SUPREME COURT OF QUEENSLAND

CITATION:	*Crowther v Brisbane City Council* [2010] QCA 348
PARTIES:	**CLAIRE CROWTHER** (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 9654 of 2010 P & E Appeal No 2104 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave Integrated Planning Act/ Miscellaneous Application - Civil
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2010
JUDGES:	Margaret McMurdo P and Holmes and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce further evidence is refused.** **2. The application for leave to appeal is dismissed.** **3. Costs are awarded in favour of the respondent; restricted in respect of counsel's costs to the costs of one junior counsel.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – HERITAGE CONSERVATION – OFFENCES UNDER HERITAGE LEGISLATION – where applicant applied for orders enjoining works removing and replacing trees which comprised a war memorial – where the learned primary judge held that the Planning and Environment Court did not have jurisdiction to hear the application – whether applicant is someone whose "interests are affected by the subject matter of the proceeding" – whether applicant is "someone else with the leave of the Court" *Environmental Protection Act* 1994 (Qld), s 4, s 6, s 8, s 319, s 437, s 438, s 493A, s 505 *Nature Conservation Act* 1992 (Qld), s 14, s 173B *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; [1979] HCA 1, cited.

COUNSEL: The applicant appeared on her own behalf
R L Litster SC, with J G Lyons, for the respondent

SOLICITORS: The applicant appeared on her own behalf
Brisbane City Legal Practice for the respondent

[1] **MARGARET McMURDO P:** The applicant has not demonstrated any reason justifying the grant of leave to appeal. I agree with Holmes JA's reasons and proposed orders. The application should be refused and the applicant should pay the respondent's costs limited to the appearance of one junior counsel.

[2] **HOLMES JA**: The respondent Brisbane City Council sought and obtained an exemption certificate under pt 6 div 2 of the *Queensland Heritage Act* 1992 (Qld) for work it proposed to carry out by way of removal and replacement of trees in the Yeronga Memorial Park. The trees formed part of an avenue, a memorial to servicemen who died in World War I. The obtaining of the certificate was necessary because the park was a "State Heritage Place" under the *Queensland Heritage Act*.

[3] The applicant filed an originating application in the Planning and Environment Court which, in its original form, did not identify any orders sought but asserted that the proposed works contravened various Acts. Subsequently, the applicant filed a document which stated that she sought an injunction to restrain the removal of the trees, the effecting of environmental, conservation and land management plans and declarations under ss 6, 8 and 505 of the *Environmental Protection Act* 1994 (Qld) and s 173B of the *Nature Conservation Act* 1992 (Qld).

[4] The matter came on before a judge in the Planning and Environment Court. He considered the legislation relied on by the applicant and concluded that she had not established that the court had any jurisdiction to deal with her application. Accordingly, he struck out her application for want of jurisdiction. The applicant seeks leave to appeal that decision.

[5] Initially at first instance, the applicant relied on provisions of the *Nature Conservation Act*. That reliance was misplaced because the Yeronga Memorial Park is not within the classes of "protected area" to which that Act applies;[1] and the applicant does not now argue that it is a source of jurisdiction in this case. The other Act to which the applicant pointed, below and here, as giving the Planning and Environment Court jurisdiction was the *Environmental Protection Act*. The learned judge in his reasons identified the applicant's reliance on s 4 of the Act, which describes the phases of an integrated management program by which the State's environment is to be protected, and s 505, the relevant parts of which are in these terms:

> "**505 Restraint of contraventions of Act etc.**
>
> (1) A proceeding may be brought in the Court for an order to remedy or restrain an offence against this Act, or a threatened or anticipated offence against this Act, by—
>
> (a) the Minister; or

[1] Section 14.

(b) the administering authority; or

(c) someone whose interests are affected by the subject matter of the proceeding; or

(d) someone else with the leave of the Court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding).

(2) In deciding whether or not to grant leave to a person under subsection (1)(d), the Court—

(a) must be satisfied—

(i) environmental harm has been or is likely to be caused; and

(ii) the proceeding would not be an abuse of the process of the Court; and

(iii) there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and

(iv) it is in the public interest that the proceeding should be brought; and

(v) the person has given written notice to the Minister or, if the administering authority is a local government, the administering executive, asking the Minister or authority to bring a proceeding under this section and the Minister or executive has failed to act within a time that is a reasonable time in the circumstances; and

(vi) the person is able to adequately represent the public interest in the conduct of the proceeding; and

(b) may have regard to other matters the Court considers relevant to the person's standing to bring and maintain the proceeding.

