DISTRICT COURT OF QUEENSLAND

CITATION:	*McKay v Doonan* [2005] QDC 311
PARTIES:	**JAMES ASHLEY McKAY (Appellant)**
	V
	BERNARD GEORGE DOONAN (Respondent)
FILE NO/S:	3610/2004
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Brisbane
DELIVERED ON:	28 October, 2005
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2005
JUDGE:	Judge Alan Wilson SC
ORDER:	**1 Appeal upheld**
	2 On the charge of destroying trees on Crown Land, the appellant is ordered to pay a fine of $10,000
CATCHWORDS:	APPEAL – CONSTRUCTION OF TREE CLEARING PERMITS – whether permits issued to appellant permitted clearing of cypress pines – construction of permits
COUNSEL:	Mr P Flanagan SC for the Appellant
	Mr R Mulholland QC for the Respondent
SOLICITORS:	Clewett Corser for Appellant
	Crown Law for Respondent

[1] Mr McKay appeals his conviction in Charleville Magistrates Court on 27 August 2004 on two counts of destroying commercial cypress pine trees on and near his grazing property, Torres Park, situated about 100km north-east of Augathella. He was found to have unlawfully removed 19,702 trees on Torres Park and fined $125,000, and ordered to pay compensation assessed at $85,353.40 and costs of $65, 530.20 – in total, $275,883.60. He also pleaded guilty to a third charge, involving clearing on a road reserve.

[2] Torres Park is a property of 53,000 acres operated by his family for many years and, since 1984, by Mr McKay and his wife. He did not dispute that between 30 April and 20 November 1999 contractors who were 'broad acre clearing' parts of Torres

Park destroyed 2,307 cypress pine trees on Lot 1 and 17,395 trees on Lot 5 each of which, relevantly, had a diameter of more than 19cm.

[3] The central issue at trial, and on appeal, was whether or not two Tree Clearing Permits (TCPs) issued to Mr McKay permitted the clearing of cypress pine trees with that, or greater, girth. Both were interpreted to prohibit it. The appeal seeks to overturn that finding or, in the alternative, reduce the quantum of the fine, compensation and costs. A complicating factor is Mr McKay's guilty plea to the further charge, which the court dealt with (as it properly could) by imposing one fine for all three convictions; if, however, the appeal against conviction on the other charges succeeds he nevertheless remains exposed to a penalty on this count, which would require determination.

[4] He was charged under s 53(1)(b) of the *Forestry Act* 1959, which provides:

> (1) A person must not
>
> …
>
> (b) destroy a tree, or get other forest products or quarry material, on a Crown holding;
>
> …
>
> otherwise than in accordance with a permit, lease, licence, agreement or contract granted or made under this Act, the Land Act 1962, or the Mining Acts or another Act.

[5] The offence is created, then, if a person destroys a tree '*…otherwise than in accordance with a permit'*. The court held that the true meaning of the TCPs is at the core of Mr McKay's criminal liability, if any[1], and summarised the issue they raised:

> 34 Does the permit authorise the clearing of everything or anything within the permit areas, or does it prohibit the clearing of cypress pine exceeding 19 cm there or elsewhere?

[6] The prosecution submission was that, on their proper meaning, the TCPs prohibited the clearing of commercial cypress pine within the permit areas (whether in 'virgin country' or 'regrowth' areas). Mr McKay contended they permitted the clearing of anything and everything within the areas on the first 'pull' of virgin country, and the prohibition only came into effect at the regrowth stage.

[7] Both TCPs were issued under s 263 (1) of the *Land Act* 1994. Under s 263 (1) (a) the Chief Executive may issue a tree clearing permit with or without conditions; and under sub-s (2) the conditions may limit the area to be cleared. S 264 provides that TCPs may not be for longer than 5 years, and must state the purpose for which trees are to be cleared, and the way that clearing is to be carried out. Both TCPs were issued for 5 years and showed their purpose as '*Tree Clearing – Broad Hectare Clearing*' and the method of clearing as '*Mechanical*'.

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[1] Reasons, 27 August 2004, paras 28 – 34. By agreement, the parties inserted paragraph numbers in this document, and they are used in this judgment.

[8] There are some slight differences in the wording of the two permits[2]. One contains the words '*of a virgin country*' under the heading '*Area Details*', but the other does not. The court determined to read the other as though it also contained those words[3] and the parties accept that was appropriate. Nor do they demur from the decision to construe the words '…*treatment of regrowth and/or seedlings*' as a reference to follow-up operations, to control re-growth after other clearing. They also accept the cypress pine trees cleared by the appellant took place in virgin country, and were not of regrowth on land previously cleared.

