008 with the same

stated purpose – where respondents accepted that, if the 1997 renewal changed the rights of the appellants, a breach of natural justice had occurred – whether the 1990 licence contemplated use of the water for irrigation and stock watering or merely storage of the water for the purpose of irrigation or stock watering – whether the 1997 licence changed the rights of the appellants – whether the 1990 licence continued in operation notwithstanding the purported renewals of the invalid 1997 licence

Water Act 2000 (Qld), s 206, s 220, s 1048, s 1048A
Water Resources Act 1989 (Qld), s 2.1, s 3.7, s 4.10, s 4.11, s 4.13, s 4.18(2), s 4.21, s 4.32 (repealed)

Birmingham, Dudley and District Banking Co v Ross (1888) 38 Ch D 295, cited
Harmer v Jumbil (Nigeria) Tin Areas Ltd (1921) 1 Ch 200, cited
The Moorcock (1889) 14 PD 64, cited

COUNSEL: L D Bowden for the appellants
S K Keim SC for the respondents

SOLICITORS: Suthers Lawyers for the appellants
The Department of Environment and Resource Management for the respondents

[1] **HOLMES JA**: The first appellants, Mr and Mrs Heslin, hold a pastoral lease on the Gulf of Carpentaria. Mrs Heslin acquired her interest initially as tenant in common with Mrs Fry (her mother), having acquired it from Mr Fry (her brother), in about 1990. In that year, a water works licence was granted, on Mr Fry's application, in respect of a weir on the property. At first instance, the appellants unsuccessfully sought declarations in the alternative in relation to the water works licence: the first, that it authorised them to take water from the weir for irrigation and stock watering, and the second, that the first respondent's later decision to alter the licence's stated purpose from "irrigation and stock watering" to "conservation" was void and without effect. They appeal the decision which dismissed their application for those declarations.

The history of the licences

[2] The weir was built on a creek on the property at some time in the first half of the twentieth century. In 1987, Mr Fry contemplated repairing the weir, raising its height and increasing its capacity in order to provide a dam for stock watering and fodder irrigation. He corresponded with officers of the Queensland Water Resources Commission about his plans. They offered helpful suggestions about possible means of repair and told him that the weir and a proposed pumping plant required a licence, providing an application form for completion.

[3] Mr Fry completed the application, which identified him as the owner

> "of land … upon which … it is proposed to construct (or is constructed) and use the work described hereunder"

and said that he applied

> "for a license in respect of the said works to be used for the purpose/s as stated in this application … ."

The work for which the licence was sought was the weir and nothing else; a section in the application form which might have been completed in relation to a pump was left blank. The "Purpose of Work" was identified as "Water Conservation for Irrigation + Stock Water", and details were given of the number of stock to be watered and the crops to be irrigated

[4] In 1990, the Water Resources Commissioner issued the water works licence to Mr Fry and Mrs Fry in the exercise of his powers under s 4.18(2) of the *Water Resources Act* 1989 (Qld). The licence was necessary because of the offence provision in s 4.13(1) of the Act:

> "**4.13 Requirements as to licence**. (1) Subject to sections 4.31 and 4.32 a person who, except under the authority of a licence under this Act –
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> ...
>
> (b)(i) constructs works or uses works already constructed in or on a watercourse, lake or spring –
>
> (A) to conserve water;
>
> (B) to take water therefrom or water contained in or conserved by a weir, barrage or dam;
>
> ...
>
> commits an offence against this Act.

"Works" was defined in the *Water Resources Act* to mean,

> "operations of any kind and all things constructed, erected or installed for or in connexion with the purposes of this Act, all sources of water supply and land reserved or set apart, occupied, held or used for or in connexion with those operations or those sources ..."

[5] The licence issued to the Frys described as the "Works" the weir, with its dimensions set out. The "Purpose of Works" was stated as "Irrigation Stockwatering". Its conditions included requiring the appellants to notify the Commissioner of

> "... any change or divestment of interest in the land whereupon the licensed work is constructed or proposed to be constructed or on which the water is used or proposed to be used".

Its expiry date was 30 April 1993. On the strength of it, Mr Fry proceeded with the repair and raising of the weir and irrigated from it, as did the Heslins in later years. The mechanism by which they did so – pump or otherwise – was not the subject of evidence.

