SUPREME COURT OF QUEENSLAND

CITATION:	*Sibelco Australia Ltd v Magistrate Graham C Lee & Anor* [2013] QSC 270
PARTIES:	**SIBELCO AUSTRALIA LIMITED (ACN 000 971 844)** (applicant) **v** **MAGISTRATE GRAHAM C LEE** (first respondent) and **GRAHAM BELL** (second respondent)
FILE NO/S:	3199 of 2013
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2013
JUDGE:	Dalton J
ORDER:	**Application dismissed**
CATCHWORDS:	*Environmental Protection Act* 1994 (Qld) *Integrated Planning Act* 1997 (Qld) *Justices Act* 1886 (Qld) *Chief Executive Officer of Customs v Jiang* (2001) 111 FCR 395 *Craig v South Australia* (1995) 184 CLR 163 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 *R v Bjelke-Petersen, ex parte Plunkett* [1978] Qd R 305 *Sankey v Whitlam* (1978) 142 CLR 1 *The Electrical Trades Union of Employees Queensland v President of the Industrial Court of Queensland* [2007] 1 Qd R 1 *Thiess Pty Ltd v President of the Industrial Court of Queensland & Anor* [2011] QSC 294
COUNSEL:	P O'Shea QC with R Devlin QC and R Byrnes for the applicant R Marsh for the first respondent A Glynn QC with K Mellifont QC for the second respondent

SOLICITORS: Sparke Helmore for the applicant
Crown Law for the first respondent
Department of Environment & Heritage Protection for the second respondent

[1] This matter came before the Court on an originating application. The applicant is charged with one offence under the *Environmental Protection Act* 1994 (EPA) and one offence under the now repealed *Integrated Planning Act* 1997. It was conceded by the respondent that the outcome was the same whichever set of statutory provisions were used, so I refer throughout to the EPA, but my decision is in relation to both charges. Both offences relate to sand mining on North Stradbroke Island. The matter came on for summary trial in the Magistrates Court and on 27 February 2013 the defendant made a no case submission. The Magistrate ruled there was a case to answer and delivered written reasons on 28 March 2013. The Magistrate listed the remaining part of the trial for October 2013. In this Court the applicant seeks an order in the nature of *certiorari*. Error on the face of the record and jurisdictional error are relied upon to justify the grant of this remedy. As well the applicant asks for declarations which effectively contradict the substance of the Magistrate's decision and would put an end to the criminal proceedings in the Magistrates Court.

Error on the Face of the Record

[2] Both parties accepted that I was bound by *Craig v South Australia*[1] in determining what the record in the Magistrates Court was. The respondent conceded that the particulars to the charge brought formed part of the record and I proceed on that basis, which seems correct having regard to *Craig*, pp 180 and 182. The record is in three parts. First the Magistrate's decision below that, "… in respect of the no case to answer submission, … there is a case to answer …"

[3] Secondly, there is the Complaint:

> "… between 3 December 2003 and 18 December 2008 at North Stradbroke Island in the Magistrates Court district of Cleveland, [the applicant] did, in contravention of section 427(1) of the *Environmental Protection Act* 1994, carry out a level 1 chapter 4 activity, not being a registered operator for the activity and not acting under a registration certificate for the activity.
>
> **PARTICULARS**
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> **1. Level 1 chapter 4 activity:** extracting sand (other than foundry sand) from a pit or quarry using plant or equipment having a design capacity of 100,000t or more a year.
>
> **…**"

[4] Thirdly, the particulars of the charge which were given:

> "1. The contravention continued over the period 3 December 2003 until 18 December 2008, and more specifically:
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> - between 3 December 2003 and 18 December 2008, in conjunction with the Defendant's mining activity on

[1] (1995) 184 CLR 163, 182-3.

Mining Lease 7064 under Environmental Authority M2884 (MIM800091702); and

- between 1 April 2007 and 18 December 2008, in conjunction with the Defendant's mining activity on Mining Lease 1108 under Environmental Authority MIM900220203.

2. During the offence period, the level 1 chapter 4 activity was Environmentally Relevant Activity 20, which is described on the complaint.

3. The Defendant was not a registered operator for Environmentally Relevant Activity 20 as it did not hold a registration certificate issued under section 73F *Environmental Protection Act 1994.*

4. The Defendant was not acting under a registration certificate issued under section 73F *Environmental Protection Act 1994* to carry out Environmentally Relevant Activity 20.

