

SUPREME COURT OF QUEENSLAND

CITATION: *Mackay v Queensland Rural Adjustment Authority* [2008]
QSC 340

PARTIES: **HUGH CARMICHAEL MACKAY**
(applicant)
v
QUEENSLAND RURAL ADJUSTMENT AUTHORITY
(respondent)

FILE NO/S: SC 342/2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 19 December 2008

DELIVERED AT: Townsville

HEARING DATE: 15 December 2008

JUDGES: Cullinane J

ORDER: **1. Application dismissed**
2. Parties given leave to make submissions as to costs, such submissions to be provided to the court prior to the 31st January 2009

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – EXTENSION OF TIME – where application file out of time – where application made for extension of time – whether an extension of time should be granted

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – GENERALLY – where applicant seeks review of a decision refusing the applicants application for enterprise assistance – where application refused on the basis that the applicant did not fall within the definition of ‘farming business’ – whether the respondent erred

Deer Farming Act 1995
Judicial Review Act 1991 s 26

Rural and Regional Adjustment Act 1994 s 13C, s26 (1) (b)
Rural and Regional Adjustment Regulation 2000, s 141

Brooks v Federal Commissioner of Taxation [2000] 173 ALR 235 cited

Hoffman v The Queensland Local Government Superannuation Board (1993) 1 Qd R 369 considered
Kuku Dujunjun Aboriginal Corporation v Christiansen (1993) 2 Qd R 663 cited

COUNSEL: The applicant appeared on his own behalf
 PG Bickford for the respondent

SOLICITORS: The applicant appeared on his own behalf
 McCullough Robertson Lawyers

- [1] This is an application for judicial review filed on 28 May 2008 relating to a refusal by the respondent of an application by the applicant for enterprise assistance pursuant to a scheme established under the *Rural and Regional Adjustment Act 1994* as amended.
- [2] The decision for the purposes of the application is a decision pursuant to an internal review under s 13C of the *Rural and Regional Adjustment Act 1994*.
- [3] The relevant decision was made on 23 November 2007 and notified to the applicant by letter of 28 November 2007. The evidence suggested that it was received by the applicant in the first week of December 2007.
- [4] The original decision which was the subject of review under s 13C of the Act was made on or about 30 August 2007. It was also to refuse the application.
- [5] The application before the Court was therefore made well out of the time provided for under s 26 of the *Judicial Review Act 1991* as amended which requires such an application to be made within 28 days after the day upon which the decision is given to the applicant.
- [6] The applicant therefore seeks an extension of time pursuant to s 26(1)(b) of the Act.
- [7] I will return to this matter a little later.
- [8] The application made by the applicant was for enterprise assistance under the Vegetation Management (Enterprise Assistance) Scheme provided for in part 13 of the *Rural and Regional Adjustment Regulation 2000*.
- [9] The scheme is extensive and complex in its terms. It is sufficient to refer to some aspects of it.
- [10] Only farm entities are eligible to receive assistance. A “farm entity” is defined as meaning “an individual, a partnership, or a proprietary company, solely or mainly engaged in a farming business.”

- [11] “Farming business” means “a business that involves primary production, including, for example, the agricultural, apicultural, aquacultural, horticultural or pastoral industries.”
- [12] There are a number of eligibility criteria provided for in s 141 of the scheme set out hereunder. For present purposes the important eligibility criteria are to be found in s 141(f) and (g).

“141 Eligibility criteria

(1) For a farm entity to be eligible to receive assistance under the scheme, the authority must be satisfied that—

- (a) the farm entity owns, or has a relevant interest in, an area of land that is an affected area of land; and*
- (b) the area of land is shown as an affected area of land in the farm entity’s enterprise management plan; and*
- (c) an affected area certificate has been issued for the area of land or the farm entity has made reasonable efforts to obtain an affected area certificate for the area of land; and*
- (d) either—*
 - (i) the farm entity acquired, or entered into a contract to acquire or use, the affected area of land or the relevant interest in the affected area of land before 22 May 2003; or*
 - (ii) the affected area of land or the relevant interest was transferred to the farm entity on or after 22 May 2003 and the transfer was a relevant family transfer; and*
- (e) the project under the enterprise management plan for which assistance is sought under the scheme (the **relevant project**) is consistent with the objectives and purpose of the scheme; and*
- (f) having regard to the enterprise management plan, each of the following applies—*
 - (i) carrying out broadscale clearing of vegetation in the affected area of land would be necessary to achieve or maintain sustainable long-term viability of the farm entity;*
 - (ii) the relevant project will substitute for broadscale clearing in the affected area of land by achieving or maintaining long-term viability of the farm entity;*
 - (iii) the action proposed under the plan is consistent with managing vegetation in a way that achieves the purposes of the Vegetation Management Act;*
 - (iv) the farm entity has the capacity to become financially independent of the assistance under the scheme within a reasonable period; and*
- (g) the farm entity can achieve long-term viability with the assistance provided under the scheme, taking into account the viability factors; and*
- (h) the assistance given under the scheme is likely to contribute to, or facilitate, improvements in the viability of the farm entity by—*
 - (i) reducing the average costs of operating the farm entity’s farming business; or*
 - (ii) providing a sustainable increase in the value of the production of the farming business; and*

(i) the person operating the farm entity's farming business, under normal circumstances—

(i) is responsible for contributing the majority of the person's labour to the farming business; and

(ii) generates, or has the potential to generate, the majority of the person's income from the farming business.

