TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

CORNACK, Magistrate

M-183067/05(2)

VICTOR CRAIG ELLIOTT — Plaintiff

and

RICHARD TUDOR KNIGHTS — Defendant

BRISBANE

..DATE 14/12/2006

CONTINUED FROM 02/11/2006

..DAY 4

DECISION

BENCH: This is the decision in charges against Richard Tudor Knights brought by a complaint and summons by Victor Craig Elliott.

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BENCH: Richard Tudor Knights is charged by complaint that between the 5th day of October 2000 and the 6th day of September 2001 at Bollon in the Magistrates Court district of St George he did start assessable development namely the clearing of native vegetation on freehold land without a development permit for that development.

Further, he is charged that between the 24th of August 2002 and the 19th of August 2003 at Bollon in the Magistrates Court district of St George likewise he did start assessable development namely the clearing of native vegetation on freehold land without a development permit for the development.

Particulars of each of these two charges is set out in the complaint. At the conclusion of the hearing the prosecution sought to amend those particulars. The remnant vegetation that is concerned is located in each case on lot 8 of plan MGL33. There is various areas alleged to have been unlawfully cleared, quite a large amount of land covered in that. Some of it is said to be remnant endangered vegetation and some remnant not of concern vegetation and some being remnant of concern vegetation.

DECISION

The onus of course rests with the prosecution to prove each and every element of each of those charges beyond reasonable doubt. The prosecution is assisted in this case by statutory provisions about evidence concerning observations and material obtained by satellite navigation image.

The prosecution has called a large number of witnesses and produced a large number of certificates, maps, charts and other documentary pieces of evidence. It is a complicated matter and did extend over three days in the Dalby Magistrates Court and submissions were heard at the conclusion of that. So, there is a large amount of evidence before the Court. The defendant, Mr Knights, has not called evidence or given evidence.

This is not really a case about the credit-worthiness of the witnesses. It is really about whether the prosecution has proved in a technical way that the clearing was carried out between those dates at the places the prosecution says were such that the defendant required a development permit.

The complaint was made before a Justice of the Peace on the 26th of September 2005. The complaint identified the complainant as a public officer within the meaning of section 142A of the Justices Act. From the evidence it appears that the complainant is a regional compliance manager with the Department of Natural Resources and Mines at Toowoomba. A public officer for the purposes of the Justices Act means an officer or employee of the public service of the State who is

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acting in an official capacity. There can be no doubt that Mr Elliott falls within that definition.

The prosecution tendered into evidence a large file concerning a development application that Mr Knights, together with his other two co-owners of the parcel of land, had lodged with the Department. Mr Knights is one of three joint owners of a large parcel of land at Bollon described as lot 8 on plan MGL33 in the Shire of Bollon. The land comprises a parcel to the north and a parcel to the south separated by some disruption, either a road. The land is generally used to graze stock.

In December 2001 an application was lodged by the three owners with the Department of Natural Resources and Mines to clear native vegetation on the land. The proposed development related to 1,521 hectares of remnant vegetation which was proposed to be developed with a mixture of native and improved pasture species. This application was prepared with the assistance of professional consultants. The aim was to spread the grazing capacity over the entire property whilst retaining substantial areas of remnant vegetation.

The proposal was to clear 926 hectares and seed that area with buffel. That application indicated that in excess of 3,299 hectares of the whole property had already been cleared and that 1,470 hectares had otherwise been disturbed. The application listed eight regional ecosystems and described the area attaching to each. The application said that according

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to the consultants 2,803 hectares on that property had already been ringed, pushed or pulled and this area had not yet reverted to its remnant ecosystem condition.

The application analysed the existing mapping and pointed to a number of errors in the mapping of the ecosystems in the regional ecosystem maps. In particular the application claimed that 3,140 hectares had been declared as disturbed whereas in fact, this area was naturally open grassland areas.

Further, that 1,344 hectares had been wrongly classified as remnant vegetation when it had been previously disturbed and had not attained sufficient regrowth to be reclassified as remnant. And substantial areas of remnant vegetation had been incorrectly described as endangered. The consultants engaged by the three land owners asserted that what had been listed in the regional ecosystem maps were as Belah, Brigalow and Gidgee was actually Box, Sandalwood and Wilga.

There is a large amount of correspondence on the file such that the Department had difficulties meeting the time limits set by the legislation and sought several requests for an extension of the statutory time to assess the application. Originally the applicants refused the request; it was pointed out to them that there refusal meant that their application had deemed to be refused and they then had the right to appeal.

DECISION

The Department sent the application to the Environmental Protection Agency for comment. In the material about the regional ecosystems status the report of the Environmental Protection Agency indicates that regional ecosystems 6.4.1 and 6.4.2 both of which relate to endangered systems, and regional ecosystem 6.5.4 which was of concern, had a low representation of less than 1 per cent in the reserves.

The EPA advised that most of the property was of State significance and no remnant vegetation should be cleared on the property and that no Mulga clearing by broad scale chain pulling should occur.

If the consultants engaged by the defendant and his co-owners were accurate, already 37.7 per cent of the property had been cleared by that stage and a further 16.8 per cent had been disturbed. That totals more than 50 per cent of the property.

The application was considered by the Department. The report on the application finds in that there are no endangered regional ecosystems nominated for clearing or impacted by the clearing. The application for development was eventually refused after a long period, despite many protests by the land owners. This decision was based on the problems identified by the Environmental Protection Agency and because the application failed to nominate an acceptable solution to protect the landscape from increased salinity or water-logging.

