# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Currareva Partnership v Welford [2000] QSC* 098 |
| PARTIES: | **CURRAREVA PARTNERSHIP**<br>(applicant)<br>**v**<br>**RODNEY JOHN WELFORD**<br>(respondent) |
| FILE NO/S: | S 3178 of 2000 |
| DIVISION: | Trial Division |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 28 April 2000 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 14 April 2000 |
| JUDGES: | Dutney J |
| ORDER: | **The Application for judicial review under section 20 of the *Judicial Review Act* is dismissed.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – CHARACTER OF DECISION – Applicant seeks judicial review of decision of the Minister to make a water management plan – whether decision is administrative in character – whether subordinate legislation capable of judicial review.<br><br>*Judicial Review Act 1991* ss20, 48<br>*Uniform Civil Procedure Rules* r171(1)(a)<br>*Water Resources Act* ss25B, 25C, 25D, 25I<br>*Statutory Instruments Act 1992* 59(2)<br><br>*Resort Management Services Limited v Noosa Shire Council* [1995] 1 Qd R 311, considered.<br>*Vietnam Veterans' Affairs Association of Australia v Cohen* (1996) 70 FCR 419, considered.<br>*Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, considered. |
| COUNSEL: | S Couper QC for the applicant<br>J Batch SC and P J Flanagan for the respondent |
| SOLICITORS: | Hunt & Hunt for the applicant<br>Crown Solicitor for the respondent |

[1] The principal application is an application to judicially review a decision of the Minister to make the Water Management (Cooper Creek) Plan 2000 ("the Plan").

[2] Alternatively, the principal application seeks declarations that the Plan or parts of it are void or that the subsequent decision of the Governor in Council to approve the Plan is void on the grounds of non-compliance with the statutory requirements and on the same grounds that it is sought to review the Minister's decision.

[3] The review of the Minister's decision is sought only under s20 of the *Judicial Review Act 1991*.

[4] The respondent has brought an interlocutory application to strike out that part of the application which seeks to judicially review the Minister's decision on the grounds that the decision is legislative and not administrative and is thus not "a decision to which this Act relates" for the purposes of s20 of the *Judicial Review Act*.[1] This relief is sought under s48 of the *Judicial Review Act* or rule 171(1)(a) of the *Uniform Civil Procedure Rules*.

[5] No application is made to strike out the alternative claim in the principal application.

[6] Sub-section 25B(1) of the *Water Resources Act* authorises the Minister to make a water management plan ("a plan") for parts of Queensland.

[7] By sub-section 25B(2) of the Act a plan may only be made by making a draft plan under Part 3A Division 1 of the Act.

[8] By sub-section 25B(3) a plan is subordinate legislation.

[9] Section 25C of the Act provides for the content of a plan. No issue arises before me as to this plan's content although that question will arise in the principal application irrespective of the outcome of the interlocutory application.

[10] By section 25D the Minister must give public notice of his intention to prepare a draft plan and receive submissions on it. After the draft plan is prepared the Minister must again give public notice and receive submissions[2]. The Minister must then consider all submissions made in relation to the draft plan[3]. One of the complaints made in the application is that the Minister did not consider the applicant's submissions on the draft plan[4]. If after considering submissions the Minister decides to alter the Plan he must give notice and receive submissions again[5].

[11] By section 25I a plan does not have effect until it is approved by the Governor in Council.

[12] Mr Couper Q.C. for the applicant concedes that the act of the Governor in Council in approving the plan is legislative but submits that because the plan does not have

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1 for the definition of "a decision to which this Act relates" see s4.
2 *Water Resources Act 1989* s25F.
3 *Ibid* s25F.
4 Application paragraph (5).
5 *Water Resources Act (supra)* s25G.

effect until it receives that approval the decision of the Minister to make a plan is merely an administrative decision on the way to making a plan.