[9] The introductory words of the TCPs set out the general nature of the permission they grant, and explain how they are to be read:

> Pursuant to the provisions of section 263(1) of the Land Act 1994 the person described in Schedule 3 is hereby permitted to clear trees in the area of land described in Schedule 1 beginning on the day specified in Schedule 2.
> SUBJECT TO –
> (a) the condition specified in Schedule 4; and
> (b) such other reservations and conditions as may be contained in and declared by the laws of the State

[10] The TCP in relation to Lot 5 permits the clearing of 2,290ha, its boundaries determined by reference to lot numbers with an alphabet designation which refers to a plan (AP 2560) attached to the permit. This is, clearly, the '… *area of land described in Schedule 1*' but that part of the document then contains a heading '*Area Details*' beside which these words appear :

> Approximately 2290 hectares of brigalow, belah, sandalwood, box, iron bark, bauhinia, wilga and pine seedlings of virgin country.

[11] Schedule 4 contains these words:

> SCHEDULE 4 – SPECIFIED CONDITIONS
> X1
> No clearing is to occur without a permit unless otherwise authorised
>
> **Treatment of regrowth and/or seedlings. None of the following may be destroyed unless marked by and authorised officer:**
> …
> **Trees with a girth of more than 19 centimetres diameter over bark when measured namely cypress pine (Callitris glaucophylla)**… (emphasis added)

[12] It was held that, while the TCPs might have been better expressed, their meaning was plain: Mr McKay was permitted to clear only those kinds of trees referred to under '*Area Details*' in Schedule 1 – brigalow, belah, sandalwood, etc. The judgment says:

> 65 Mr Mulholland accepts these TCPs could have been expressed more clearly… I agree with this concession. However it is to be remembered that I am not called on to interpret a document required to be prepared with the certainty of a statute by a parliamentary drafter, but rather to interpret permits issued by a principal resource officer as the delegate of the Director-General of the Department of Natural Resources.
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> 66 Therefore, despite this concession, I agree with Mr Mulholland that the meaning of the TCPs is clear. It is reasonably plain, as he put it… each TCP is intended to authorise the

[2] Exhibits 40, and 41
[3] Reasons, para 64

> defendant to clear the specified forest types within the total area specified. I consider it is not simply 'reasonably plain' as Mr Mulholland put it but that it is, in fact, plain. Further, the meaning of the section is that the defendant may clear those trees only and that he may clear no others, including commercial cypress pine.

[13] The permits contain, however, clear introductory words permitting the clearing of trees, and on their face limit that permission in four respects: clearing can only occur in the area described in Schedule 1; that activity can only commence on the date set out in Schedule 2; it is subject to the conditions set out in Schedule 4; and, the right to clear is also subject to other reservations and conditions contained in and declared by other State laws. They have to be read, too, in light of the fact they plainly permit large-scale clearing, by mechanical means, which necessarily connotes non-selective removal of trees. None of the words in Schedule 1 otherwise suggest some limits on the extent of the permission for clearing on this scale.

[14] As the evidence showed, the land also contained a large number of other types of tree and it was common ground that clearing on the permitted scale would have been impossible had it been limited to the named species. It is impossible to avoid the conclusion that the intended effect of naming particular species was, as some evidence suggested, to identify the areas where clearing might occur, in the context of acknowledged imprecision in defining those places which could be cleared under the permits by 'broad hectare' means. It seems unavoidable that any other construction of the passage mentioning the species is illogical, since there were many more species represented on the land and the apparent selection of only some of them cannot otherwise be explained.

[15] Schedule 4 does not contain any other apparent limitation or, at least, one which is relevant to the charges here. It speaks of cypress pine of specified dimensions, but only in the context the treatment of re-growth or seedlings which, as it was also accepted, could only refer to 'follow-up' operations after large scale clearing. It was not in dispute that the cypress pine cleared by Mr McKay's contractors stood in virgin country, and was not regrowth.

[16] It seems an unassailable proposition that, had the permits been intended to prohibit the felling of cypress pine in virgin country, that could readily have been stated in them. In the absence of anything suggesting that prohibition, their natural and ordinary meaning must be that it was not.

[17] The analysis which lead to the opposite conclusion is first touched upon in a passage immediately following that set out above when, at para [67] of the Reasons, it is said that the meaning of the permits must be determined in light of the legislation under which they were issued, and in the context of evidence suggesting cypress pine, present on this scale, has considerable commercial value.

[18] After a lengthy discussion of that evidence it is concluded, at para [102], that the interpretation of the permits advanced by Mr McKay – in reliance upon the words used in them, set out above – would produce an 'absurd result', because that extraneous evidence makes it improbable the Crown could have intended to permit clearing of cypress pine in virgin areas, but prohibited it in regrowth areas. Then, in the face of that perceived absurdity, the court chose to adopt a construction said to be consistent with 'the legislative scheme'.