[6] In 1993, Mrs Heslin and Mrs Fry received an expiry notice in respect of the licence, in a form which also contained a section allowing them to apply for its renewal. The notice again stated the purpose of the works as "Irrigation Stockwater". Mrs Heslin applied for renewal, but it does not appear that her application was then acted on. However, s 4.21 of the *Water Resources Act* maintained the licence in effect until a decision on its renewal was notified. In September 1997, the Department of Resource Management sent Mrs Heslin (who at this stage was the

sole registered lessee of the property) a water works licence with the same number as that issued in 1990, dated 19 September 1997, with an expiry date of 30 April 2005. On this licence, the "Purpose of Works" was given as "Conservation". In November 1997, the Department wrote again to Mrs Heslin, advising that it was "conducting validation of [its] records" and forwarding another water works licence dated 6 November 1997. This licence gave a different real property description, apparently to recognise an earlier subdivision of the property, but was otherwise in identical terms to the one issued seven weeks earlier.

[7] In May 2005, shortly after the stated expiry date for the 1997 licence, Mrs Heslin completed an "Application for Reinstatement of an Expired Water Licence". It described the "Authorised Activity" as to

> "[i]nterfere with the flow of water in L CREEK by impounding water on or adjoining land described as Lot 1 on CP838627. Maximum volume of water stored at full supply level not to exceed 1200.0 megalitres".

The "Authorised Purpose" described in the application was "Conserve Water". Mrs Heslin received a licence dated 21 July 2005, issued under the *Water Act* 2000 (Qld), with an expiry date of 30 April 2010. The "Authorised Activity" and "Authorised Purpose" identified in it were stated in identical terms to those in the application.

[8] On 25 July 2008, another licence, in the same terms as that of 21 July 2005 and with the same expiry date, was issued to Mr and Mrs Heslin to reflect the fact that they now held the lease as tenants in common. Another such licence, we were told, was issued in 2010, but neither it, nor the application for it, was in evidence. At some point after the issue of the 2008 licence, controversy arose, the first respondent asserting that the appellants were not authorised to carry out irrigation work, particularly since they had never sought or been given a licence to install or use a pump, while the Heslins maintained that the first respondent had unilaterally altered the purpose of the licence. It should be said, however, that on the evidence before the Court it does not seem that any of the parties at any time acted other than in good faith, albeit with different understandings of what the licence or licences entitled the appellants to do.

The determination of the issues at first instance

[9] At first instance (and here by notice of contention), the respondents maintained that the 1990 licence merely authorised the construction of the weir to conserve water, the contemplated purpose of the conservation being "irrigation and stock watering"; it did not extend to permitting the taking of water from the weir for those purposes. Their argument was that s 4.13(b)(i) of the *Water Resources Act* contemplated a licence to construct or use works for the purpose of conserving water or a licence to construct or use works to take water. The appellants had been granted only the former.

[10] The learned judge at first instance accepted as significant the facts that the 1990 licence was granted in a context in which the appellants and the respondents had discussed the intended use of the water; that the legislation made it an offence to take and use water from a weir without a licence; and that the licence itself described the purpose for which the water was to be used. The licence should, he held, be taken as authorising the use of the water in the weir for the purposes of irrigation and stock watering.

[11] The appellants and the respondents agreed that if the licence as it was worded on its renewal in 1997 changed the rights of the appellants, a breach of natural justice had occurred. The respondents' position, however, was that the renewed licence, as the earlier licence had previously done, did no more than give the right to use the weir to conserve water. The learned judge, on the premise that the appellants' rights had been altered, declared the issue of the licence in 1997 void and of no effect. However, his Honour took this view of the effect of the 2005 application for renewal and the licence then issued:

> "[I]n 2005 and again a few years later, applications were made to renew the licence (in the former case an expired licence) and new licences were issued in response to such applications in 2005 and again in 2010. The *Water Act* 2000 governs these.
>
> No doubt both the applicants and the commission would have proceeded under the belief that the licence issued in 2005 renewed the licence granted in 1997 rather than what was in fact the true position, namely that the expired licence which was sought to be renewed was the licence of 1990, given the failure by the respondent to comply with the requirements of natural justice in relation to the purported grant of the 1997 licence."[1]

It could not be said, the learned judge concluded, that the 1990 licence remained in effect; the appellants' rights were determined in turn by the 2005 and 2010 licences. He dismissed the application.

The legislation

[12] Section 2.1 of the *Water Resources Act* vested in the Crown, until otherwise appropriated under legislation and subject to restrictions in the Act itself, the rights to the use and flow and control of water conserved in a weir constructed in a watercourse which flowed through the land of more than one occupier or owner. By virtue of s 3.7 of the Act, any works in a watercourse constructed by the Commission vested in the Commission.

