DISTRICT COURT OF QUEENSLAND

CITATION:	*Doonan v McKay* [2002] QDC 209
PARTIES:	**BERNARD GEORGE DOONAN** **Appellant** **v** **JAMES ASHLEY McKAY** **Respondent**
FILE NO/S:	D 642/02
DIVISION:	Appellate
PROCEEDING:	Appeal from Magistrates Court
ORIGINATING COURT:	Magistrates Court, Charleville
DELIVERED ON:	27 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 June 2002
JUDGE:	Forde DCJ
ORDER:	**Appeal Dismissed** **Appellant to pay Respondent's costs on the standard basis to be assessed**
CATCHWORDS:	STAY OF PROSECUTION- improper purpose- internal oppression- external or objective injustice *Forestry Act (Qld) 1959* *Justices Act (Qld) 1886* ss 222, 225 Applied- *Rogers v. The Queen* (1994) 181 CLR 251 at 255 *Walton v. Gardiner* (1992-1993) 177 CLR 378 at 398. Referred to- *Russo v. Russo* (1953) 57 at 62 *House v. The King* (1936) 55 CLR 499 at 50.4-505 *Jago v. District Court (NSW)* (1989) 168 CLR 23 at 75-6 *Johnson v. Miller* (1937) 59 CLR 467 at 497. *Williams v. Spautz* (1992) 174 C.R 509 *Hunter v. Chief Constable of the West Midlands Police* (1982) 1 AC 536
COUNSEL:	Mr. A. Macsporran for the Appellant Mr. M. Byrne Q.C. with Mr. G. Allan for the Respondent
SOLICITORS:	Crown Solicitor for the Appellant

Anderssen & Company Lawyers for the Respondent

[1] The Respondent in this case is James Ashley McKay. He appeared before the learned Magistrate at Charleville charged with two counts of destroying trees on a Crown leasehold contrary to the conditions of permits issued under the relevant legislation. On 18 December 2000, the learned Magistrate found that the prosecution by the complainant Bernard George Doonan was oppressive and unjust and stayed the prosecution. The complainant who is the appellant in these proceedings seeks to quash the order on each count.

[2] This appeal involves questions of fact and law. It is common ground that if the appeal is successful, the matter would then proceed before the Magistrates Court but before a different magistrate. This appeal is governed by s.222 of the *Justices Act 1886*. The powers of a Judge on appeal are governed by s.225. There is power under that section to quash a decision of a magistrate. The matter is not remitted to a magistrate. If the decision is to be quashed, then the matter will proceed in the ordinary course.

Nature of the Charges

[3] The Respondent is charged as follows:

> "(a) 'that between the 30th day of April 1999 and the 20th day of November 1999 at Torres Park in the Magistrates Court district of Charleville in the State of Queensland JAMES ASHLEY McKAY did destroy a number of trees on a Crown holding, otherwise than in accordance with a permit, lease, licence, agreement or contract granted or made under the **Forestry Act** 1959, the **Land Act** 1962, the **Mining Acts** or another Act.

PARTICULARS

You did destroy or cause to be destroyed a quantity of cypress pine trees with a girth of more than 19 centimetres diameter over bark when measured.

The cypress trees were located on grazing homestead perpetual lease GHPL10/3159 lot 5/CHS12 Parish of Chesterton.'

and

(b) 'That between the 30th day of April 1999 and the 20th day of November 1999 at Torres Park in the Magistrates Court district of Charleville in the State of Queensland JAMES ASHLEY McKAY DID DESTROY A NUMBER OF TREES ON A Crown holding, otherwise than in accordance with a permit, lease, licence, agreement or contract granted or made under the **Forestry Act** 1959, the **Land Act** 1962, the **Mining Acts** or another Act.

PARTICULARS

You did destroy or cause to be destroyed a quantity of cypress pine trees with a girth of more than 19 centimetres diameter over bark when measured.