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Indeed, the physical description of the property contains a regional ecosystem summary for the area of the proposed development. It identified only one category, 11.3.28, which is currently of concern and four other ecosystems which are currently not of concern.

File notes on that file which is Exhibit 3 and tendered, shows that the development application had been approved by the Department for nearby properties that forward in the same terrestrial bioregional corridor.

The witness called by the prosecution, Darryl Baumgartner, was the witness involved in assessing the application and the only witness in relation to that application that was called by the prosecution. He inspected the property at least twice - in March 2003 and in June 2003 - however, he was unable in his evidence to say what he really did in June 2003 as he didn't take very good notes of that visit. He was assessing the application from the point of view of salinity. He was not there as a compliance officer to investigate any illegal clearing. However, he was an authorised officer under the Environmental Protection Act and under the Vegetation Management Act. He had with him aerial photos and satellite imagery from 2001 which was used by the Department in this prosecution.

From the file tendered it appears he visited several sites and took photographs. Some of the material on the file indicates that might have been up to 28 sites but the photographs of his

inspections were not tendered. The photographs that are tendered do not match the detail shown in the report of his inspection on the file. No map was tendered and no evidence was led showing the precise points of his inspection so, it is clear that the prosecution does not rely on this inspection back in March 2003 as part of its evidence in this case. Otherwise greater particularity and certainty about those sites would have been included in the evidence.

His record on the file indicates that at position 515523 6875044 "On the western side the country has been pulled". Several other sites he notes that the timber has been rung. When he was questioned in the Court his answers in cross-examination said he had no idea that there had been illegal clearing as he was of the view that all of the clearing he saw could have been explained by the land owner.

The report and Exhibit 3 clearly shows that Darryl Baumgartner also formed the view that the regional ecosystem maps then in force had errors in them because he submitted a request for an amendment of the regional ecosystem mapping data for the property. It says that this was addressed with property visits from the Department and negotiations with the Queensland Herbarium. The mapping then was finalised on the 22nd of November 2002.

A consideration of that Exhibit 3 is in these proceedings shows that there is a map in there obviously prepared by Mr Baumgartner which shows that there were significant changes he

believed required to the regional ecosystem maps which changed the status of the mapping. Comparing the map headed Possible Regional Ecosystem - sorry, possible RE Changes in Exhibit 2 - Exhibit 3, sorry, with slide 2 in Exhibit 25, it is clear that a large proportion of the area alleged to have been unlawfully cleared in each of these charges in this case is included in the area shown as what was described as disturbed which was marked as remnant. That is what Mr Baumgartner said, that those areas had been described in the maps as disturbed - that were actually disturbed but they were marked as remnant. So, on the regional ecosystem maps, according to Mr Baumgartner, what was marked as remnant was in fact, disturbed.

This would indicate that Mr Baumgartner formed the opinion following his inspection that this part of the area was, in fact, actually disturbed and was not in fact, remnant as noted in the regional ecosystem map.

Exhibit 3, the file tendered by the Department also includes the following notation. "Roma GIS officer, Linda Hardwick, highlighted a potential compliance issue on the property. This involved the removal of vegetation that appeared to have occurred without a permit. The status of this inquiry has not been finalised. Information supplied by Toowoomba Compliance Unit suggested that the assessment could continue as the area in question was not associated with the development proposal." This notation on the file was somewhat surprising as it is completely at odds with the submission of counsel for the prosecution who argue that this case was a serious one as the

alleged unlawful clearing happened in the area where the proposal development was to be carried out despite the defendant knowing that the application had not been approved.

The application was refused and the decision was dated on the 17th of December 2003. Mr Baumgartner had by that stage inspected the whole of the property; he had been there on more than one occasion. He had been there with satellite navigation images and he had been there assessing the regional ecosystem maps to see if they were accurate.

Clearly, as at the 17th of December 2003 officers within the regional - sorry, the Toowoomba Compliance Unit had more than simply an allegation that there had been some illegal clearing. They had an officer who was an authorised officer under the Vegetation Management Act and the Integrated Planning Act having attended and inspected the property on two occasions.

The complaint contains an averment that the matter of this complaint came to the knowledge of the complainant on the 18th of February 2005. An averment is evidence of the matters averred unless there is other evidence before the Court that conflicts with it. In this case it is very surprising that Mr Elliott signed or made that complaint with that averment in it when his own evidence is that he had been to the property inspecting it and considering the allegations of illegal clearing a long time before February 2005. In fact, he had been there in October 2004.

Mr Elliott's evidence was that he inspected the property on the 26th of October 2004. In fact, Exhibit 9 which was tendered is a site inspection report, showing four sites clustered around the south-eastern boundary of the property where Mr Forcier and Mr Elliott, both officers from the department had attended, taken photographs and made observations.

It is a little bit confusing because there is two charges and it is quite clear that Mr Elliott, from that site inspection, did not got to the northern part of the property and did not do any investigations concerning the allegations about an earlier clearing in the middle of the northern part of the property. However, it is quite clear that he attended various sites, four of them in total, on the 26th of October 2004 and that he took photographs and was gathering evidence about the matter.

And prior to the visit, on his own evidence, Mr Elliott had done some preparation with a view to his continuing his investigations; he had developed a map based on the material he had and he went out, clearly checking his GPS at the survey marker at Saint George and he gathered accurate evidence about those four sites.