[13] Sub-sections 4.10 and 4.11 of the Act concerned individuals' rights to take and use water:

> "**4.10 Right to take water by prescription or use prohibited**. A person does not acquire, except under the authority of this Act, the right –
>
> (a) to take, use or divert water from or to use works constructed in or on a watercourse, lake or spring or a weir, barrage or dam vested in the Commission or under the control of the Commission or Commissioner;
>
> ..."

> "**4.11 Ordinary riparian rights to use water**. Subject to section 4.32, an owner or occupier of land abutting a watercourse, lake or spring or a weir, barrage or dam vested in the Commission or under the control of the Commission or Commissioner may, without applying for or obtaining a licence or permit in that behalf, use for –
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> (a) domestic purposes;

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[1] *Heslin & Fry v The Department of Environment & Resource Management & Ors* [2010] QSC 226 at [52]-[53].

(b) watering stock,

the water, at the material time, in that watercourse, lake or spring or weir, barrage or dam.

For the purposes of this section 'stock' means stock of a number not exceeding the number depastured ordinarily on the land having regard to seasonal fluctuations in the carrying capacity of the land and not held in close concentration for a purpose other than grazing."

[14] Section 4.32, referred to in s 4.11, provided:

"**4.32 Power to issue permit to construct or use works in the exercise of a right to use water under s. 4.11**. (1) An owner or occupier of land who uses water in a watercourse, lake or spring, in accordance with section 4.11 must, where he desires to construct or use works to take water in connexion with that use, make application in writing signed by him for a permit.

..."

The balance of the section dealt with the making of the application, its consideration and the Commissioner's decision.

[15] The crucial part of s 4.13 has already been given, but it is necessary to set the provision out more fully:

"**4.13 Requirements as to licence**. (1) Subject to sections 4.31 and 4.32 a person who, except under the authority of a licence under this Act –

...

(b)(i) constructs works or uses works already constructed in or on a watercourse, lake or spring –

(A) to conserve water;

(B) to take water therefrom or water contained in or conserved by a weir, barrage or dam;

...

commits an offence against this Act.

…

(4) The Commissioner may require in a case where the proposal is for the construction or use of combined work a separate application in respect of each of the works comprised in those works.

(5) Where, in compliance with a requirement of the Commissioner, a separate application has been made in respect of works comprised in a proposal for the construction or use of combined works, the Commissioner, in dealing with applications in respect of those works, may determine which of those works are to be included in each licence."

...

(7) For the purposes of this section, the term "to use works" includes to take and use water contained in works or obtained by means of works whether for the use of –

(a) the owner of the land on which the works are constructed;

(b) the person who constructed or is using the works;

or

(c) an owner of land in the vicinity of the site of the works."

[16] The *Water Act* introduced water licences in lieu of water works licences. A land owner now applies for a water licence for taking and using water on his land or for interfering with the flow of water on it.[2] The *Water Act* contains an equivalent provision to s 4.21, providing that where there is an application to renew a licence, the licence remains in force until the new licence is granted or 30 days after the application is refused or, where there is an appeal, until the applicant is notified of the result.[3] Transitional provisions preserve in effect applications for licences made under the repealed Act and not yet decided[4] and licences granted under the repealed Act.[5]

Did the 1990 licence authorise the use of the weir to take water?

[17] The respondents filed a notice of contention turning on their argument that the 1990 licence permitted only the repair of the weir for the purpose of conserving water and conferred no right to take or use the water stored in the weir for irrigation or stock water. In their argument as to the proper construction of the licence, they addressed firstly, the application for it, as part of the factual context in which the licence was issued; secondly, the statutory context; and thirdly, the terms of the licence itself.

The application

[18] In respect of the application, the respondents contended that the reference to the "Purpose of Work" as "Water Conservation for Irrigation + Stock Water" indicated that it was concerned with storage, not taking, of water. Irrigation and stock watering were merely the ultimate purpose of the storage. But reliance on that part of the application overlooks the context provided by its introductory section, which described a proposal to construct and *use* the work (the weir) and sought a licence in respect of the weir "to be *used* for the purpose/s as stated"(italics added), that is, for "Water Conservation for Irrigation + Stock Water". Given that context, the application can be read, in my view, as one for a licence to use the weir for all the stated purposes: conservation, irrigation and watering stock. At best for the respondents, the phrase they rely on is equivocal.