[13] Mr Couper submits that there is no material distinction between the decision of the Minister here and the decision of a local authority under s2.19(3) of the *Local Government (Planning and Environment) Act 1990* to proceed with a proposed amendment of a town planning scheme. In the latter case the Court of Appeal in *Resort Management Services Limited v Noosa Shire Council* [1995] 1 Qd R 311 at 317-318 held that the decision of the local authority was administrative. At p318 in a joint judgment the members of the Court said:

> "More generally, it is extremely difficult to attribute any legislative characteristic to the appellant's material decision. The entire statutory process with respect to planning schemes, with its dependence upon approval by the Governor in Council and publication in the Gazette before a scheme or an amendment to a scheme becomes binding, seems inconsistent with the notion that steps in that process, such as decisions by a local authority, are themselves legislative in character. On the contrary, the power under s2.18 of the *Planning Act* to propose amendments to the planning scheme for its area seems entirely consistent with, and even perhaps an element of, the appellant's duty, under s2.16, to administer the scheme".

[14] There are, however, some important differences between the position of a local authority and the position of the Minister under the *Water Resources Act*.

[15] In the case of the Minister he is expressly given the power to make plans under s25B and the same section bestows on such a plan the characteristic of subordinate legislation. This suggests to me that the plan is endowed with the characteristics of subordinate legislation on being made by the Minister and requires only formal approval under s25I to take effect.

[16] Further, s9(2) of the *Statutory Instruments Act 1992* expressly excludes from the definition of "subordinate legislation" by-laws, ordinances or other statutory instruments made by a local authority.

[17] In light of the above I have difficulty seeing any direct parallel between the position here and the position of the local authority in the *Resort Management* case.

[18] The decision to make a plan should be contrasted with the decision to make a draft plan or to alter a draft plan in the light of submissions made by interested parties. I have no difficulty in categorising these decisions as administrative. They fail each of the three broad indicia of legislative character identified by Tamberlin J in *Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419 at 430 F-G. These are:

- "that a legislative instrument has the effect *of changing or determining the content of law*, rather than applying the law;

- that a legislative instrument has a *binding quality* as opposed to one designed to provide guidance as to the way in which a decision-maker may or should act;

- that a legislative instrument is usually one which has *general application* and is not directed to apply only in a particular case".

[19] By way of contrast the decision to make a Plan in the context of the statutory framework seems to satisfy all three. In particular the Plan determines the law in a binding way and is of general application. This is subject only to the fact that it does not commence to have this effect until it receives assent. By the Act, however, the Minister has the power to determine the content of the law and the Governor in Council reserves only the power to accept or reject the Minister's decision in that regard.

[20] I am satisfied that the Act operates to confer on a plan made by the Minister the status of subordinate legislation.

[21] The distinction between a decision of an "administrative" character and decisions of a "judicial" or "legislative" character was recognised by the Court of Appeal in the *Resort Management* case at p317. The same distinction is recognised by Thomas J in *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314 at 316 and founds the observation at p316 that "plainly, the [*Judicial Review Act*] was not intended to allow judicial review of subordinate legislation".

[22] The decision under challenge fails to satisfy the definition of "a decision to which this Act applies" by reason of its being of a legislative rather than an administrative character.

[23] In consequence the claim under s20 of the *Judicial Review Act* is ill founded.

[24] Despite reaching the above conclusion I have been troubled by the utility of making the order sought in the respondent's interlocutory application where the alternative claim in the principal application relies on the same grounds. Nonetheless no submission has been made that I should refuse the interlocutory relief on discretionary grounds and consequently I will not do so. In any event, once a plan has been made and approved by the Governor-in-Council it seems doubtful whether the Minister has the power to reconsider other than under s25F of the *Water Resources Act* which relates to amendment. The application under s20 of the *Judicial Review Act* may have been futile anyway. In any event, I do not have to consider that matter.

[25] That part of the principal application which seeks to review pursuant to s20 of the *Judicial Review Act* the decision of the Minister to make the Water Management (Cooper Creek) Plan 2000 is dismissed.