5. The sand extracted is described as 'B grade silica sand' (also commonly known as 'construction sand', 'building sand', 'B grade glass', 'brickies loam', 'sandy loam', 'reject sand', 'fill sand', 'loam' and 'white sand').

6. The pit or quarries that the B grade silica sand was extracted from were those used by the Defendant to carry out mining activities on Mining Lease 1108 under Environmental Authority MIM900220203 and Mining Lease 7064 under Environmental Authority M2884 (MIM800091702).

7. The plant or equipment used to extract the B grade silica sand were:

   - a Komatsu WA480 front end loader on Mining Lease 1108; and
   - a Caterpillar 970F front end loader on Mining Lease 7064.

   Both front end loaders were employed to extract more than 100 000t of sand a year from the respective leases."

[5] Chapter 5 of the EPA provides for permits or authorities to issue for mining activities, as defined. Taking silica from the mining leases is a mining activity. The applicant did this and had a relevant permit. Chapter 4 of the EPA provides for permits or authorities to issue for "environmentally relevant activities". Extracting B Grade sand is prescribed by regulation to be environmentally relevant activity 20. The complaint before the Magistrate is the applicant did this and did not have a relevant permit.

[6] Section 147 of the EPA, situated in chapter 5 under the divisional heading, "Key definitions for ch 5" provides as follows:

"(1) A *mining activity* means an activity mentioned in subsection (2) that, under the Mineral Resources Act, is authorised to take place on–

(a) land to which a mining tenement relates; or

(b) land authorised under that Act for access to land mentioned in paragraph (a).

(2) For subsection (1), the activities are as follows–

(a) prospecting, exploring or mining under the Mineral Resources Act or another Act relating to mining;

(b) processing a mineral won or extracted by an activity under paragraph (a);

(c) an activity that–

(i) is directly associated with, or facilitates or supports, an activity mentioned in paragraph (a) or (b); and

(ii) may cause environmental harm;

(d) rehabilitating or remediating environmental harm because of a mining activity under paragraphs (a) to (c);

(e) action taken to prevent environmental harm because of an activity mentioned in paragraphs (a) to (d);

(f) any other activity prescribed for this subsection under a regulation."

[7] Shortly put, the applicant's argument on the no case submission was as follows. First, everything which it did at the mining leases fell within the definition of mining activity in the EPA: it was either mining silica under s147(2)(a), or an activity directly associated with that (taking B grade sand) under s147(2)(c).[2] Secondly, it had an authority under chapter 5 of the EPA for mining activity. Thirdly, as a matter of statutory construction, an activity which was a mining activity within chapter 5 of the EPA could not constitute a chapter 4 activity under that Act. In circumstances where it performed no act other than acts which constituted mining activity within chapter 5 of the EPA, there was no case to answer on a prosecution for carrying out a chapter 4 activity.

[8] Accepting for the purposes of argument that the applicant's case as to statutory construction is correct, there is no error on the face of the record. The record shows that there was a contravention alleged which took place on a mining lease and in conjunction with mining activity. It shows an allegation that something which is not a mineral (B grade sand) was extracted, and extracted with front-end loaders, from the pits or quarries used to carry out mining activities, but no more. Additional facts are crucial to the applicant's point, namely: (a) mining for silica at the pits in question entailed removal of topsoil and then, with front-end loaders, removal of an undifferentiated mass containing both silica and B grade sand; (b) it was impossible to remove silica from the pits without also removing B grade sand as part of that undifferentiated mass; (c) it was necessary later to employ processes to separate silica from the B grade sand in that undifferentiated mass; (d) removal of B grade sand in that fashion was an activity which "may cause environmental harm" within the meaning of s 147(2)(c)(ii). The record does not reveal these facts.

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[2] The requirement at s 147(2)(c)(ii) does not seem to feature in the case below. It seems to be assumed that it was satisfied in relation to the extraction of B grade sand. Perhaps there was evidence before the Magistrate to this effect, or will be when the defence case is run. It need not concern me on this application.

Without it doing so, there is no error of law apparent on the record, even assuming the applicant's statutory construction point is correct.

Jurisdictional Error

[9] The applicant argues that the Magistrate made an error of law in considering its statutory construction point. The Magistrate concluded that as a matter of law under the EPA the same activity could be both a mining activity under chapter 5 and a chapter 4 activity and that, implicitly, a person would need a permit both under chapter 4 and chapter 5 to carry on such an activity. The applicant had only a permit for a chapter 5 authority and thus the Magistrate ruled that there was a case to answer and that the summary trial should continue.