The statutory context

[19] The judge at first instance had, the respondents said, erred in reading the legislation as making it an offence to take and use water without a licence. The offence was, rather, to construct or use works to take water without a licence. Section 4.13 of the 1989 Act made separate and distinct the activities of conserving and taking water. In written submissions, the respondents contended that s 4.13 (in sub-sections (4) and (5)) contemplated the need for more than one licence to be issued for a land holder; it followed that separate licences could (and would) be issued for the use of works for storage and the use of works for taking. However, as I understood the oral argument on the appeal, it was conceded, in my opinion correctly, that a single licence might authorise different works and different activities. In my view, the fact that s 4.13(b)(i) separates the activities of conserving and taking water simply reflects the fact that it is a penal provision and each of those activities will constitute an offence; it says nothing about how a licence might be structured.

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2 Section 206.
3 Section 220.
4 Section 1048.
5 Section 1048A.

[20] The respondents maintained that there was no need to imply into the licence a right to take water from the weir, because s 4.11 already gave the appellants the right to use water in a weir for domestic purposes or watering stock, although s 4.32 required a land owner wanting to construct works (a pump, for example) to take water for a purpose identified in s 4.11 to apply for a permit. But I do not read s 4.11 as entitling a land owner to use water in weirs other than those vested in the Commission or under the control of the Commission or Commissioner. Section 3.7 vested works constructed by the Commission in the Commission, but not works constructed by others; and nothing suggested that the Commission had control of the appellants' weir, before or after its repair.

[21] The point, however, is probably of little moment because the appellants could have constructed and used their own weir to take water from the creek for the purposes described in s 4.11 under the authority of a permit issued under s 4.32, as opposed to a licence under s 4.13; the latter became necessary because the intended uses went beyond those in s 4.11. The different sections simply confirm, for what it is worth, that s 4.13 contemplated licensing of works where their use to take water was for more extensive purposes than the use for domestic purposes or watering stock specified in s 4.11. And while construing s 4.13(1)(b) as contemplating the use of a weir to take water from it might otherwise present some difficulty, s 4.13(7) makes it clear that for the purposes of the section, "to use works" is a broad concept; it includes the taking and using of water contained in works.

The licence

[22] On the respondents' contention, the licence described, not the purpose for which the water was to be used, but the purpose of the licensed works, that being the weir. Consequently, the stated purpose identified the purpose for which the water was stored in the weir (irrigation and stock watering, as opposed to, say, industrial purposes), not a purpose for which it could be used. If it had been intended to give permission to take water, that would have been said in so many words. While the amount to be stored was identified in the licence, there was no condition governing an amount which might be used.

[23] The respondents are undoubtedly correct in saying that the licence was for the construction of the weir, but the term which required the appellants to notify the Commissioner of any change of interest in the land "... on which the water is used or proposed to be used" suggests that it contemplated also the use of the weir as a source of water for the property. The licence did not say explicitly, it is true, that it permitted the taking of water, but it also did not say that it permitted the weir's construction. It simply described the works and gave their purpose; it did not identify the permitted activity as either construction or use of water, although the terms dealt with both activities. Reading the "Purpose of Work" ("Irrigation Stockwatering") stated in the licence in the context of the licence as a whole, including its terms, one concludes that it identifies the purposes for which the weir is to be constructed and used. It was, in my view, properly read as a licence to construct the weir and to use it by taking and using water contained in it.

Does the 1990 licence continue in effect?

[24] The appellants argued that the 1990 licence continued in effect, since there had been no valid decision on the 1993 renewal application. It could not have been overtaken

(as the learned judge found) by the licence reinstatement in 2005, which occurred in circumstances in which the appellants had been denied natural justice. The Commissioner ought to have advised the appellants that the effect of the reinstatement application, which described the purpose of the licence as "conserve water", would be the deprivation of their irrigation rights. The breach of the rules of natural justice meant that that decision was void.

[25] The respondents did not contend that the transfers of interests in the property and consequent changes in the identity of the licence holders affected the continuity of the 1990 licence if it in fact remained operative. Their only argument in response to the appellants' contention that they were denied natural justice when the licence was renewed in 1997 was that since the 1990 licence had never permitted anything but conservation, the change in the wording did not affect any right of the appellants. For the reasons I have given, that argument is not tenable. The licence permitted more than use of the weir to conserve water; it permitted its use as a supply of water.