He gave evidence that the property in that area had been cleared. It appeared it had been mechanically cleared. A single dozer had been used, or it had been pulled over with a chain. It was not pushed into heaps. It had not been burned.

It had not been turned into pasture but there were trees that he could observe had been cleared in that way. He then went back and did another inspection at a later stage.

It was submitted on behalf of Mr Knights that these two charges are both outside the time allowed for the bringing of prosecutions. The Vegetation Management Act provides that proceedings for these offences must start within one year after the commission of the offence, or within one year after the offence comes to the complainant's knowledge but within five years after the offence is committed.

The prosecution and the defence have both helpfully referred me to many cases, or several cases, concerning the question of time limitations for the commencement of prosecutions. Those cases clearly show that the Court must look at what is in the mind of the actual complainant and what is to the knowledge and in the mind of some other public servant, is not relevant in considering whether the complainant is or is not in time.

I have read those cases carefully and considered them and I understand there has been a recent case which I have been unable to get particulars of that the Court of Appeal heard in the last couple of weeks. So, there may be some other case that I am not aware of. However, the cases I have been referred to, whilst they are helpful in saying the Court must look what is in the complainant's personal mind and not look what is in the mind of other public servants; I do note that a point raised by Mr Sheridan is of concern.

Mr Sheridan made the point that the law should not be interpreted in such a way that within one compliance unit, where there are 10 workers, or 10 managers, or 10 investigators, that the first one sit on a file and do nothing for 12 months and then at 11 months and three weeks, hand the file on to the next officer who does not know anything about the matter; then another 11 months and three weeks goes by and they hand it on to officer number C, who does the same. So, that there is a round robin within the one department and the department can then extend the time limit for quite a considerable period of time, which would defeat the purpose of the time limits that is set out in the statute.

Clearly, the Court must be concerned of what was in the knowledge of the complainant. If there was evidence that a public servant had sat on the file for a time and then, in a way to defeat the course of justice by avoiding the time limits, and hand it on to somebody else, that would be a case where the Court should exercise its discretion in an appropriate way.

It is clear though that this issue is one that must be resolved on the evidence at the hearing. Just because the hearing commences does not mean that the prosecution has proved that it is within the time limit set out in the statute.

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The cases say that a complaint by someone, or information by someone, does not constitute knowledge that the offence has been committed. It must be more than that. That comes after there has been some preliminary investigation.

I have not been able to find a case that helps me where there may be constructive notice. For example, if somebody is the manager or supervisor or other investigators because they are his agents or servants, then he is deemed to have that knowledge and that he is bound by - or the time limit starts to run by the first time anyone within his unit or department has knowledge of the alleged offence.

Clearly, it would seem unfair that a person may be subjected to a time limit that keeps expanding because someone sneakily hands it over to the person on the next desk. If a person in a department who is authorised to lay a complaint has knowledge, or should have reasonable grounds to believe an offence committed, this may be a different thing. And it is a fine line to determine what is the relevant, collective, corporate knowledge of the Department of Natural Resources, as opposed to what was in the mind of Mr Elliott. It is important to consider the whole of the evidence about who knew what.

Mr Sheridan did make quite considerable gains in his cross-examination to prove that there was knowledge by other people within the compliance unit, and not just any compliance unit, within the compliance unit at Toowoomba. And one would have

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thought that the compliance unit in Toowoomba is not that large.

I find that the averment is incorrect. I find on the evidence before me that the complainant, Victor Craig Elliott, had - the matter of the complaint had come to his knowledge on the 26th October 2004, after he had prepared preliminary maps and gone to the property and commenced the inspection, preparing Exhibit 9 along the way and seeing the evidence of the clearing.

However, that does not really resolve the matter in such a way that I then must find the complaint is out of time, because if I find that Mr Elliott had knowledge on that day, I find that despite the gains that Mr Sheridan did make in his cross-examination about knowledge to other people, the cross-examination did not go far enough to establish to me that I can be satisfied to the required standard, that the knowledge of Mr Baumgartner, Ms Hardwick and everybody else within the compliance unit, whoever they might have been, was such that constructively knowledge should be imputed to Mr Elliott, at a date prior to October 2004.

Therefore, I find that the 12 months runs from the 26th of October 2004 and this complaint was made on the 26th of September 2005. So, that is within the 12 month period.

Secondly, it is submitted on behalf of the defendant that the clearing in this case is not assessable development, except

for any areas proved to be remnant-endangered ecosystems and that the evidence before the Court is insufficient to prove that the clearing did happen in a remnant-endangered ecosystem, so that the defendant should be found not guilty of the two offences. The Integrated Planning Act of 1997 provides that operational work includes the clearing of vegetation on freehold land. That is found at section 1.3.5.

Section 3.1.4. provides that a development permit is necessary for assessable development. Section 4.3.1 makes it an offence to carry out assessable development without a development permit. Schedule 8 provides that assessable development includes 3A;

> "Carrying out operational work, that is the clearing of native vegetation on freehold land, unless the clearing is B; necessary for essential management or C; necessary for routine management in an area that is outside an area of high nature for conservation value and an area vulnerable to land degradation and a remnant-endangered regional ecosystem shown on a regional ecosystem map. Essential management means establishing and maintaining fire-breaks and built infrastructure. Routine management means clearing native vegetation to establish built infrastructure of that is not remnant vegetation or for supplying fodder for stock in drought conditions only. Clear for vegetation is defined to mean remove, or cut down, ringbark, push over, poison or destroy the vegetation in any way."

