

LAND APPEAL COURT OF QUEENSLAND

CITATION: *De Tournouer v Department of Natural Resources and Water* [2009] QLAC 0006

PARTIES: Margaret Frances De Tournouer
(applicant)

v.

Chief Executive, Department of Natural Resources and Water
(respondent)

FILE NO: LAC2008/0773

DIVISION: General Division

PROCEEDING: Appeal against a decision of the Land Court

ORIGINATING COURT: Land Court of Queensland

DELIVERED ON: 12 June 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

THE COURT: White J
Mrs CAC MacDonald, President of the Land Court
Mr PA Smith, Member of the Land Court

ORDERS:

- 1. The appeal is dismissed.**
- 2. The appellant is to pay the respondent's costs of and incidental to the appeal unless the appellant contends that some other order ought to be made in which case:**
 - (i) the appellant file and serve any submissions within 21 days;**
 - (ii) the respondent file and serve any response submissions within 14 days of receipt of the appellant's submissions;**
 - (iii) the appellant file and serve any reply within 7 days of receipt of the respondent's submissions;**
 - (iv) the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.**

CATCHWORDS: Water licence – application – appeal against review decision of volume granted – nature of appeal – hearing to the Land Court de novo – but with same powers and restraints as for chief executive – hearing to Land Appeal Court rehearing on record below

Water licence – criteria to consider granting – *Water Act 2000* and *Water Resources (Barron) Plan 2002* – not sufficient evidence of efficient use – mandatory requirement – only need to balance all criteria if sufficient evidence of efficient use – appeal dismissed

Appeal – discretion – circumstances – where discretionary decisions of Court will be altered on appeal

Water licence – safeguards applicable to grant (conditions of approval, amendment, limited time) – only relevant if mandatory criteria first met

APPEARANCES: Mr DR Gore QC for the appellant
Mr WL Cochrane with Mr S Fynes-Clinton for the respondent

SOLICITORS: Preston Law for the appellant
Crown Solicitor, Crown Law for the respondent

- [1] These proceedings arise out of an application made under the provisions of the *Water Act 2000* (the Act) by the appellant, Margaret Frances De Tournouer, for a water licence. The appellant had applied to take 715 megalitres per annum (ML/a) from the Atherton Basalt Subartesian area (Management Area B) as described in the *Water Resources (Barron) Plan 2002* (the *Barron Plan*). The application indicated that the water was to be used for domestic, stock watering and irrigation purposes, the irrigation requirements being for crops of pasture hay, maize and potatoes. The land on which the water was to be used was identified as Lot 266 on Plan NR 263, Lot 267 on Plan NR 288, Lot 268 on Plan NR 288, and Lot 188 on Plan NR 287, all in the Parish of East Barron.
- [2] On 9 November 2006 the Chief Executive granted the appellant a licence to take 80 ML/a.
- [3] The appellant sought a review of that decision.¹ By Notice of Review Decision, the appellant was advised that the decision of the reviewer was to "confirm (in whole) the original decision". A notice of appeal challenging the review decision was filed in the

¹ S.862 *Water Act 2000*.

Land Court. The Land Court dismissed the appeal and affirmed the review decision.²
The appellant has appealed to this Court against that decision.

Land Court Decision

[4] Section 210(1) of the *Water Act* sets out the criteria for deciding applications for water licences:

"210 Criteria for deciding application for water licence

- (1) In deciding whether to grant or refuse the application or the conditions for the water licence, the chief executive must consider the following—
 - (a) the application and additional information given in relation to the application;
 - (b) if notice of the application has been published—all properly made submissions made about the application;
 - (c) any water resource plan, resource operations plan and wild river declaration that may apply to the licence;
 - (d) existing water entitlements and authorities to take or interfere with water;
 - (e) any information about the effects of taking, or interfering with, water on natural ecosystems;
 - (f) any information about the effects of taking, or interfering with, water on the physical integrity of watercourses, lakes, springs or aquifers;
 - (g) strategies and policies for the sustainable management of water in the area to which the application relates;
 - (h) the sustainable resource management strategies and policies for the catchment, including any relevant coastal zone and regional aquifer systems;
 - (i) the public interest. ..."

[5] The learned Member drew attention particularly to s.210(1)(c) and s.210(1)(g), commenting in relation to clause (g) that it appeared to be a criterion relied on particularly by the Chief Executive in the original decision on the application.³

[6] Section 210(1)(c) refers to any water resource plan that may apply to the licence. The *Barron Plan* applies to the appellant's land. That plan provides in s.11(2):

"11 General Outcomes

- (2) Both surface water and subartesian water are to be allocated and managed in a way that seeks to achieve a balance in the following outcomes—
 - (a) to allow water to be used for the following—
 - (i) agriculture;
 - (ii) aquaculture;
 - (iii) industrial needs;
 - (iv) small scale uses;

² *De Tournouer v Chief Executive, Department of Natural Resources and Water* [2008] QLC 0151.