[26] The error in his Honour's reasoning, in my respectful view, was to regard the 1990 licence as having expired and requiring renewal. The renewal application of 1993 continued in effect under s 4.21 of the *Water Resources Act* until a (valid) decision on it was notified, and the respondents conceded that if the licence issued in 1997 did purport to effect a change in the appellants' rights, it was not valid. The result was that the 1990 licence and the 1993 renewal application continued in effect during the life of the *Water Resources Act* and thereafter under the *Water Act*, by virtue of s 220(3). Since the licence had not expired, no reinstatement application was required in respect of it. The purported licences issued in 2005, 2008 and 2010 did nothing to affect its continued operation. The learned judge did not find that the appellants, by the 2005 application for reinstatement, had waived any existing right; on the state of the evidence he could not have done so. The result is that the appellants' rights under the 1990 licence continued.

[27] The respondents suggested that for discretionary reasons, no declaration to that effect ought to be granted: the Heslins and the first respondents had acted on the 1997 renewal as if it were valid. The respondents' concession, however, that the Heslins had been under a misapprehension as to what the (purported) renewed licence permitted, negates any such consideration. The respondents also asked that any declaration be circumscribed to make it clear that the appellants were not entitled to use a pump to take the water. I do not think that is necessary: the declaration I propose refers only to the works in respect of which the licence was granted, that is, the weir, and cannot properly be read as extending to other works.

[28] I would allow the appeal and declare that the licence granted to the appellants on 20 July 1990, No. 49981, authorises them to use the weir described therein to take and use water therefrom.

[29] The appellants should have their costs of this appeal.

[30] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.

[31] **CHESTERMAN JA**: I agree with the orders proposed by Holmes JA, and with her Honour's reasons. I add a comment of my own.

[32] In my opinion the 1990 licence which permitted the appellants to take and use water contained in the weir authorised them to take the water by any means reasonable and appropriate for the authorised use, irrigation and stock watering. The licence should be construed to extend to the use of a pump if that mechanism was (as no doubt it was) reasonable and appropriate for the authorised purpose. To construe the licence as authorising the taking of water but not the use of the only reasonable means by which it could be taken, would be to make nonsense of the licence, and deprive it of any utility.

[33] The principle that a grantor must not derogate from his grant, which applies to leases, easements, and profits a prendre, is "a principle which merely embodies in a legal maxim a rule of common honesty" per Younger LJ in *Harmer v Jumbil (Nigeria) Tin Areas Ltd* (1921) 1 Ch 200 at 225. Bowen LJ described the operation of the principle in *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 Ch D 295 at 313:

> "a grantor having given a thing with one hand is not to take away the means of enjoying it with the other."

[34] A licence to take and use water issued under the *Water Resources Act* 1989 is not, of course, a grant of an interest in land, or anything like it. Nevertheless it seems to me that the notion which underlies the principle, common honesty, should apply equally to the issue of the licence.

[35] It would, in my opinion, have been dishonest of the Commissioner to issue a licence authorising the appellants to take and use water from the weir to irrigate their crops and water their stock, but to seek to prevent them from using, or prosecute them for using, a pump if the use of the pump were reasonable and appropriate for the authorised purpose. It would not matter that authority to use a pump could have been the subject of a separate application and/or licence. A licence to take and use water can include the use of the work by which the water is to be taken.

[36] But there is no reason to suppose that the Commissioner acted other than with propriety in issuing the licence. Senior Counsel who appeared for the respondent assured the Court of that circumstance. The issue of the licence should not then be considered in any way an improper exercise of the Commissioner's power. It should be accepted that the licence was issued legitimately in response to the application and for the purposes given expression in the licence itself.

[37] The 1990 licence should therefore be construed as extending to any reasonable and appropriate means of extracting water from the weir for the purposes of irrigation and stock watering.

[38] The licence, is not, obviously, a contract, and the rules which regulate the implication of terms in contracts (see e.g. *BP Refinery Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26) have no application. The concept which underlies the rules, and gives rise to their necessity, is, I think applicable. It was described by Bowen LJ in *The Moorcock* (1889) 14 PD 64 at 68:

> "… the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that in all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as

> must have been intended at all events by both parties who are business men … ."

[39] That expression of the rationale does not entirely fit the issue of a statutory licence but it is close enough. Having authorised the appellants to take water from the weir to water their stock and to grow fodder for the animals the respondent cannot have intended that they should not take the water.

[40] Whether by implication of a term, or by the construction of the licence, I would conclude that the respondent authorised the appellants to pump water from the weir.

[41] The relevant factors are that there is no downstream property. L Creek discharges into the Gulf of Carpentaria at the boundary of the appellants' land. The water in the weir cannot benefit any other property and its use by the appellants will not deprive any other person of the water. Its use for the described purposes would improve the profitability of the appellants' pastoral lease and to that extent enhance the economy of the region and the State.

[42] I concur with the orders proposed by Holmes JA.