The cypress trees were locate dong razing homestead perpetual lease GHPL10/27/57, lot 1/NV67 and lot 3/NV67 Parish of Westerton.'"

[4] The Appellant submits that there was no evidentiary or legal basis for the making of such an order and that in so doing the learned Magistrate erred in fact and law.

Nature of the Appeal

[5] The ordering of a stay is a discretionary exercise of power which involves balancing various factors:

> "…that decision was the result of a weighing process involving subjective balancing of the various factors and considerations supporting or militating against a conclusion that a continuation of the proceedings in the Tribunal would be so unfairly and unjustifiably oppressive of the respondents as to constitute an abuse of the Tribunal's process." Per Mason C.J., Deane J. and Dawson J. in *Walton v. Gardiner*[1]

[6] In the submission of the respondent it is suggested that "the ordering of a stay is a discretionary exercise of power which involves a considerable latitude of individual choice of a conclusion": *Jago v. District Court (NSW)*[2]; *Russo v. Russo*[3]. It was submitted that "for the Appellant to succeed that it was necessary for him to establish substantial error to the level required to interfere with discretionary judgments." The authority of *House v. The King*[4] was cited. The relevant passage states:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that 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 effect 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 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."

[7] In deciding the breadth of the discretion, one only has to look at the decision of *Rogers v. The Queen*[5] where Mason C.J. summarised the relevant principles:

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[1] (1992-1993) 177 CLR 378 at 398.
[2] (1989) 168 CLR 23 at 75-6 per Gaudron J
[3] (1953) 57 at 62 per Sholl J.
[4] (1936) 55 CLR 499 at 504-505
[5] (1994) 181 CLR 251 at 255

> "In *Walton v. Gardiner* (1993) 177 CLR 378 at p.395 it was pointed out that the majority judgment (in *Williams v. Spautz* (1992) 174 C.R 509) contained nothing which supported the proposition that a permanent stay of proceedings can only be ordered on the ground of either improper purpose or no possibility of a fair hearing. In that case, Mason C.J., Deane and Dawson JJ. stated that the inherent jurisdiction of a superior court to stay its proceedings for abuse of process[6]:
>
> > 'extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.'

Their Honours went on to say:

> "Proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which had already been disposed of by earlier proceedings." [7]
>
> Statements to the same effect have been made by the House of Lords (*Hunter v. Chief Constable of the West Midlands Police* (1982) 1 AC 536) and the New Zealand Court of Appeal (*Moevao v. Department of Labour* (1980) 1 NZLR 481). These statements indicate that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly the fact that the matter complained of will bring the administration of justice into disrepute. This led the majority in *Walton v. Gardiner* to state that the question whether criminal proceedings should be permanently stayed was to be determined by a weighing process involving a balancing of a variety of considerations[8]

These considerations, which reflect the two aspects of abuse of process outlined above, include:

> 'the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice.'"[9]

It is proposed to apply those principles to the present case.

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[6] op cit. at p.393
[7] op cit. at p. 393
[8] op cit. at pp.395-396
[9] op cit. at p 396

Background facts

[8] The Appellant submits that the learned Magistrate made errors in his findings of fact and that he erred in law. It is convenient to set out the facts as alleged by the Appellant in the written submissions:

> "5. The Respondent and his wife are joint leaseholders of the property known as Torres Park, which consists of grazing homestead perpetual lease 10/2757, consisting of lots 1 and 3 and grazing homestead perpetual lease 10/3159, consisting of lot 5.
>
> 6. In 1995, the Respondent made an application for a tree clearing permit to clear certain of the lands constituting the Torres Park property.
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> 7. Mr Trevor Beetson, who was then a District Forester with DPI Forestry at Roma, carried out an inspection of the areas proposed to be cleared in order to make a recommendation to the Lands Department in respect of that proposed clearing.
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> 8. Mr Beetson met with one of the Respondent's employees and inspected the property. He noticed that the property contained vast cypress pine resources and pointed out to the Respondent's employee the requirements to retain the commercial cypress pine.
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> 9. Commercial cypress pine is pine with a diameter of 19 centimetres, measured over bark at about breast height.
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> 10. As a result of the inspection, Mr Beetson prepared a report recommending which areas could be cleared and delineated those areas on the map included with his report. In effect, the recommendation was that areas containing mostly non-commercial timber could be cleared. He also included a recommendation that clumps of commercial cypress pine up to an area of 1 hectare, which were scattered amongst areas of non-commercial timber in a certain area of the property known as the mountain, could also be cleared. Maps were tendered into evidence showing the areas outlined by Mr Beetson in his report to the Lands Department (see Exhibits "A", "B" and "C").
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> 11. The report of Mr Beetson was then given to a Mr Coleman, the Operations Manager for the Charleville office of the Department of Natural Resources, whose role it was to issue tree clearing permits.

12. On or shortly after 22/11/96, Mr Coleman issued standard tree clearing permits over both grazing homestead perpetual leases covering lots 1 and 3 on the one hand and lot 5 on the other of the property Torres Park. The permits prohibited the clearing of any commercial cypress pine.

13. In October 1997, the Respondent made application to amend the tree clearing permits. The amendments sought did not relate to seeking permission to clear commercial cypress pine or to seek permit conditions consistent with the recommendation made by Mr Beetson, but sought clarification of the permit boundaries with the then available use of technology.

14. Mr Coleman issued amended tree clearing permits in June 1998. There was no further inspection of the property carried out before these amended permits were issued. The permits, as issued again, contained the standard condition prohibiting the clearing of any commercial cypress pine.

15. The Respondent made no further application to amend the permit thereafter, nor did he at any time request permission to clear any cypress pine from his property.

16. The Complainant, in respect of each of the charges the subject of this prosecution, Mr Bernard Coonan, a Forest Officer employed by the Department of Natural Resources at the relevant time, first heard of possible breaches of the *Forestry Act* in respect of the Respondent when he was informed by one Michael Ince (a Forester attached to the Department of Primary Industries Forestry) in early September 1999. At the time there was a departmental procedure operating such that if an officer from DPI Forestry discovered a potential breach of the Act, the matter would ordinarily be referred to a Forest Officer at the Department of Natural Resources for investigation and possible prosecution.

17. Mr Ince told Mr Doonan that he had noticed substantial volumes of commercial cypress pine, which appeared to have been cleared on lot 5 of Torres Park. He asked Mr Doonan to launch an investigation. Mr Doonan told Mr Ince that he could not commence an investigation at that time because of other work commitments and suggested that Mr Ince carry out an initial inspection himself. Several weeks later Mr Ince again approached Mr Doonan and expressed concerns that commercial cypress pine, which had been cleared, may be burnt and therefore not available to be assessed for salvage and again requested that Mr Doonan carry out an investigation. Mr Doonan was still unavailable

and again suggested that Mr Ince carry out the initial inspection.

18. On 15/11/99, a Mr Peter Voller, a Forest Extension Officer with the then Department of Natural Resources sent an e-mail to others in Brisbane and Mr Beetson in Toowoomba. The e-mail reported that "DPI Forestry were first to notice the clearing and had reported it to DNR with significant vigour". Mr Voller explained (see T.16-17) that this e-mail was sent to make his superiors in Brisbane aware of the situation. The e-mail continued on to state "I have spoken to Sally Egan. She is well aware of the issues associated with this case and supports prosecution. This is also the position held by myself and Nev Hunt." Mr Voller had no role to play in the investigative process and no say in whether a prosecution should be initiated or not. He indicated that Mr Beetson would have been a person having such role (T.18,1.52-19,1.60). Mr Beetson's evidence in relation to this e-mail was that he supported the investigation and subsequent to the information which he could get he supported the prosecution. (T.32,11.25-28).