³ Reasons for judgment (RJ) [7]. In an Information Notice given pursuant to s.211(3) of the Act, the respondent said: "Consultations with the WAG [Water Advisory Group] resulted in the department giving an undertaking to deal with certain applications for entitlement that meet specific conditions including those related to the Moratorium Notice. In view of the considerable investment made by the applicants to locate and test possible ground water supplies it was decided to grant some entitlement in the Peterson Creek sub-area based on the mean entitlement of other licensees. This results in a possible entitlement of 80 ML/a for each applicant in this sub-area."

- (v) stock and domestic purposes;
 - (vi) tourism and recreational uses;
 - (vii) urban needs;
- (b) to provide for the continued use of all water entitlements and other authorisations to take or interfere with water;
- (c) to encourage the efficient use of water;
- (d) to maintain areas of significant tourism and recreational value, including the Barron Falls, Barron Gorge and Tinaroo Falls Dam;
- (e) to allow cultural use by Aboriginal or Torres Strait Islander communities;
- (f) to provide water to support natural ecosystems."

[7] Having identified s.210(1) of the Act and s.11(2) of the *Barron Plan* as relevant, amongst other matters, to the exercise of jurisdiction, the learned Member said:⁴

"At their broadest, cases of this nature are concerned with three elements: the availability of water for allocation; the potential environmental impacts of making the allocations sought; and the use to which allocated water is to be put. Section 11(2)(b) and (c) of the Barron Plan are concerned with the third element."

[8] The learned Member noted that the expert evidence led before him focussed mainly on the first element, the question of availability of water to meet the application. The experts called were Mr Iain Hair (Hydrogeologist) for the appellant and by Mr RW Lait and Dr JB Prendergast (Hydrologist) for the respondent. For the reasons set out in the decision, the Land Court held that the opinion evidence provided by Dr Prendergast could not be safely relied upon. That conclusion has not been challenged in this appeal.

[9] However, the Court also held the appellant had failed to satisfy the Court as to the third of the requirements set out above, namely the use to which the allocated water was to be put and, accordingly, the review decision was affirmed.

[10] Evidence as to the use to which the allocation of 715 ML/a of water would be put was provided by Mr JM De Tournouer, the appellant's son and the manager of the property. Mr De Tournouer said that his primary purpose for making the application was to drought-proof the property. He also said that he would grow winter crops such as winter rye grass and clover and thereby almost double the carrying capacity of the land for cattle. Further, Mr De Tournouer said that he intended to grow crops such as vegetables (potatoes) as an option if beef prices declined. Prior to the hearing before the Land Court, Mr De Tournouer had met with a Mr McQuillam of Malanda Rural Supplies and Mr McQuillam had advised Mr De Tournouer as to the appropriate crops that could be planted and the amount of water necessary to sustain those crops.

⁴ RJ [9].

[11] The learned Member found that there was no evidence as to how much water was necessary to drought-proof the property. Nor was there any evidence as to the area to be sown for the winter crops or the water needed for such plantings and, the learned Member observed, the idea of doubling the carrying capacity appeared to be inconsistent with such evidence as was led as to the volume of water required.⁵ The learned Member also found that the water volume attributed to Mr McQuillam assumed an intensive use of the appellant's land for cropping and the dedication of part of it to permanent tree crops. He said that those uses were not consistent with Mr De Tournouer's stated intention in his affidavit that he wanted to drought-proof the property as a grazing enterprise and his expectation of doubling the grazing capacity. Mr De Tournouer's evidence was that he viewed cropping as an option without any present commitment to pursue that option.⁶ Further, the learned Member found that the documentation relating to this proposal was not and did not purport to be a cropping and water usage plan based on the appellant's intentions but represented suggested water usage if the cropping assumed by Mr McQuillam (potatoes, corn (silage), hay – grass seed and orchard trees) ever eventuated. He also said that the figure of 633 ML/a ultimately contended for by the appellant appeared to have derived from Mr McQuillam's calculations but the exact calculation was not fully explained.

[12] Accordingly, the learned Member was not convinced that the volume of water sought by the appellant would be used for the purposes assumed by Mr McQuillam. Therefore the appellant had not demonstrated that there would be a "continued use of the water entitlement"⁷ sought, nor of any lesser identifiable amount.