[19] In the course of considering the evidence reliance is apparently placed, among other things, on Mr McKay's concession that he knew cypress pine had commercial value. Putting aside, for the moment, the relevance of this evidence, what Mr McKay said indicates the concession was made in a particular context: that there were, here and there on the land, stands of cypress in sufficient proximity and numbers to make harvesting commercially worthwhile and, where that occurred, the stands were left alone, but in the main the trees which were removed stood in small numbers over a large area and their harvesting was not feasible, in commercial terms.

[20] The approach taken at the hearing to the admitted lack of clarity in the permits begins with the proposition set out above, from para [65]. As the decision of the High Court in *Project Blue Sky v ABC*[4] shows, statutes are now interpreted according to their ordinary meaning, without reliance upon technical rules. Having chosen that approach what then appears from the judgment here is, however, the apparent adoption of a technical rule – proper reliance upon extrinsic evidence - said to be warranted by the detection of an absurdity.

[21] The 'absurdity' identified is said to be a reading of the permits which allows broad clearing, when the legislation[5] has the general purpose of prohibiting the destruction of trees, without permission; but it does not assist in the interpretation of the permits to point out that not one tree may be destroyed without a permit itself.

[22] The offence created here under s 53(1)(b) is destruction of trees otherwise than in accordance with a permit. Hence the meaning of the permit is critical to the determination of criminal liability. For the reasons set out earlier in this judgment, the presence of an absurdity is not apparent on the face of the permits, and can only be detected, if at all, by reference to things extraneous to them.

[23] If, notwithstanding this conclusion, there is any uncertainty about the meaning of the permits then Mr McKay says he should have the benefit of them[6]. Neither at first instance, or on appeal, could counsel refer to any cases on the interpretation of permits but it was submitted, in both places, that if a person is at risk of incurring a criminal liability or civil penalty because of the wording of a permit, the court should require some certainty of application before imposing liability.

[24] This approach is consistent with the way the High Court has dealt with the interpretation of penal statutes, to which the ordinary rules of construction must be applied.

[25] If the language of the statute remains ambiguous or doubtful, the uncertainty should be resolved in favour of the subject by refusing to extend the category of criminal offences[7]. As Gibbs J said in *Beckworth v The Queen* (1976) 135 CLR 569, at 576:

> The rule formally accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful, the ambiguity or doubt

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[4] (1998) 194 CLR 355 (at 384, per McHugh, Gummow, Kirby and Hayne JJ)
[5] Forestry Act, 1959, and the Land Act, 1994
[6] This matter was dealt with by the learned Chief Magistrate at para [64]
[7] *King v Adams* (1935) 53 CLR 563, at 567.

> may be resolved in favour of the subject by refusing to extend the category of criminal offences.

[26] That submission (that Mr McKay should have the benefit of any uncertainty, or ambiguity) was rejected at the hearing because, as it was said, there was in truth no uncertainty in the wording of the permits, and to the extent that there "…*may be any ambiguity*…" that could be resolved by construction and interpretation - principles used in respect of other documents. The rejection of the principle, however, follows a finding that the permits lacked clarity and, as para [67] shows, the meaning ultimately attributed to them could only be reached by reference to extrinsic material including the legislation behind them, and evidence about the value of commercial cypress pine trees.

[27] As appears elsewhere[8] it was accepted there were two interpretations open as to the meaning of the permits, one of which was said to be consistent with the legislative scheme and another which would produce, it was said, absurd results; but it is the very acknowledgment of uncertainty and ambiguity which attracts the principle.

[28] It has been applied, in different forms, in other circumstances. In the context of conditions applicable to a planning approval, Connolly J said in *Matijesevic v Logan City Council* (1983) 51 LGRA 51 at 57:

> Planning decisions are apt to have considerable effects on the value of property and in my judgment it would accord with principle, where planning approvals are ambiguous, to construe them in a way which places the least burden on the land owner.

[29] Where a statute interferes with the property rights of an individual, the principle would clearly apply. As McMurdo P said in *Commonwealth DPP v Hart & Ors* [2003] QCA 495:

> Whilst I am confident the clear words of the Act warrant this interpretation, I am given added comfort by the well-established principle of statutory interpretation that any ambiguity in legislation of this type, which radically restricts property rights, must be strictly construed in favour of the property owner appellants: *DPP v Logan Park Investments & Anor* …

[30] There are other variations – eg, in insurance law, the *contra proferentem* rule: *Minucoe v London and Liverpool and Globe Insurance Company Limited* (1925) 36 CLR 513 (at 523).

[31] An attempt was otherwise made to resolve the ambiguity by reference, at paras [103]-[163] of the Reasons, to a number of matters which were said ultimately to resolve themselves "…*in favour of the interpretation that they do not permit the destruction of commercial cypress pine in either virgin country or in regrowth areas*". As is then noted[9]:

> It would be strange if the issuing authority would change its policy of prohibiting the destruction of commercial cypress pine in response to an application that did not seek to clear it.