The term drought conditions is not defined and I am not satisfied it means solely drought declared. The Vegetation Management Act of 1999 provided that the purpose of the Act are to regulate the clearing of vegetation on freehold land to preserve remnant-endangered regional ecosystems, remnant of concern regional ecosystems and vegetation in areas of high nature conservation and areas vulnerable to land degradation.

This was amended in the year 2000 by Act 35 of 2000 to remove the reference to the "remnant of concern regional ecosystems." This arose from a commitment made by the Premier of this State to remove references to "of concern regional ecosystems." Act number 1 of 2004 re-inserted the reference to "remnant of concern regional eco-systems" from the 29th of April 2004, so that therefore between the year 2000 and the year 2004, the "of concern regional ecosystems" as not part of the regulation of the Vegetation Management Act.

The Vegetation Management Act of 1999 defines a regional ecosystem map as a map certified by the Chief Executive, as the regional ecosystem map for the particular area and maintained by the department for the purpose of showing, for the area, remnant endangered regional ecosystems and remnant of concern regional ecosystems and remnant not of concern, regional ecosystems and numbers that reference regional ecosystems.

Two certificates have been tendered by the prosecution under section 66B of the Vegetation Management Act of 1999. These appear in evidence as Exhibit 23 and 24. Section 66B provides that statements made in these certificates are evidence of the matters stated in the absence of evidence to the contrary. The statements in this case relate to whether vegetation in a state area has been cleared. The persons conclusions drawn from a stated remotely sensed image and whether a stated area is an area of remnant vegetation.

Jeremy Anderson, who provided the certificates, gave evidence that the remotely sensed image can only provide evidence of a change in vegetation. Whether the change occurs from natural factors, such as fire, drought, flood, storm or wind or some other act of God, cannot be determined by comparison of remotely senses images. The certificates provide evidence that the remotely sensed images reveal a reduction in vegetation in the state areas.

If these certificates are coupled with evidence obtained from the site inspection, that mechanical clearing has occurred at specific sites, the prosecution will prove, beyond reasonable doubt, the offences.

Mr Anderson used regional ecosystem map version 3.2 and overlaid over the areas he determined had been cleared in the remotely senses images. Mr Anderson did not produce every document and every remote sensed image he had regard to in forming his conclusion. It appears that he relied on a wealth of other material that was not produced to the Court, which was not produced to the defendant and the defendant was denied the opportunity to cross-examine about that.

From Exhibit 25, the presentation by Mr Anderson, it is clear that the regional ecosystem map version 2.1 was published on the 15th of September and it was based on data obtained more than three years before this, on August 1997. Therefore, at the time that that map was published, the data used to formulate it was already three years out of date. There could

have been many intervening factors and events that occurred between when the data was gathered and when the map was published. Specifically, if there had been lawful clearing of the property, of any of the parts of the property, between the 18th of August 1997 and the 15th of September 2000, making some areas that had been mapped as remnant, now disturbed or cleared, this would not be reflected in the regional ecosystem maps.

Version 3 was published on the 7th of June 2001 and is based on data obtained on the 16th of August 1999. Version 3.2 was published on the 21st of November 2002 and was based on data obtained on the 16th of August 1999.

One of the difficulties obvious in the regional ecosystem maps is that these large time delays mean that there is a question as to what was actually physically at any particular property when the Vegetation Management Act came into effect in 1999, as some of the data used to make these maps was, by that stage, nearly two years out of date.

In this case, a comparison of the maps attached to Exhibit 6, Exhibit 5, Exhibits 12, 13, 14, 16, 17 and 18 show a significant difference in the shape, size and relative positioning of polygons that indicate the areas of the three different categories of remnant regional ecosystems.

Exhibit 13 is the updated 1999 version dated May 2002. In this map all relevant areas for both charges appear to be endangered. In Exhibit 13 most of the relevant areas appear to be endangered but some areas now fall outside any relevant area and appear to already have been cleared.

In Exhibit 14 dated November 2002, some of the area concerning charge 1 is endangered and some is of concern. In the area concerned in charge 2, some of the area is endangered, some of concern and some falls outside any relevant area mapping.

In Exhibit 16, all of the areas fall within the category of endangered. In Exhibit 17, none of the area for charge 1 falls within any remnant polygon and the same applies to the northern half of the area concerned with charge 2.

In Exhibit 18, which is the 2003 regional ecosystem map, based on 2003 data, almost none of the area for charge 1 falls within any remnant regional ecosystem. Mostly, that area is now described as non-remnant. Likewise with the area concerned with charge 2. That area is now mostly defined in that map as non-remnant. A small part of the area is still defined as remnant endangered.

In the maps attached to Exhibit 6 there have been significant changes to positioning of the remnant of concerned regional ecosystem. A comparison of these maps clearly shows that

these polygons are part of an evolving system. The difficult of an evolving system is that it has limited certainty.

Exhibit 27, "Methodology for Surveying and Mapping of Regional Ecosystems and Vegetation Communities in Queensland" by Nelda et al, version 3.1, points out at paragraph 2.3, "That the Queensland Regional Ecosystem classification framework was developed to assist in planning for biodiversity". The framework is said to be dynamic and regularly reviewed. In addition, the report by Dr Olsen in the paragraph dealing with the Vegetation Management Act states, "There are often discrepancies apparent between the certified mapping and the remnant vegetation apparent at a property scale, as a certified mapping is intended for use at a bio-regional scale, not at the finer scale of resolution as possible, the individual scale of assessments".