[13] Further, the learned Member said, he had not been presented with any means of ascertaining what would constitute "the efficient use of"⁸ any water entitlement that he might order. The learned Member concluded that the volume of water sought in the appellant's licence application was not estimated by reference to a plan of productive and effective usage but represented the maximum volume that might be allowed.⁹

The appeal to the Land Appeal Court

[14] The appeal to the Land Court lay under s.877(1)(b) of the Act. Section 882(1) of the Act provides that in deciding an appeal, the Land Court may confirm, set aside or amend the review decision or send the matter back to the reviewer with appropriate directions or set aside the review decision and substitute it with a decision the court considers appropriate.

⁵ RJ [18].

⁶ (RJ) [26].

⁷ S.11(2)(b) *Water Resource (Barron) Plan 2002*.

⁸ S.11(2)(c) and s.51(2)(b) *Water Resource (Barron) Plan 2002*.

⁹ S.53(1)(b) of the *Water Resource (Barron) Plan 2002* provides that the maximum annual volumetric limit for a licence to take water in the Atherton Subartesian Area is 5 ML for each hectare to be irrigated.

The effect of s.882(1) is that the Land Court must consider the application de novo but the Court has the same powers and constraints as those that applied to the chief executive when making the original decision. Relevantly, the matters to be considered by the chief executive are set out in s.210(1) of the Act and ss.11(2) and 51(2) of the *Barron Plan*.

[15] We accept the reasoning of the Land Court in *Sinclair v Chief Executive, Department of Natural Resources and Mines*¹⁰ that s.210 of the Act does not prescribe a set of threshold criteria, the demonstration of which would entitle the appellant to a favourable decision. Although s.210 requires the chief executive to consider all the criteria set out in the section, the chief executive retains a wide discretion as to whether the licence should be granted. There is no dispute that, in exercising that discretion, s.210(1) of the Act requires the decision maker to balance the considerations set out therein as well as the relevant provisions of the *Barron Plan*, that is ss.11(2) and 51(2).

[16] The appeal to this Court is by way of rehearing to be decided on the evidence on the record of the proceeding below.¹¹ Since the appeal to this Court is an appeal against the exercise of a discretion, the principles to be applied are those set out by the High Court in *House v The King*¹² —

"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[17] Turning now to the submissions before us, the appellant's case was, in broad terms, that -

- a. the Member had not determined the real issue in the appeal, even though he decided an important aspect of it strongly in favour of the appellant;
- b. the Member wrongly elevated a subsidiary issue in the appeal, the proposed use of the water, to a level of determinative importance even though that issue was of no consequence in the respondent's decision and the appellant's case on the issue, in the appeal to the Land Court, was sufficient.

[18] Senior Counsel for the appellant, Mr Gore QC pointed out that a substantial proportion of the written and oral evidence adduced before the Land Court was expert evidence. As

¹⁰ [2006] QLC 0006 at [17].

¹¹ Section 56(1), *Land Court Act 2000*.

¹² (1936) 55 CLR 499 at 504, 505.

stated above,¹³ the learned Member held that the evidence of one of the respondent's experts, Dr Prendergast, could not be safely relied. However the learned Member did not decide whether there was water available for allocation as sought, or what might be the environmental impacts of the allocation as sought because the learned Member was not satisfied as to the appellant's proposed use of any allocated water.

[19] Mr Gore submitted that, having successfully destroyed the credibility of Dr Prendergast, the appellant was at a loss to understand why the appeal to the Land Court failed. There had been a breach of the Court's duty to give reasons for its decision, he said, in that the Court had failed to decide the principal issues as to the availability of water and the environmental impact of any allocation. Instead the learned Member had decided the matter by reference to a wholly different and substantially subsidiary consideration.

[20] It is convenient to consider the learned Member's decision as to the proposed use of the water, before discussing whether there was a failure by the learned Member to determine the real issues in the appeal.

[21] Mr Gore submitted that the proposed use of the water was not a consideration relied on by the respondent in its original decision or its review decision. Both decisions resulted in the grant of an entitlement of 80 ML.

[22] We do not accept that the proposed use was not relied on by the respondent in its review decision. The reasons identified by the reviewer were –

- " • The results of drilling and pump testing show signs of dewatering of the top and lower water levels in two of the four production bores; hence there is doubt as to the long term sustainability of these bores. Another 6 test holes failed to locate a useable supply.
- The granting of the entitlement takes into account the Water Advisory Groups' views that the applicants in the Peterson Creek sub area should be granted an entitlement on the basis that the existing water users in the area would be prepared to accept a higher risk to their water security objectives under the WRP.
- The granting of the entitlement should not be done on the basis of property area."¹⁴

[23] Although the proposed use of the water was not referred to in the original departmental decision, it is apparent that the review decision did state that one of the reasons for decision was that the entitlement should not be granted on the basis of property area. As pointed out by the learned Member, the application for an allocation of 715 ML/a appeared to have been calculated by reference to the maximum volume that might be allowed under s.53 of the *Barron Plan*, that is 5 ML for each hectare to be irrigated.¹⁵

[24] While the reviewer did not refer expressly to the proposed use of the water it is clear that the reviewer rejected the basis on which the volume of water sought in the licence

¹³ At [8].