19. It transpired that on 2/11/99, Mr Voller had been with a "60 Minutes" film crew which had been filing Torres Park from a helicopter for a program which went to air on 21/11/99. The program concerned the issue of clearing and featured an interview with the respondent. (T.33,1.58-34,1.35).

20. On 16/11/99, Mr Doonan called into the DPI Forestry office at Roma and met with various officers, including Mr Beetson. There was discussion about the alleged clearing on Torres Park, especially in relation to lot 5, and Mr Doonan was instructed by Mr Beetson to attend to it as soon as possible. Mr Doonan then arranged to go with Mr Ince to Torres Park to carry out an inspection on 19/11/99.

21. On that day, Mr Doonan, accompanied by Mr Ince, inspected parts of lot 5 on Torres Park. Following an initial inspection, they met with the respondent and his wife at their residence on the property and the parties together then carried out a further inspection of areas of lot 5. There was discussion between Mr Donnan and the respondent concerning areas of cleared commercial cypress pine. Mr Doonan had with him on 19/11/99 a copy of a tree clearing permit issued to the respondent in respect of lot 5 in June 1998. As mentioned previously, that permit had, as a condition, the prohibition of clearing any commercial cypress pine on lot 5.

22. Following the inspection of 19/11/99, Mr Doonan took steps to ascertain the nature of any tree clearing permits over lots

1 and 3 on Torres Park. He ascertained that a permit had issued for those lots on 31/3/98. The permit contained a similar condition to the one in respect of lot that prohibited the clearing of any commercial cypress pine.

23. Mr Doonan returned to Torres Park early in December and inspected lots 1 and 3. On this occasion, photographs were taken of various areas of cleared commercial cypress pine. Further inspections were carried out in February 2000 and May 2000, when further investigations were completed and further photographic evidence obtained.

24. Ultimately, on 16/5/2000, Mr Doonan took out the Complaints and Summonses in relation to the matters before the Court.

25. Mr Doonan conceded that although there was a complete prohibition on clearing any commercial cypress pine in respect of lots 1 and 3 and lot 5, he would not have been concerned with the clearing of such commercial cypress in scattered areas amongst cleared non-commercial timber. He conceded that the clearing of some commercial cypress in such areas was an inevitable consequence of the clearing exercise of those large non-commercial areas.

26. Mr Doonan indicated however that the inspections he carried out in respect of lots 1 and 3 and lot 5 on Torres Park indicated large areas of purely commercial cypress pine, which had been cleared, in areas distinct from non-commercial timber.

27. The complaints as particularised allege the clearing of 149 commercial cypress pine trees on lots 1 and 5, Torres Park. Mr Doonan's evidence was that those 149 cypress pine trees were all in commercial areas on the property and were not the result of inadvertent or inevitable clearing of commercial cypress during the clearing of non-commercial timbered areas. (See T.57,11.10-23).

28. The investigation into the clearing on Torres Park ultimately revealed a total area of about 1,200 hectares of commercial cypress pine had been cleared, consisting of between 34,000 and 43,000 trees of a value of about $38,000.00. (See T.26-28).

29. During the course of Mr Doonan's investigation, and not long after his inspection of Torres Park on 19/11/99, there was an exchange of correspondence between Mr Beetson and a Mr Claydon (one of Mr Beetson's superiors). This was an e-mail of 25/11/99 and was in the following form:

> "As discussed I seek your concurrence to investigating this high priority task. To this end the priorities of Bernie Doonan, Roma, and myself will require focussing on this specific task to be successful. Other duties will need deferring or juggled to meet our immediate imperative.
>
> To achieve our desired aim of a successful investigation, cooperation from both the DM M-B and DM Charleville will be required. Matters specific to the case should remain confidential until at least a decision on proceeding through Court is made.
>
> Would you please advise that this is a regional priority and that reasonable unfunded costs (up to - $5,000) may be invoked to achieve the necessary end."