- [13] Points of claim and points of defence were delivered in the matter and in the course of doing so it became clear that there was one relevant issue and this involved a question of construction. I will return to this shortly.
- [14] The applicant was at all times unrepresented and appeared on the hearing of the application personally.
- [15] The relevant property is known as Hotspur. It was not contended by the respondent that the applicant does not have a relevant interest in the property. The property is approximately 3350 hectares in area and is situated north of Jericho.
- [16] The property carries a number of cattle which the applicant in a letter of 24 July 2007 to the respondent described when speaking of the carrying capacity by reference to the improved and unimproved areas of the property.
- [17] In addition to running cattle on the property the applicant also has deer and some buffalo on the property. It is in relation to the deer which are bred and raised there that the issue before the court primarily turns.
- [18] The applicant describes the stocking rate of the various types of deer which run on the property and his operations in relation to the deer in the same letter:

Deer

Stocking rate is 1 deer each 1/16 of a beast acre of 16 deer to 1 beast for Rusa, Fallow, Fallow, Axis, Samba. For Red deer and Elk, the ratio is 1:8. Deer live on 70% browse. We value add deer and bring in overseas hunters to hunt trophy animals under fair chase rules. The trophy fees for deer range from \$2500-\$5000 US per head plus \$3500 US for the hunt. We breed deer and buy in good bloodlines. Prior to the drought we used to sell approximately 50 to 53 stags per year."

- [19] The applicant conducts a business under the name of Australian Outfitters Hotspur Outback Safaris which provides deer to hunters who come to the property where they are accommodated and a deer is made available to each hunter for the purposes of being hunted and killed. The type of deer is identified in antecedent discussion between the applicant and the hunter.
- [20] The applicant charges each person two separate fees. One is described as a trophy fee which as I understand it represents the value of the beast provided for the purposes of being hunted. In addition he charges a fee "for the hunt" which is as I understand it would include accommodation, food and transportation. Sometimes agents arrange for a hunter to come to the property and in this case only one payment is made.

- [21] What happens with the remains of the beast after it has been killed is a matter for the hunter. Generally speaking, a hunter will consume some of the meat and take the head and horns as a trophy.
- [22] It seems that a similar business is conducted with buffalos although this appears to be at a lesser level. Some hunters want to be able to hunt both deer and buffalo in the one visit.
- [23] I should mention that the cattle are also sold under the business name referred to above.
- [24] It had been necessary under the *Deer Farming Act 1995* for the applicant to register his property as a deer farm but this legislation was repealed in late 1997 and such registration is no longer required.
- [25] Included in the material which the applicant has placed before the court (and which was before the respondent) are two letters from the Department of Primary Industries in which reference is made to “the farming of deer” and “deer farming”.
- [26] The applicant sought to make something of these descriptions on this application.
- [27] The refusal of the application upon the internal review and the reasons for such refusal are summarised in the following concluding passage in the assessment consequent upon the internal review:
- “Advise the applicant that we have reviewed our earlier decision and note contents of letter from Lionel Walsh (on his behalf) dated 30 October 2007. We have reviewed our earlier decision however remain of the opinion that your primary production business is not viable and that reliance on hunting business income is expected to continue to be required. Accordingly your application is declined.”*
- [28] This assessment also appears in the letter of 28th November 2007 to the applicant.
- [29] The assessment contains a number of comments in relation to various components of the scheme but it was common ground that ultimately the issue was whether the assessor erred in law in concluding that the operations on the property in relation to the deer would not fall within the definition of “farming business” in the scheme.
- [30] It was common ground that if the deer operations were excluded the grazing operations on the property would not meet the eligibility criteria. This would appear to have been conceded in a letter from the accountant for the applicant to the respondent dated the 30th October 2007. It cannot be said that the respondents conclusion was not open if the deer and buffalo operations are excluded.
- [31] As will be seen “farming business” is defined in a non exclusive manner.
- [32] The definition of “farming business” is a business that “involves primary production”. A number of examples are then given.