Further Nelda also discusses in appendix 4, changing vegetation principles and examples. It is clear that changes in vegetation as discernible from satellite images may result from a range of events, some of the natural and others, in their words, anthropogenic. For example, significant changes may occur from drought, death and fire, as well, storms and wind may cause damage.

The witness, Jeremy Anderson, agreed that significant changes as detected in satellite images may arise from a number of factors. Evidence of physical clearing is needed to prove the offence in question.

Of course, the difficulties with the regional ecosystem that could remedied by a proper inspection of the property and an identification of cleared or felled timber as timber within the relevant ecosystem by a botanical inspection.

Comparing the slides in Exhibit 25 with the various regional ecosystem maps that have been tendered, it shows that the classification of some areas is non-remnant, remnant of concern, endangered and cleared is a moving and fluctuating thing.

Mr Anderson produced regional ecosystem 3.2, he did produce version 3. It would appear that a number of the witnesses have used different versions of the relevant regional ecosystem map. Mr Forcier went with Mr Elliott to do the inspection on the 26th of October 2004, he did not do anything to check the accuracy of the GPS. That inspection was done in those four sites shown in Exhibit 9 only, concentrated around the south-eastern corner of the property. He took photos. He formed the opinion that the offences may have occurred.

Mr Elliott, when he gave evidence, said that he developed the map before he went there. He formed the opinion, as I said, that the property had been cleared and he went back and did an inspection of 12 sites. He went back later with the expert witness, Olsen. There is a great deal of difficulty trying to match up any of the evidence of the witnesses, as they all have very different sets of evidence they gave. I have tried without success to try and match up any of the sites that Dr Olsen took photos of and gave evidence of with the points marked by Mr Elliott and it is impossible. Dr Olsen refers to 18 sites, Mr Elliott only 12. Some of the ones that Mr Elliott took, they do not have any relevance to the prosecution, they are designed to provide a comparison between what was previously with other areas that have been cleared. One of them is just to show that a bit of grassland and a fence post. The biggest difficulty is that Dr Olsen, all of his report is based on the old minutes and seconds, not the GPS system, so it is impossible to correlate those spots that he refers to in his report with any of the documentation that the prosecution has called in this case, because it is not based on the same measurement. It is not based on GPS, it is based is given so many degrees and minutes and seconds south and east, and I cannot plot that or find in any way where that would be on any of the exhibits.

DECISION

When Mr Elliott went out and did his inspections, he did the third one with Dr Olsen, three years after the first one by Mr Baumgartner and one year after the second one that he had done himself. He saw a large amount of clearing. He does not recall what regional ecosystem mapping is on any inspection, so, it is very difficult to work out how he assessed where he was and how he assessed that what he was looking at fell within an area that was remnant endangered, remnant of concern, or remnant not of concern. He does not recall what regional ecosystem map he used.

As I said, Dr Olsen refers to 18 points, and I have tried for many hours to try and match up the points with the evidence of Mr Elliott. Dr Olsen, his brief was not to provide evidence of the areas that were cleared, his brief was to work out the impact of the alleged clearing. So, his report is not designed to prove the sites that were cleared or to prove the clearing. He conducted traverses of what he said was alleged illegal clearing and he was asked to ascertain various things about the soil and vegetation. Likewise, Dr Olsen came up with a list of areas in the regional ecosystem maps, though when he was cross-examined, he said that none of his recommendations to modify and amend those maps had been referred to the herbarium. So, he had conducted a two day inspection of the property and none of that is now reflected in the regional ecosystem maps. Dr Olsen says that he saw

marks on the trunks of fallen trees, that indicated chains had been used, but he gave no evidence of precisely the points that those vegetation - where those vegetation were and, as I said, all of his sites are based on a different scale.

Mr Grey was called to give evidence and he said about before the harvesting on the property and he was very vague about where he did that, when he did it, sometime between 2001 and 2003, he said. He said the only area that he had actually cleared under the instructions of Mr Knight had already been cleared before and what he was doing was assisting him to do fodder harvesting.

Mr Baumgartner, a witness for the prosecution, did indicate that when he went there, the first inspection of the property, there was very little available for the stock to eat and there is significant evidence before the Court that the property was getting - that the owners of the property were getting assistance under the drought relief scheme from July 2002 to December 2002. They were getting assistance for the transport of fodder for feeding stock. The site inspector at St George had made a declaration about the property that was affected by drought from February 2002.

It should be noted that Mr Anderson in preparing his report - prepared his report to the Court was based only on satellite

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navigation images and not based on any field work he did on the property. He said he used the field report from Forcier and Elliott. Well, that field report only focuses on the south eastern corner of the property, not on the northern parcel. He says he has done 15 similar cases before and he has conducted three site visits in other properties. So, he has not had an extensive opportunity to crosscheck his interpretation of satellite navigation images as to what is actually on the ground.

Mr Anderson had access to a lot of satellite navigation images and a lot of aerial photographs, however the whole series was not produced to the Court and he says in some material he had at his disposal he could see trees pushed over, standing trees and patterns of them being pulled or pushed in one direction.

The prosecution also called Mr Voller. He did some community consultation in relation to the vegetation management plans and he met Mr Knights and he explained to Mr Knights about the exception to the system for fodder harvesting in drought declared properties, except if the ecosystems were endangered. He aid it had to be drought declared. The Act says drought conditions, so there is a variance there. The Act does not define drought conditions. He told people to determine which ecosystem is endangered and just to avoid any species of that ecosystem when they were doing their clearing. This is

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clearly a different message than the department would like people to have, as the department says any area falling within the polygons, developed by the herbarium should be avoided for clearing, and in fact clearing in those polygons is illegal.