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[8] Reasons, para [102]

[9] Reasons, para [163]

[32] The need for reference to extrinsic material is not immediately apparent in the face of the finding there was not, in truth, any uncertainty in the wording, meaning or application of the permits but there is, at least, a tacit acknowledgment that an ambiguity exists, at para [65]. The use of extrinsic material is introduced, however, by a reference to the decision of the High Court in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, but that was a case involving the interpretation of a contract, and is a well known authority for the principle that surrounding circumstances can be considered if the language of the contract is ambiguous, or susceptible of more than one meaning.

[33] These permits are not a contract between the parties, but rather a licence issued by a statutory authority. The latter, in view of their different consequences, including penalties, cannot be construed in the same way: see, e.g., the judgment of Dixon J in *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, at 196-197; and *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59, per Kitto J at 70-71[10].

[34] Some aspects of the references to various forms of extraneous material illustrate the difficulties it can cause. At para [108] it is said the court did not have regard to evidence about the intention of the issuer of the permit but, at para [180] there is a further reference to the (previously mentioned) conclusion that the defendant understood the permits to prohibit the destruction of *any* commercial cypress pine on the property. First, it does not appear that conclusion necessarily flows from Mr McKay's evidence and, secondly, it is difficult to see how evidence about either his state of mind about his rights generally in respect of the property, or his intention or belief about it, or the meaning of the permits, could be relevant to the interpretation of them.

[35] No argument was addressed concerning the reference, in the preamble to the permits, to "…*such other reservations and conditions as may be contained in and declared by the laws of the State*". In particular, it was not suggested that they mean the permits must be read conjointly with the legislation but, even if that course is adopted, that legislation does not constrain the plain permission to clear trees contained in the permits nor, relevantly, otherwise limit clearing in the way now alleged by the prosecution. As Lord Bingham remarked recently in R v Bentham (2005) 2 All ER 65[11], "… *purposive construction cannot be relied on to create an offence which Parliament has not created*".

[36] There is authority that permits of this kind cannot be construed to permit something contrary to statute[12], or justify committing a nuisance[13], but those matters do not arise here, where the sole question is whether or not the permit did, or did not, permit Mr McKay's acts. Nor is this a case like *Ostrowski v Palmer* (2004) 218 CLR 493 where the respondent had relied upon wrong information from an official; the offence alleged here depends upon the very wording of a document issued under the statute, and its meaning.

[37] Two other complications arise. First, Mr McKay was also charged with clearing some trees outside the areas specified in the permits, an issue not previously

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[10] And, also, *Fawcett Properties v Buckingham County Council* (1961) AC 636 per Lord Keith at 671
[11] At para [10]
[12] *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402
[13] *Gard v Gibbons Ltd* [2004] TASSC 108

decided. It is clear the areas and their boundaries (referred to as "polygons") were imprecise and meant to be indicative only, and that Mr McKay cleared outside them. The issue was wrapped up in the primary question addressed at the trial. I did not understand that the respondent, in the event the appeal succeeded, sought a new trial in respect of that matter and there are compelling reasons why that would not be ordered.[14]

[38] The second matter concerns the sentence which ought to be imposed upon Mr McKay upon the charge to which he pleaded guilty, removing trees on a road reserve. The penalty for that offence was wrapped up in the other charges and, in the Reasons concerning penalty delivered on 20 September 2004, were said to involve 58.4 hectares but there was no evidence about the amount of cypress pine removed there and no compensation was sought for it. There was a finding Mr McKay was "… *reckless as to the position of the road reserve*"[15].

[39] Further, at p 22 the court said:

> …Road reserves are useful as a conservation management tool because they provide a corridor for nature and provide a protective area for flora and fauna. This in itself makes the clearing onto the road reserve a serious offence and this should be reflected in the overall penalty that I impose.

[40] In submissions on penalty at first instance the prosecution contended there should be a separate fine for the clearing on the road reserve in the range $8,000-$12,000. For the two other offences it was submitted the range should be $50,000-$75,000 for each. The court ultimately imposed one fine for all offences of $125,000. The maximum for this offence is $75,000.

[41] Taking all of these matters into account (and the fact Mr McKay pleaded guilty to the charge, and had an apparently unblemished character) an appropriate fine is $10,000.

[42] The appeal is allowed and the orders of the Magistrates Court at Charleville are set aside. It is ordered that Mr McKay pay a fine of $10,000 on the charge of destroying trees on Crown land. I will hear further submissions about time for and terms of payment, and the costs below, and on appeal.

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[14] See *Director of Public Prosecutions for Nauru v Fowler* (1984) 154 CLR 627

[15] Reasons for penalty, p 21