[10] There is no doubt that the Magistrate had jurisdiction to entertain the summary trial so that the Magistrate did not mistakenly assert the existence of such a jurisdiction. Nor do I think it could be argued that he misapprehended the nature or limits of his functions or powers in exercising that jurisdiction – see *Craig,* cited in *Kirk v Industrial Court of New South Wales.*[3] The Magistrate has not purported to act wholly or partly outside the general area of his jurisdiction in the sense contemplated by *Craig* – p 177 – "entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of [his] functions and power".

[11] The Court in *Craig* went on to say, "Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do." Once again, that is not the case here. The Magistrate had authority to determine whether or not there was a case for the defendant to answer. He has done that. If he is in error, it is an error in the course of making a decision which he has authority to make.

[12] Lastly in *Craig* – p 177-178 – the High Court said that jurisdictional error, "will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case." The Court recognised that this type of jurisdictional error was the most difficult to discern. These comments were repeated in *Kirk* at p 574.

[13] The judgment in *Kirk* slightly recasts this part of *Craig*[4] and the applicant relies upon the judgment in *Kirk* at p 574 point (c), "misconstruction of the relevant [jurisdiction giving] statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case." Accepting that the EPA is the statute which gives the Magistrate jurisdiction to hear the summary trial – see ss 19 and 22 of the *Justices Act* 1886 and chapter 10 Part 3 of the EPA – the error of law which the applicant contends this Magistrate has made is not an error as to the nature of the function which he is performing or the extent of his powers in this case. If there is an error, it is not jurisdictional error. The Magistrate has jurisdiction to make determinations

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3 (2010) 239 CLR 531, 573.

4 I note that the Court in *Kirk* warned that the categories or types of jurisdictional error discussed in *Craig* are not "a rigid taxonomy of jurisdictional error" – p 574.

of fact and law within his jurisdiction – *Craig*, p 179-180; *R v Bjelke-Petersen, ex parte Plunkett*.[5] That is what he has done. If there is an error, and the applicant is convicted, the applicant has a remedy pursuant to s 222 of the *Justices Act.*

Declarations

[14] I did not understand the applicant to seek declarations (essentially in terms of its view of the statutory construction point), in the event that relief in the nature of *certiorari* was not granted. There is good reason why a court would not grant declarations in such circumstances: it would amount to a collateral attack.

Discretion

[15] It was argued that I should not grant the relief sought by the applicant on discretionary grounds. Because of my determinations as to the substance of the matter, a determination on this point does not arise. However, I note the Court's traditional reluctance to interfere with a criminal process.[6] The applicant here argued that the matter was unusual in that there was little dispute about the facts; the error it relied upon was an error of statutory construction and thus one which could be determined by a court which had not heard the witnesses, and that due to the Magistrate's having adjourned the remainder of the trial for reasons unconnected with this application, determination of the application would not itself result in fragmentation of the summary trial before the Magistrate.

[16] In these respects the instant case is unusual. However, I am not persuaded that even if there were grounds for making an order akin to *certiorari* I should make such an order or declarations. The legislature has set out the process for the trial and appeal, after trial, of criminal contraventions such as the subject of this application. Respect ought to be accorded to that structure, and to that process. It cannot help but diminish that respect if this Court sits as some sort of supervisory body overseeing the process and substituting its own views for the views of those entrusted to deal with those matters.[7] The criminal process here ought to be allowed to run its course. There may never be a conviction; there may never be an appeal. If there is an appeal, s 222 of the *Justices Act* provides that the appeal lies to the District Court of Queensland. I can see no reason why this Court should interfere with the process.

[17] I dismiss the application. I will hear the parties as to costs.

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5 [1978] Qd R 305, 310-311.

6 *Sankey v Whitlam* (1978) 142 CLR 1, 25-26; *Chief Executive Officer of Customs v Jiang* (2001) 111 FCR 395, 400.

7 See for example the comments made by Applegarth J in *Thiess Pty Ltd v President of the Industrial Court of Queensland & Anor* [2011] QSC 294, [51] per Applegarth J citing *The Electrical Trades Union of Employees Queensland v President of the Industrial Court of Queensland* [2007] 1 Qd R 1, [21].