If Mr Voller is right about his interpretation, the prosecution would an onus to prove that there are actually species on the ground that are being cleared that were species that fell within the regional ecosystem.

Now, the whole question is whether I can be satisfied that the evidence led by the prosecution is sufficient to prove that the areas where clearing has been found falls within areas that are one of the areas in the three categories under the regional ecosystem maps. Clearly, Dr Olsen, he said he saw a mosaic of remnant and recently cleared vegetation and regrowth when he went there, but there is no way that the Court can determine where he was actually looking, somewhere in the vicinity of where Mr Elliott did his 12 sites. I have carefully looked at the photos that have been tendered by every witness and there is no obvious tractor marks, there is no obvious marks in trunks visible in any of the photographs, so we are relying on the verbal evidence of witnesses and no-one pinpointed where they saw those things. Some of the photos taken by Dr Olsen just show a few dead tree branches on the ground. A couple of them do show root balls as well. The

most significant clearing obviously occurs in photos 17 and 18, but the evidence before me is insufficient to establish beyond reasonable doubt where those sites are.

Mr Olsen - or Dr Olsen's report refers to map 1, but map 1 was not included with the report and not tendered to the Court. It is clear, however you look at it, that the information that was given by Dr Olsen from whoever it was from the department who gave it to him, was not precise and not accurate, because Dr Olsen refers to 850 hectares of endangered, 61 hectares of concern and 11 hectares of not of concern, and those figures do not tie up with the evidence of other witnesses.

When I look at the photos of the 12 sites that Mr Elliott produced for his examination, some of them show some dead branches on the ground, some show no trees on the ground, some show an absence of trees, some show lots of trees, some are not relevant to the prosecution. There is a root ball obvious in one.

The photographs that have been tendered that are Exhibit 8, that go along with Exhibit 9, the four site spots for Mr Forcier and Mr Elliott. Site 1 shows a fence line and it is not marked out where the proper corridor is for the fence, that is an exemption and there seems to be plenty of trees around a corridor to the fence. I am not able from the

photograph to work out where the appropriate amount of exemption lies to maintain the fence line from the photograph, as there is no measurement on the photograph.

Site 2 there appears to be lots of old trees on the ground and some regrowth, and, looking beyond the fence into the neighbour's property, there is also lots of dead trees on the ground. So, site 2 does not assist - the photographs there do not assist me in determining that clearing has happened.

Site 3, once again there are some dead trees on the ground and it is a large area with dead trees on the ground. Looking south to next door, there are also dead trees on the ground.

Site 4 seems to be the main area in those four sites where there is some evidence of clearing. There is lots of dead trees and one root ball obvious. The whole area that was photographed appears to be devoid of trees.

DECISION

Clearly Mr Elliott did not realise that the Prosecution was going to rely upon him to prove what areas had been cleared, because when he was cross-examined about that, he said, well, the information he had been given was that the area had been cleared. So it was not his - he did not see it as his responsibility to prove what areas had been cleared.

Obviously Dr Olsen was not called for that purpose, because he was there just to assess the impact of the clearing. The prosecution do not rely on Mr Baumgartner, nothing has been produced in evidence to satisfy the Court beyond reasonable doubt where he was, when he did his inspections. So that means that no one has actually checked the accuracy - or no one has actually gone out to the property, pinpointed a particular site, and mapped that with accuracy onto the area mapped by the satellite navigation image.

So there is clear evidence on the satellite navigation image that there had been a disturbance to the vegetation but none of the field work or ground work can prove beyond reasonable doubt the precise sites and compare them and overlay them on the areas of the satellite navigation image, and I find it would be impossible to expect me to do that. I have tried to look at the various positions but without accuracy I believe it would be merely conjecture on my part to try and match them up.

The maps are of different sizes, they are different configurations and - that is not something that the Court is

capable of doing. It seems that people either did not record what regional eco-system maps they were using, and there is several versions, or they all used different ones. There is evidence about at least three different versions being used.

The four sites, in Exhibit 9, have not been checked for accuracy by Mr Forcier, they were by Mr Elliott. But Mr Elliott used computer software to generate that map, and there was not - and so there was not any actual survey done to prove that those sites could - did come within the area seen in the satellite navigation image.

When he was cross-examined Mr Elliott said he relied on Dr Olsen to confirm the regional eco-system mapping and that the clearing had happened, but that was not communicated well to Dr Olsen, because he did not provide that information in his report. Likewise Mr Elliott says he did not know what regional eco-system maps he used, or what we used to calculate the area.

Dr Olsen also said that it was their version 2.1 that was relevant for the northern part of the property but he did not know what was relevant for the southern part of the property.

Another matter was raised by counsel for the defendant, and that is that the regional eco-system maps are not - the ones that have been tendered are not - do not have any statutory basis as they rely on - or they map what is called dominant and sub-dominant within each various sub-category of regional

eco-system. Sub-dominant and dominant are categories that are not found within the legislation. In view of the other points involved in this case I find it is not necessary for me to make a decision about that.