- [33] An example is in accordance with ordinary principles of construction not intended to be exhaustive of cases which might fall within the definition. See *Brooks v Federal Commissioner of Taxation* [2000] 173 ALR 235 at 252.
- [34] The term “primary production” is not defined. I was not referred to any authority dealing with this nor have I found any dictionary definition.
- [35] The applicant relies upon the definition of “primary production” contained in the Income Tax legislation. However a definition contained in another statute will not be likely to be of any real assistance in construing similar language used in different legislation. This is perhaps particularly true of revenue statutes.
- [36] The meaning of the definition is to be determined by reference to the language used taken in the context of the nature and purpose of the legislation in which it appears.
- [37] “Farming” is defined in the Shorter Oxford Dictionary as: the business of cultivating land, and raising stock etc.”
- [38] The same dictionary defines “pastoral” as: “2. of land: used for pasture.” I think it would be generally accepted that the term “pastoral would include the use of land for grazing purposes.
- [39] In the course of argument analogies were sought to be made with a number of different scenarios. Some of these appear in correspondence passing between the accountant for the applicant and the respondent.
- [40] Before me the respondent placed consideration emphasis upon what it described as the hunting experience which it was said was at the centre of the operations concerning the deer and sought to compare it with hunting wild animals such as kangaroos and pigs and the like on a grazing property.
- [41] However there is an obvious distinction between such activities and what occurs in this case in the sense that there is undoubtedly an element of husbandry involved in the breeding and growing of deer until they reach the point where they are suitable to be hunted by a hunter. The improvements on the property such as fencing and waters are used for these purposes for the deer in the same way as they are used for cattle.
- [42] Although no authority or references were placed before the court which might assist in construing the term “primary production” I think that it can reasonably be taken as meaning some undertaking involving the first step or steps in a process which step or steps may involve activities such as cultivation of some kind, grazing of animals or extraction of materials and which process will culminate in a product to be consumed by a consumer and which is useful whether being in the nature of food, clothing or some other item having a beneficial purpose.
- [43] It can be accepted that if deer are bred and grown for the purposes of ultimately providing meat and hide there would be no difficulty in concluding that this activity fell within the definition under consideration here.
- [44] Here I think that the product which the applicant seeks to sell can be described as a hunting experience on the property “Hotspur” involving a deer previously agreed

upon and made available to the hunter. The animal is destroyed in the process and the remains may be used by the hunter partly for consumption and partly for the purpose of a trophy as a memento of the experience. I think there is some difficulty in characterising this as primary production or part of a pastoral industry as the applicant contends.

- [45] Whilst I do not think that the applicant's contention that his deer and buffalo undertaking falls within the definition of a "farming business" in the scheme is unarguable I am inclined to think that the construction he contends for is somewhat implausible. It is not however necessary to express a concluded opinion on this issue because of the view I take about the application for an extension of time.
- [46] The applicant requires an extension of time of a little less than six months. His explanation is that as a layman he was unaware of the procedures and the time limits involved.
- [47] He pursued the matter with the ombudsman believing that this was the appropriate course to take and it was only sometime after that that he became aware of the existence of the avenue of a judicial review.
- [48] In *Kuku Dujunjun Aboriginal Corporation v Christiansen* (1993) 2 Qd R. 663 Moynihan J said at page 665:

"It seems to me that, prima facie, proceedings commenced outside the limitation period ought not to be entertained unless the applicant shows an acceptable explanation of the delay and that it would be fair and equitable in the circumstances to extend the time. Such considerations, in cases such as the present, extend beyond considerations applying as between the applicant and the respondent and include a wider public interest. The same may be said of consequences of prejudice to the respondent and others consequent on the delay in bringing the application."

- [49] In *Hoffman v The Queensland Local Government Superannuation Board* (1993) 1 Qd R 369 Thomas J said at page 372: *"—but the absence of explanation for a delay must at least be a persuasive factor against granting an extension."*
- [50] In that case His Honour thought there was a prima facie case that a denial of natural justice had occurred and ultimately took the view that the circumstances of the case generally warranted the granting of an extension.
- [51] In the present case the applicant advances an explanation for his failure to file an application within time but it can hardly be regarded as an adequate one based as it is upon a misunderstanding of the position which would have been surely dispelled had he sought legal advice as might be expected of a reasonable person in his circumstances.
- [52] Were the position such that I thought that the respondent's construction of the terms of the scheme plainly wrong I would have regarded this as justifying an extension of the period and indeed counsel for the respondent accepted that that would be a sufficient basis upon which to extend time.

- [53] However as will be apparent I am not convinced that it can be said that the decision is plainly wrong and in these circumstances I do not think it is appropriate to grant the extension sought of some five months
- [54] The application is therefore dismissed.
- [55] I give the parties leave to make submissions on the question of costs. Such submissions are to be provided to the court prior to 31st January 2009.