(3) However, the Court must not refuse to grant leave merely because the person's interest in the subject matter of the proceeding is no different from someone else's interest in the subject matter.

…"

His Honour accepted the respondent's submission that the applicant was not someone who had been granted leave of the court to proceed under s 505(1)(d) and, implicitly, that she was not someone whose interests were affected by the subject matter of the proceeding within the meaning of s 505(1)(c).

[6] In this court, the applicant again pointed to s 505(1) as founding jurisdiction. She was asked to identify the offence to restrain which a proceeding could be brought under s 505(1), and the capacity in which she claimed to be entitled to bring such a proceeding. In response, the applicant submitted that the respondent had not complied with the "general environmental duty" referred to in s 319(1), which provides:

> "A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the ***general environmental duty***)."

That, however, is not an offence provision.

[7] The applicant also adverted to s 493A, which identifies relevant acts and makes them unlawful unless authorised. Again, that is not an offence provision. However, ss 437 and 438 (which the applicant did not refer to at first instance) create offences of wilfully and unlawfully causing, respectively, serious environmental harm and material environmental harm. Assuming in the applicant's favour that one or other of those offences might be relevant here, there remains the question of the applicant's entitlement to commence a proceeding to restrain such an offence.

[8] The applicant said that she would fall within s 505(1)(c), as a person whose interests were affected by the tree removal. Her interest was as a community member concerned with the fate of the trees in the park and also, as she put it, her interest "as a human being interested in the Anzac tradition". Alternatively, she was someone who could bring the proceedings with leave of the court under s 505(1)(d). That submission requires a consideration of the different kinds of interest contemplated by the two subsections.

[9] The meaning of the expression "someone whose interests are affected" in s 505(1)(c) is illuminated by the content of s 505(1)(d). The latter identifies the persons to whom it extends as those who do not have interests in the nature of "proprietary, material, financial or special interest[s] in the subject matter of the proceeding". That is the conventional language of locus standi; individuals without such interests must seek leave under s 505(1)(d). In contrast, persons with interests of that kind, which are affected by the activities in question, are those who may proceed as of right: in the context of this provision, under s 505(1)(c). Merely to be interested in the subject matter, in the sense of having "a mere intellectual or emotional concern"[2] with the only advantage to be gained "the satisfaction of righting a wrong, upholding a principle or winning a contest"[3] is not to be "someone whose interests are affected".

[10] The applicant was certainly interested in the fate of the trees but her interests were not affected by their removal. She might have sought leave under s 505(1)(d), but she did not do so. As to that, before deciding to grant leave the court would first have to be satisfied, inter alia, that the applicant had given written notice to the Minister or relevant authority asking them to proceed and that they had failed to do so in a reasonable time.[4] There was no suggestion that anything of that kind had occurred.

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2 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530.

3 At 530.

4 Section 505(2)(a)(v).

[11] The applicant complained of a breach of natural justice at first instance because she was not given the opportunity to put in further material as to her standing which would have showed that others recognised her as someone with a strong interest in what happened in the park. She sought here to tender that material. It might have been helpful were she making a leave application under s 505(1)(d), but she was not; and it would not have assisted in demonstrating that she was a person whose interests were affected under s 505(1)(c) in the sense I have described. Her application to adduce it in this Court should be refused for a number of reasons, the most obvious of which is that it is immaterial to the correctness of his Honour's decision.

[12] Since the applicant is unable to show that the learned judge was wrong in his conclusion that the Planning and Environment Court did not have jurisdiction, I would dismiss the application for leave to appeal.

[13] The respondent sought its costs of the application. The applicant argued that they should not be granted, since her application was in the public interest. I do not think, however, that there was any public interest element to this application, which amounted to a dogged insistence on a jurisdiction which did not exist, resulting in a costs burden which, no doubt, will eventually be shared by rate-payers. The respondent should have its costs; restricted, however, in respect of counsel's costs to the costs of one junior counsel. Nothing about this application warranted briefing two counsel, let alone senior counsel.

[14] **CHESTERMAN JA:** I agree that the application for leave to appeal should be refused for the reasons given by Holmes JA. The applicant should pay the respondent's costs of the application, limited to the appearance of one counsel.