30. The following day there was another e-mail, on this occasion from one Kelly Shauna, to others including Mr Beetson. The e-mail contained the following:

> "I concur that investigations into unauthorised destruction of commercial cypress pine on land leased by Ashley and Doris McKay at Augathella should continue and appropriate resources be assigned to proceed to prosecution should the investigation support same."

31. On 10/12/99, Mr Beetson sent an e-mail to Mr Ince (the e-mail forms part of a bundle of documents tendered as Exhibit "F" or "G" at page 93 on the application). The e-mail contains in part the following:

> "It is hoped that by the end of January DNR will be in a position to know if it has sufficient evidence to pursue Mr McKay through the Courts. If yes, as expected, DNR will require a valuation of cypress destroyed. To expedite things, as DNR will require a valuation relatively quickly, as it is our intention to push the matter before the Courts as quickly as possible for maximum exposure, I seek DPIF co-operation in preparing what it can in readiness for the valuation request…"
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> Mr Beetson explained that this view was expressed because the matter was of such significance to the local community in Augathella (see T,33,11.27-31)."

[9] Some of the facts are disputed or there is more emphasis placed on some aspects by one party and not the other. Mr.Voller in his role as a Forest Extension Officer was

also involved in developing a process for regional vegetation management on behalf of the Department of Natural Resources[10]. The Respondent was a high profile member of the local community who had been the Chairman of the committee to develop the State Tree Clearing Policy[11]. The "60 Minutes" story was screened on 21 November 1999. In the complaint, the Appellant averred that he first had knowledge of the offence on 19 November 1999. On 10 December 1999, Mr. Beetson sent a further E-mail to Mr. Michael Ince. Mr. Beetson was employed by the Department of Primary Industry –Forestry[12]. In fact on 15 November 1999, Mr. Peter Voller sent an E-mail to various departmental personnel including Mr. Trevor Beetson. Mr. Beeson had been a member of the State Tree Clearing Policy Committee chaired by the Respondent. He was the person who inspected the Respondent's property and made recommendations to the Department of Lands relating to the issue of the permits[13].

[10] The said E-mail contained certain assertions about the Respondent and his permits which were not correct[14]. Mr. Voller said in evidence that the purpose of his E-mail was to "provide advice to our policy people in Brisbane that this was on the horizon, what they call on the radar, that is a political radar in Brisbane"[15]. Mr. Beetson dispatched the Appellant to the Respondent's property and he visited there on 19 November 1999[16]. A meeting had been held between the Appellant and other officers on 16 November 1999. The Appellant was a Forest Officer employed by the Department of Natural Resources. The Appellant agreed to investigate promptly "eventhough he had previously seen no reason to investigate promptly, when he had

[10] Transcript 14.40-61
[11] Transcript 21.46-48
[12] Transcript 28.20-30;21.30
[13] Transcript 21.50-23.30; Exhibit A
[14] Transcript 18.32-42;19.39-40
[15] Transcript.18.13-17

been advised over more than two months of possible breach activity on Torres Park"[17]. Mr. Beetson confirmed that he had a role to play in deciding whether a prosecution proceeded. The Department of Primary Industry –Forestry and the Department of Natural Resources seemed to work together in the investigation and prosecution[18].

Grounds for Stay of Prosecution

[11] There were three bases upon which the learned Magistrate relied in deciding that the prosecution should be stayed:

a. improper purpose

b. internal oppression; and

c. external or objective injustice.

Improper Purpose

[12] The learned Magistrate relied upon the "unusual confluence of events in mid-November 1999" for finding that there was an improper purpose. Reference was made to the E-mail of 15 November 1999 after Mr. Voller had been interviewed for the "60 Minutes" programme. Apart from this national exposure, it seems there was little interest in prosecuting prior to this. Also, the Appellant had been advised some two months previously of a possible breach of the permits on "Torres Park" which was the Respondent's property. The complaints were not laid until 16 May 2000.