¹⁴ Appeal Record 4/93.

¹⁵ RJ [20]. Section 53(1)(b)(i)(A) of the *Water Resource (Barron Plan) 2002* provides that in deciding the annual volumetric limit for an irrigation licence granted in the Atherton Subartesian Area after the commencement of this plan, the chief executive must not decide a volume that is more than 5 ML for each hectare to be irrigated.

application had been calculated. The evidence of Mr McQuillam was obtained by Mr De Tournouer in July 2007, after the licence was rejected and some four months after the appeal to the Land Court has been filed. It is possible that this evidence (as to the crops that could be planted and the volume of water necessary to sustain those crops) was obtained for the purpose of the appeal. In any event, since the reviewer had rejected the methodology used to calculate the volume sought and accordingly the quantum of water sought, we consider that the proposed use of the water became, by necessary implication, an issue to be addressed by the appellant in any subsequent appeal.

[25] Moreover, since the Land Court was required to consider the application de novo, the Court was obliged to consider all the criteria set out in s.210 of the Act. Section 210(c) of the Act requires the decision maker to consider any water resource plan that may apply to the licence. Thus the provisions of the *Barron Plan* must be considered. Relevantly s.11(2) of the *Barron Plan* requires that subartesian water is to be allocated and managed in a way that seeks to achieve a balance between, inter alia, the following outcomes – (b) to provide for the continued use of all water entitlements and other authorisations to take or interfere with water, and (c) to encourage the efficient use of water. Section 51(2) of the *Plan* requires the chief executive to have regard, inter alia, to (b) the efficiency of the proposed water use practices. There is nothing in the legislation to suggest that the proposed use of the water was a subsidiary issue. Further, the requirement that the learned Member "must have regard" to the efficiency of the proposed water use practices¹⁶ is a mandatory requirement. It is not correct to say, therefore, as submitted by Mr Gore, that because the appellant had successfully challenged the credibility of one of the respondent's main witnesses, the issue of the proposed use of the water was a wholly different consideration. Similarly, we do not accept that if the learned Member had found that ample water was available in the system, the need to scrutinise the proposed use of the water would be significantly diminished. The requirement to scrutinise the proposed use of the water is imposed by ss.51(2) and 11(2) of the *Barron Plan*.

[26] Mr Gore also submitted that the learned Member had overstated the burden on the appellant, in respect of the proposed use of the water, by misinterpreting s.11(2) of the *Barron Plan* and s.210(1)(c) of the *Water Act*. Mr Gore said that those provisions do not require, as held by the court below, that an applicant for a licence must demonstrate that there would be "continued use of the water entitlement" sought.¹⁷

[27] Section 11(2) of the *Barron Plan* provides that subartesian water is to be allocated and managed in a way that seeks to achieve a balance in a number of specified outcomes

¹⁶ S.51(2)(b) *Water Resource (Barron) Plan 2002*.

¹⁷ RJ[27].

including in s.11(2)(b) "to provide for the continued use of all water entitlements and other authorisations to take or interfere with water". The learned Member found that he was not convinced that the volume of water sought by the appellant would be used for the purposes assumed by Mr McQuillam and concluded that the appellant had not demonstrated that there would be a continued use of the entitlement sought or of any identifiable lesser entitlement.¹⁸

[28] We tend to the view that the words "the continued use of all water entitlements" in s.11(2)(b) mean that the decision maker must take into account all the water entitlements in the area and, in making a decision whether to allocate further water, seek to achieve an outcome that enables the continuing use of any entitlement granted to the appellant as well as the existing entitlements. On that basis, we agree that the appellant was not required by s.11(2)(b) to show that she would make continued use of the water granted. However we do not consider that our difference of opinion with the learned Member on this aspect of the matter affects the final outcome.