In the circumstances of this case, I find I am satisfied beyond reasonable doubt that here was definitely clearing on the property as a whole. No one has denied that, Mr Knights, in his application, said that 37 per cent of his property was cleared at some stage, before he put in his application to clear some more. However, I find I am not satisfied the prosecution has proved beyond reasonable doubt that the clearing that was witnessed by Dr Olsen, by Mr Elliott, Mr Forcier and Mr Baumgarten had not proved beyond reasonable doubt the exact location of that clearing. And they have not proved, beyond reasonable doubt, that the clearing was done in an area that was either regional endangered, regional of concern, or regional not of concern, under any relevant regional eco-system map. And I find Mr Knight not guilty.

MR SHERIDAN: Would your Honour hear me on costs, before your Honour makes a final order of dismissal?

BENCH: Yes, sure.

MR SHERIDAN: I'm going to make that application - I have some submissions here, (indistinct). You see there in paragraph 2, your Honour, it sets out there, and I've attached the decision of the Court of Appeal in Bell v. Carter ex parte Bell, and on page 5 of that case that I've attached, there's a joint judgment, their Honours McPherson, Davis and Thomas say if an order for costs is made in relation to a dismissal, it is necessary that the formal dismissal be deferred until the Court is in a position to make its final determination on the question of costs.

The section 158A, if we go to paragraph 4 of the Justices Act, provides that an order for costs in favour of the defendant

against the complainant who's a public officer, which is the case here, may be made only if the Justice is satisfied that it is proper that the order for costs should be made.

Section 158B of the Justices Act restricts the amount of costs that may be awarded to the scale of costs prescribed under the regulations. Further section 152B allows your Honour to award a higher of costs if you're satisfied that higher amount is just and reasonable and having regard to the special dignity, complexity or importance of the case. And it's the submission of the defendant that the matter before the Court was of significant complexity and difficulty in light of the complex expert scientific evidence that was relied upon by the prosecution, and the number of expert witnesses that brought that evidence and were called by the prosecution.

There is a decision of Justice McGill, QC, DCJ, and I've also attached in the matter of Benson v. Matthews, which was as well a prosecution for the defence under the same section of the Integrated Planning Act, and that went on appeal to His Honour and he considered the relevant sections of costs, in the Justices Act, as far as an award of costs to a successful defendant. It is not an unlimited discretion, as you see your Honour, His Honour Judge McGill, at paragraph 4 in that judgement says that because at section 158A, sets out how that discretion is to be exercised - it's not an unfettered discretion - your Honour must have regard to the various matters specified in subsection 2 before making an order to award costs.

Subsection 2A questions whether the proceedings was brought and continued in good faith. The defendant submits that these proceedings were certainly not continued in good faith, as far as the prosecution was concerned, the prosecution in cross. As your Honour pointed out in her reasons, disclosure was incomplete, certainly prior to the trial in the matter, thus placed the defendant at an extreme disadvantage in respect of preparation. Throughout the trial the prosecution repeatedly sought to tender documents that had never been disclosed to the defendant, thus hampering the ability of the defendant to conduct a defence. The prosecution, having provided statements from and notification that certain witnesses were going to be called, did not call those witnesses, due to the absence of certificates of immunity from prosecution for those witnesses. There were a number of witnesses that turned up at Court - the defence had prepared their case based on the statements that were given by them. They did not have the requisite certificates of immunity so they went away and gave no evidence.

Further, the prosecution sought to amend the particulars of complaint after the defence had completed closing submissions, despite the issue of amendment of particulars being raised at the outset by the defence.

Subsection 2B of the Justices Act considers whether there was a failure to take appropriate steps to investigate a matter coming to or within the knowledge of the person responsible

for bringing or continuing the proceeding. And as submitted by the defence in closing, the particulars of the complaint alleged offences that were unknown to the relevant statute, such the defendant was put to the expense in respect of defending those matters. And as the authority - the prosecuting authority, the Department of Natural Resources, is the authority responsible for administering the Vegetation Management Act, the defendant submits that these matters were within the knowledge of the complainant and should have been properly investigated before the complaint was brought.

Subsection 2C considers whether the investigation into the offence was conducted in an appropriate way. In respect of that subsection the defendant submits that the investigation into the offence was not conducted in an appropriate way. It seems as though the investigation dragged on for some time and then when the 12-months statute bar was approaching, it was conducted with some unseemly haste and the defendant was issued with a complaint and summons in an attempt to get inside the 12-month statute limitation, rather than having a full investigation with all relevant issues considered.

Subsection 2B considers whether the order for dismissal was made on technical grounds and not on the finding that there was insufficient evidence to convict or make an order against the defendant, and in the defendant's submission the complaint has not been dismissed on technical grounds.

Subsection 2A considers whether the defendant brought suspicion on himself by conduct engaged in after the events; the defendant engaged in no conduct post-fact that brought suspicion on himself. He did not reasonably decline an opportunity to explain the version of events, and he was cooperative.

And subsection 2H (indistinct) considers whether the defence was conducted in such a way that prolonged the proceeding unreasonably. In the defendant's submission it was not.

The final costs, as I've attached there, in the last four pages of that bundle of documents and submissions, goes to the costs and outlays incurred by the defendant in respect of the defence of the matter, and that is a total of $39,249.78, which includes solicitors costs and outlays and costs of counsel defending - preparing and defending - three day trial.

In light of the foregoing and the statutory provisions for your Honour to exercise her discretion in costs - and the decision of His Honour McGill QC DCJ, in my submission it is just and reasonable that the defendant, given the way the investigation and the prosecution was run in this matter, be awarded the costs of defending the matter as set out in the attached schedule. Unless I can assist your Honour any further, that is my submission on costs.

