

# SUPREME COURT OF QUEENSLAND

CITATION: *Booth v Frippery P/L & Ors* [2006] QCA 42

PARTIES: **CAROL JEANETTE BOOTH**  
(applicant/appellant)  
**JAMES ANTHONY PURTILL**  
(applicant)  
v  
**FRIPPERY PTY LTD** ACN 010 890 007  
(first respondent)  
**MERVYN MEYER THOMAS**  
(second respondent)  
**PAMELA ANN THOMAS**  
(third respondent)

FILE NO/S: Appeal No 9268 of 2005  
P & E Appeal No 4658 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*  
Miscellaneous Application - Civil

ORIGINATING COURT: Planning and Environment Court at Townsville

DELIVERED EX TEMPORE ON: 27 February 2006

DELIVERED AT: Brisbane

HEARING DATE: 27 February 2006

JUDGES: Williams JA, Holmes and McMurdo JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDER: **1. The Chief Executive is joined as a party to the appeal**  
**2. The Chief Executive is to pay the costs of the respondents incurred in consequence of his application and joinder**  
**3. The Chief Executive will not be seeking an order for costs**  
**4. Leave to appeal granted but limited to ground 7 of the applicant/appellant's (Carol Jeanette Booth) proposed notice of appeal and the Chief Executive's proposed notice of appeal**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant/appellant (Carol Jeanette Booth) applied for

leave to appeal under s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) – where application for leave to appeal involved questions of law and questions of fact – whether limited leave to appeal in relation to the interpretation of s 88(3) of the *Nature Conservation Act* 1992 (Qld) should be granted

APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – HEARING OF APPEAL – PROCEDURE – where James Anthony Purtill, the Chief Executive of the Environmental Protection Agency sought to be added as a party to the hearing of the appeal – whether James Anthony Purtill may be joined as a party to the appeal

*Nature Conservation Act* 1992 (Qld), s 88, s 88(3)(b),  
s 173D(4)  
*Uniform Civil Procedure Rules* 1999 (Qld), r 69

COUNSEL: S J Keim SC, with C J McGrath, for the applicant/appellant  
G J Gibson QC, with J S Brien, for the appellant  
J R Baulch SC for the respondents

SOLICITORS: Environmental Defenders Office (Qld) for the  
applicant/appellant  
Environmental Protection Agency for the applicant  
Roberts Nehmer McKee for the first, second and third  
respondents

WILLIAMS JA: James Anthony Purtill, the Chief Executive of the Department of Environmental Protection Agency seeks to be added as a party to the hearing of the appeal. Section 173D of the *Nature Conservation Act* 1992 provides in sub-section 4 that the chief executive may choose to be a party to a proceeding by filing in the Court, a notice of election, in the form approved by the chief executive.

It appears that at this stage, this is still a proceeding within that sub-section, and in consequence, the chief executive would have a right to be made a party, or become a party, by the filing of a notice of election. However, the application is made under Rule 69 of the *Uniform Civil*

Procedure Rules, and without finally deciding the entitlement of the chief executive pursuant to section 173D(4), the Court is of the view that it's appropriate to make the order under Rule 69 on the basis that, as indicated by Mr Gibson, for the chief executive, that his client will not be seeking an order for costs, and will consent to an order for costs incurred by the respondent in consequence of the joinder.

That order will be made.

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WILLIAMS JA: I'll ask Justice McMurdo to deliver his reasons first on the leave application.

McMURDO J: The application raises a number of questions involving the interpretation of section 88 of the Nature Conservation Act 1992 and thereby it raises questions of law. But mostly they are questions which are also partly questions of fact for which the relevant facts either have not been found or are the subject of findings which the applicant now wishes to challenge. An example of the former is the question of whether the operation of the Mark VII grid is such as to harm the flying foxes and so is such as to constitute a taking within section 88. An example of the latter is the issue of whether any taking could have been reasonably avoided in terms of subsection 3(b). But the applicant's ground 7, which corresponds with the Chief Executive's proposed ground of

appeal, does raise a distinct question of law of general importance and warrants the grant of leave.

I would grant leave to appeal but limit it to ground 7 of the applicant's proposed notice of appeal and the Chief Executive's proposed appeal.

WILLIAMS JA: I agree.

HOLMES J: I agree.

WILLIAMS JA: Well the order will be that leave will be granted limited, as indicated, by Justice McMurdo in his reasons.

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