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[16] Transcript 43.22-35
[17] Reasons of Magistrate p.2
[18] Transcript 28.20-42

[13] The Appellant in evidence accepted that he had told the Respondent prior to the commencement of the prosecution:

> "While I agreed it was impossible for the machine operators to miss all cypress stems in normal pulling operations, this usually would not be in (sic) a problem in non-commercial areas where cypress was scattered and generally not economical to log anyway"

and further:

> "I had no problem with the small number of commercial cypress stems that were inevitably destroyed in pulling operations due to their scattered occurrence, that those trees would normally be in non-commercial areas anyway"[19].

[14] In re-examination, the complainant stated that the 149 trees which are the subject of the complaints were in commercial cypress pine areas[20]. Even if this contention is not totally correct, I am satisfied that there is a prima facie case to answer in relation to some of these trees which were cleared were not within the non-commercial areas as depicted in Exhibit A and Map 21. Counsel for the Appellant contends that the 149 trees were merely representative and that the evidence shows that some 1200 hectares involving between 34,000 and 43,000 trees with a value of up to $83,000.00 had been cleared in breach of the permits. Such evidence may not be relevant on the hearing, but it is not necessary to decide that point on this application. Such evidence falls within a category of uncharged acts.

[15] The correct test to be applied, it is argued, is to be found in *Williams v. Spautz*[21] where it was held that proceedings are brought for an improper purpose, and thus constitute an abuse of process, where the purpose of bringing them is not to prosecute them to a conclusion but to use them as a means of obtaining some

[19] Transcript.56.24-35
[20] Transcript 57.10-15
[21] op.cit. pp.526-527

advantage beyond what the law offers. An improper act by the party instituting the proceedings is not an essential ingredient in the concept of abuse of process.

[16] The learned Magistrate accepted that "to get maximum exposure" may be a legitimate reason to publicly prosecute those who break the law in order to protect certain vegetation. That by itself would not be sufficient to order a stay. I agree. He referred to the other matters already discussed. Although the publicity attendant upon the "60 Minutes" programme may have provided the catalyst for the prosecution, it cannot be said that an abuse of process has occurred. For that to occur, the improper purpose has to be the predominant purpose. The advantage which the Department and moreover the Complainant may have achieved is wide ranging publicity. A prosecution of this nature may be a vehicle for bringing to the notice of the public in Queensland the need to comply with the tree clearing permits. It does not follow, in my view, that the complainant has obtained an "advantage for which the proceedings were not designed, or some collateral advantage beyond what the law offers"[22]. The deterrent factor following a criminal prosecution may not be as effective without some publicity. I find that the learned Magistrate has erred in this respect.

Internal Oppression

[17] The learned Magistrate found that there was a conflict "between a report to Coleman that there was no commercial timber on the area to be cleared and Beetson's recommendation which allowed for some clearing of cypress pine within the areas concerned that is on the one hand, and on the other the issue of the permit

[22] *Williams v Spautz op.cit*

not including the recommended relaxation"[23]. He went onto find that the prosecution was oppressive and unfair for that reason.

[18] The Appellant challenges this finding on a factual basis:

> "a. the recommendation of Beetson related to allowing the clearing of commercial cypress in non-commercial areas. That is not the case. [24]"

The evidence of Mr. Beetson[25] was to the effect that there were clumps of pine scattered amongst the areas delineated on the map as able to be cleared. Recognising the problem of avoiding some of these clumps Mr. Beetson recommended that "areas less than a hectare…could be cleared". That related to pine trees which had a diameter of 19 centimetres or above. If the areas of commercial cypress of up to a hectare were within the those areas marked as non-commercial, then they could be cleared. As Mr. Beetson explained, he was trying to be reasonable and practical[26]. In other words, he was not concerned about the type of pine trees which were being cleared in the areas marked as yellow on Exhibit A. There may be some dispute about whether some of these trees the subject of the complaint were cleared contrary to the permit. It is not necessary to be decisive on the quantum on this application.