BENCH: Thank you. Are you ready to argue that?

MR WILSON: Your Honour, it is admitted that the proceedings were carried out in good faith, indeed, there was a lot of evidence that clearing had occurred, and your Honour did find that clearing did occur, but you weren't able to be satisfied as to some of the particulars of that.

It says the disclosure was incomplete, due to the trial, and it was pointed out during the trial, a lot of these things are digital images that aren't easily given to someone because you need particular software. But all the stuff was given to him, nothing was withheld, in the sense that he didn't know about something. But a lot of times he did claim that he hadn't received stuff, and in fact he did receive it, so we're not quite sure what - that was in particular in relation to one report (indistinct).

The statements in relation to those witnesses that weren't called, they were only on two very minor points. They were Mr Knights' brother - the (indistinct). In relation to amending the complaint, that's quite proper and that can be amended at any time up to the time - prior to the decision being handed down.

Now his allegation that the complaint alleges (indistinct) to the relevant statute, I'm not sure if your Honour gave a ruling upon that, but we dispute that, that he's wrong in law on that point. That we say that it was assessable development irrespective of whether - not of concern - or of concern was in the Vegetation Management Act at the time.

The main point, though, your Honour, that the clearing did occur and the investigation was carried out and the proceedings were carried out in good faith. There was adequate evidence to show that such was done.

The fact that the defendant did nothing to bring suspicion upon himself by way of post-act conduct, he didn't - he had plenty of opportunities to explain; he denied the opportunity to be interviewed. He failed to offer any explanation. That's quite clear, and it come across in the way the trial (indistinct).

He did provide information in a form that could not be used against him in evidence, (indistinct) requirement. He failed to supply any information other than that. Unless I can assist you further, your Honour.

BENCH: Thank you. Can you just tell me what you're claiming for your travel?

MR SHERIDAN: Counsel's travel?

BENCH: Yes.

MR SHERIDAN: That's bound up with-----

BENCH: Because it's got your accommodation here, but it hasn't got your travel?

MR SHERIDAN: No, that's with - I travelled with the instructing solicitor, your Honour. That would be-----

BENCH: Well, how'd you get to Toowoomba?

MR SHERIDAN: With the instructing solicitor. He drove me from here to - back and forth each day from Toowoomba to Dalby, because we couldn't get accommodated in Dalby.

BENCH: Well, there's no charge for going from Brisbane.

MR SHERIDAN: No, your Honour. The instructing solicitor lives between the two, as I understand. It was fortunate that he was going from Brisbane to Toowoomba then, so he picked me up.

BENCH: So your instructing solicitor is from Toowoomba?

MR SHERIDAN: Yes, your Honour. They're based in Toowoomba-----

BENCH: So how'd you get from Brisbane to Toowoomba?

MR SHERIDAN: I got a lift with the instructing solicitor who picked me up from Brisbane and drove me to Toowoomba, on his way out. He's also got an office in Brisbane, your Honour.

BENCH: Right. So he was down here, working there?

MR SHERIDAN: Floats between the two.

BENCH: Yes, I am satisfied the defendant should get the benefit of an order as to costs. As I said, the matter was a complicated matter. It was a lengthy matter. Matters were not disclosed prior to the commencement of the proceedings. Some material was disclosed on the morning of day 1. More was disclosed on the morning of day 2.

There was a lot of complications arising from the case. It was a difficult case, and did involve complicated legislation. No order that I can make today can properly compensate, really, Mr Knights, because he has been put to a huge expense in defending himself in these proceedings.

I am not satisfied the proceedings were commenced not in good faith, but, as I said, there were very lengthy delays that were not explained, and if there had been evidence that Mr Elliott was the supervisor of the other people who had that information, I would have dismissed the prosecution for being out of time, but I did not do that, because the evidence did not disclose that.

In the circumstances, I have considered those comments made by his Honour Judge McGill, and there is, apart from the fact that it is complicated, so I believe that, as a base line, there is a lot of preparation involved in considering all of

the images, and considering the legislation, so there is a number of bases under which it is complicated.

And Judge McGill, in his case, he doubled the amount in some regards. I have formed the conclusion that the amount of costs to be awarded up to the first day should be $4,500, which is three times the statutory amount ordinarily granted.

And I am going to allow four refreshers at $1,500, which is double. That is the two days that we actually did the trial, today, because we have gone for a good part of the morning, and an extra day for travelling to and from Dalby, as it is a significant distance from Brisbane, and would take up about a day.

I accept that counsel could have been obtained in Toowoomba, but it is a complicated matter, and I am satisfied it was appropriate that counsel from Brisbane would be instructed to appear. So that is $10,500 in relation to legal costs.

I see the defendant has been put to expenses $404 paid to the Department of Natural Resources for the freedom of information application. There has been other outlays for travel and accommodation, photocopying, and, in the circumstances, as I said, there should be an allowance made for some of the travel between Brisbane and Toowoomba.

In the circumstances, I also allow $2,500 in respect of legitimate outlays, and make an order that the Department pay Mr Knights' costs which I fix at $13,000. I appreciate Mr Knights is paying approximately three times that amount. Thank you.

MR WILSON: Thank you, your Honour.

BENCH: The complaint is dismissed.

MR WILSON: Does your Honour provide a certificate? Is it-----

BENCH: I don't know what the local practice is. We'll have to find out.

MR WILSON: That's all right.