[29] We turn now to consider Mr Gore's submission that the learned Member had failed to exercise his discretion by considering and balancing all the criteria set out in s.210(1) of the Act. As discussed above, s.51(2)(b) of the *Barron Plan* imposes an obligation on the decision maker to have regard to the efficiency of the proposed water use practices. In addition, s.11(2) of the *Plan* requires that subartesian water is to be allocated in a way that seeks to achieve a balance in a number of outcomes including the encouragement of the efficient use of water. If there was no evidence or no sufficient evidence about these matters before the Court we consider that it would not be possible for the Court to undertake the necessary balancing exercise. The absence of adequate evidence on this issue, therefore, would have the effect that this criterion, that is otherwise but one in a list of matters to be considered, assumes a determinative significance.

[30] Was there sufficient evidence before the Land Court to enable the learned Member to balance the criteria set out in s.210 of the Act, including the requirements in ss.51(2)(b) and 11(2)(b) of the *Barron Plan* that he have regard to the efficiency of the proposed water practices?

[31] The learned Member found, in respect of Mr Tournouer's statement that he intended to drought proof the property, that there was no evidence as to how much water would be needed to drought-proof the property. Nor did Mr De Tournouer refer to any plans as to how the drought-proofing would be achieved including how much water would be needed. Mr De Tournouer did say that he would grow and irrigate winter pasture crops

¹⁸ RJ[27].

and thereby double the carrying capacity of the property, but there was no evidence as to the area to be sown or the water needed for such plantings.¹⁹

[32] Those findings were not directly challenged in the notice of appeal filed in this Court. Relevantly, ground (2) was that –

"The member erred in deciding the third element adversely to the appellant, particularly given that:

...

(b) the evidence of Mr De Tournouer was relevantly uncontradicted;

(c) the member failed to take into account that the volume applied for had been suggested by an officer to the respondent."

Nor were we taken to any evidence at the hearing of the appeal to this Court, indicating that there was any error in the Land Court's findings.

[33] The only evidence lead before the Land Court as to the volume of water required by the appellant related to non-forage crops and orchard trees. The learned Member found that that evidence was not produced to serve a plan of land use intended by the appellant but was probably produced for the purpose of providing evidence at the hearing and to give Mr De Tournouer some idea of what cropping might be carried out on the land should he discontinue or modify the current cattle grazing use.²⁰ The learned Member therefore concluded that he was not satisfied that the volume of water sought would be used for those purposes. Further he had been presented with no way of ascertaining what would constitute "the efficient use of" any water entitlement he might order.²¹

[34] Mr Gore pointed to the trouble and expense incurred by the appellant and Mr De Tournouer in their pursuit of a suitable water allocation and submitted that theirs was not the behaviour of persons who do not propose to make proper and efficient use of any water allocation obtained.

[35] We acknowledge that the appellant has incurred considerable expense in connection with the licence application and appeals, that Mr De Tournouer's evidence as to usage was not contradicted and that there is some evidence that he was encouraged by a departmental officer to expect an allocation based on the maximum entitlement for the area to be irrigated. However, none of those factors demonstrate that there was any error by the learned Member in his findings as to the proposed use of the water. In those circumstances we agree with the learned Member that there was no evidence before him as to what would constitute the efficient use of any entitlement. It follows, that in the absence of adequate evidence, the learned Member could not carry out the balancing exercised required by s.210(1) of the Act, and ss.11(2) and 51(2) of the *Barron Plan*.

¹⁹ RJ[18].

²⁰ RJ [26].

²¹ RJ [27].

- [36] Our conclusion is therefore that the learned Member did not fail to determine the real issue in the appeal nor to give sufficient reasons for his decision.
- [37] Finally, Mr Gore submitted that the Land Court had ignored the appellant's submission that there were sufficient safeguards - the proposed conditions of approval, the prospect of amending the licence under s.218 of the Act and the limited two year period of the licence- to allow the grant of the volume of water sought.
- [38] This submission is premised on the more general submission that the learned Member should have considered all of the matters set out in s.210(1) of the Act. Once it is acknowledged that the failure of evidence as to the proposed use of the water had the consequence that it was not possible to balance all the considerations set out in s.210(1), there was no need to consider the proposed safeguards.
- [39] Unless there are submissions to the contrary, the appellant must pay the respondent's costs to be assessed on the standard basis.

ORDERS

1. The appeal is dismissed.
2. The appellant is to pay the respondent's costs of and incidental to the appeal unless the appellant contends that some other order ought to be made in which case:
 - (i) the appellant file and serve any submissions within 21 days;
 - (ii) the respondent file and serve any response submissions within 14 days of receipt of the appellant's submissions;
 - (iii) the appellant file and serve any reply within 7 days of receipt of the respondent's submissions;
 - (iv) the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.

WHITE J

**CAC MacDONALD
PRESIDENT OF THE LAND COURT**

**PA SMITH
MEMBER OF THE LAND COURT**