[19] The evidence of the complainant, Mr. Doonan, explained that there might be cypress pines which could be regarded in size at least as commercial but as they were too scattered it was not economically viable to log same. However, the 149 trees being relevant to the complaints, he said, were in a different category viz. they were classed as being in commercial cypress pine areas. Therefore, it was argued

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[23] p.3
[24] See the evidence of Doonan – T57,1.9-21
[25] Transcript.23.40-55

that there was no apparent conflict as suggested. As pointed out by counsel for the Appellant, no application was made for an amendment to the conditions of the permit in this respect. It is noted that an application of a different nature was made.

[20] Finally, reference was made to the fact that the investigation revealed that approximately 1,200 hectares involving some 34,000 to 43,000 trees had been cleared in direct contravention of the permit condition. As mentioned, these could be regarded as uncharged acts. Such evidence may provide a background to the present charges in determining whether there is oppression. By limiting the number of trees and clearly defining same, the prosecution says is less oppressive. The case otherwise would have been lengthy and expensive not only to prosecute but also to defend. I am not disposed to allow this evidence as showing lack of oppression on the part of the prosecution as it is unnecessary to do so. No finding is made as to how many trees of the 149 were pulled in breach of the permit. I am satisfied that there is a case to answer in relation to a substantial majority of these trees which are the subject of the charge. Reference has been made to Exhibit A and Map 21 in this respect. The latter is conveniently attached to the Respondent's submissions. Any suggestion of a conflict between what Mr. Coleman reported and Mr. Beetson's recommendations is really about terminology as distinct from any practical difference.

[21] I am satisfied that there was no basis for finding that the prosecution was oppressive or unfair under this heading. I am so satisfied even without the evidence of the 43,000 to 53,000 trees allegedly cleared contrary to the permits. The Respondent's counsel argues that it is improper for the prosecution to seek to justify an oppressive

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[26] Transcript.24.10-15

prosecution by using uncharged acts. The case referred to is *Johnson v. Miller*[27]. It is unnecessary to decide that point in view of the decision reached without relying on that evidence. The learned Magistrate erred in finding that the allegation of internal oppression supported a stay of execution.

Objective Injustice

[22] The learned Magistrate regarded this issue as the strongest on which he based his decision. I agree. A comparison was made between the terms of the permit for the Respondent and his nearby neighbours, Messrs. Pampling and Adermann. Mr. Mark Coleman gave evidence that he issued the tree clearing permits by a computer process. Mr. Coleman was the operations manager for the Department of Natural Resources at Charleville. He sought the views of Mr. Beetson about the tree clearing applications. They related to broad-scale clearing and re-growth clearing. No inspection was required for the re-growth permit[28]. Two applications were needed, one for lots 1 and 3 and the other for lot 5 as they were configured differently. Both related to broad-scale clearing[29]. The subject permits were issued on 16 June 1998. Mr. Beetson had no role to play in either inspecting or reporting on the proposed amendments to the initial permits issued in November 1996[30].

[23] Mr. Beetson gave evidence that there was no difference in the policy of his Department between when the permits were issued to the Respondent and when permits were issued to the Respondent's neighbours in November 1999[31]. The recommendation of Mr. Beetson that areas of cypress pine of up to one hectare

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[27] (1937) 59 CLR 467 at 497
[28] Transcript 60.10
[29] Transcript 60.35
[30] Transcript.61.58
[31] Transcript.41.50-55

could be cleared did not appear in the permits. The evidence of Mr. Coleman on this aspect is quite revealing. Permits were issued to the neighbouring leaseholders (Messrs. Pampling and Adermann) allowing clearing of areas of commercial cypress pine up to 2 hectares. The learned Magistrate found that such a relaxation should have applied to the Respondent[32]. The difference was explained by Mr. Coleman as resulting from a better relationship between the Forest Service people who were part of the Department of Natural Resources[33]. He went onto explain that that meant they had a better appreciation of the issues and were "able to make a better call". Mr. Coleman issued the permits for Messrs. Pampling and Adermann[34]. Both contained the following condition:

> "No areas of merchantable Cypress Pine are to be cleared i.e. any patches of Cypress Pine covering an area of about two (2) hectares or more, or an area containing 100 trees or more of a diameter at breast height (DBH) of nineteen (19) centimetres or greater, whichever is the lesser area, are not to be cleared."[35]

The Respondent was being prosecuted at about the time that these more liberal conditions were being imposed[36]. Mr. Coleman accepted that if up to two hectares of pine on a neighbouring property was not commercial, then certainly one hectare of pine on the Respondent's property could not be commercial[37].

[24] In the report which Mr. Coleman obtained from the valuer Mr. Osbourne, it was stated that there was no commercial timber within the area to be cleared. Mr. Coleman relied upon that report when he issued the permits. Mr. Coleman explained that there may have been commercial timber but that the valuer may not have sighted it. There was also the report from Mr. Beetson containing the

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[32] Decision pp.4-5
[33] Transcript.65.40-50
[34] Transcript 65.54
[35] para. 12.3 Respondent's submissions
[36] para. 41 of Appellant's submissions
[37] Transcript.66.3-10

recommendation that cypress pine greater than 19 centimetres in diameter at chest height over areas of one hectare or more are to be excluded from the clearing operation. Mr. Coleman chose to ignore that recommendation when he issued the Respondent's permit. He relied upon the standard conditions as printed by the computer. This seems to be somewhat of an arbitrary approach.

[25] It changed when the employees of the Department of Natural Resources -Forestry received further training. The explanation for the difference between the conditions of the permits of the Respondent on one hand and Messrs. Pampling and Adermann on the other was because they were eighteen (18) months apart. It was accepted that the policy had not changed. Therefore, to impose certain conditions upon the Respondent and not others and then to enforce same by prosecution is a discriminatory approach.

[26] To continue to investigate with a view to prosecuting when the permits are so discriminatory points immediately to an injustice which may allow the court to exercise its power and grant a stay. The fact that the prosecution may at the end of the day establish a breach of the permit is not, at this point, determinative of the issue: *Williams v. Spautz*[38]:

> "In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case".

[27] The submission of the Respondent on this point is that the Respondent is being prosecuted for 149 scattered trees when the neighbouring land holders are being authorised to clear substantially greater numbers of pine trees. The particulars in

[38] (1991-1992) 174 CLR 509 at 522

this case are limited to 149 trees. To allow such a prosecution would, in my view, undermine public confidence in the administration of justice.

> "It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice"[39].

[28] The learned Magistrate found that the issue of the permits to the adjoining neighbours on the conditions referred to prior to the prosecution of the present matter was oppressive and unjust. It is not necessary to decide whether the prosecution would have succeeded or not on the evidence. One can assume there is a prima facie case. Counsel for the Appellant contended that even if the recommendation of Beetson to allow clearing of commercial trees up to one (1) hectare was part of the permit, the Respondent would still be in breach of the permit. That argument fails to appreciate that the adjoining landowners were given even more favourable terms as part of their permits.[40] The learned Magistrate had grounds for finding that the present proceedings were oppressive and unjust and that to allow them to proceed would be likely to lead to an undermining of public confidence in the administration of justice. The exercise of the discretion by the learned Magistrate has not been shown to be wrong.

[29] The learned Magistrate was justified in granting a stay of execution of these proceedings. The appeal is dismissed. The Appellant has succeeded on two ground of its appeal. The Respondent has asked for costs on an indemnity basis but in the circumstances the order will be that the Appellant do pay the costs of the Respondent of the appeal on the standard basis to be assessed.

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[39] *Walton v. Gardiner* (1993) 177 CLR 378 at 394
[40] paragraph 23 of Reasons