

LAND COURT OF QUEENSLAND

CITATION: *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors (No. 2)* [2016] QLC 22

PARTIES: Adani Mining Pty Ltd
(applicant)
v
Land Services of Coast and Country Inc
(first respondent)
and
Conservation Action Trust
(second respondent)
and
Chief Executive,
Department of Environment and Heritage Protection
(statutory party)

FILE NOS: MRA428-14 & EPA429-14 (MLA 70441)
MRA430-14 & EPA431-14 (MLA 70505)
MRA432-14 & EPA433-14 (MLA 70506)

DIVISION: General Division

MATTER: Application for costs

DELIVERED ON: 23 March 2016

DELIVERED AT: Brisbane

HEARD ON: Written submissions: 11 January 2016; 29 January 2016;
5 February 2016

PRESIDENT: CAC MacDonald

ORDER: **The application for costs is refused.**

CATCHWORDS: COSTS – objection to mining lease applications and associated environmental authority – whether an administrative enquiry - whether Land Court has jurisdiction to award costs in an administrative enquiry under *s 34 Land Court Act 2000*.

Environmental Protection Act 1994
Land Court Act 2000
Land Court Rules 2000
Mineral Resources Act 1989
State Development and Public Works Organisation and Other Legislation Amendment Act 2015

Anson Holdings Pty Ltd v Wallace (2010) 31 QLCR 74
BHP Billiton Mitsui Coal Pty Ltd v Isdale [2015] QSC 107
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
Dunn v Burtenshaw (2010) 31 QLCR 156
Re His Worship Mr Calder; ex parte Gardner (1999) 20 WAR 525
Re Warden French' ex parte Serpentine-Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315
Registrar of Titles (WA) v Franzon (1975) 132 CLR 611

COUNSEL: Mr P Ambrose QC for the applicant
Mr S Holt QC with Dr C McGrath for the first respondent

SOLICITORS: McCullough Robertson for the applicant
Environmental Defenders Office (Qld) Inc for the first respondent

Background

- [1] On 15 December 2015, I handed down my decision in relation to applications by Adani Mining Pty Ltd (the applicant) for three mining leases and objections thereto under the provisions of the *Mineral Resources Act 1989* (MRA) and an application for an associated environmental authority and objections thereto under the *Environmental Protection Act 1994* (EPA).
- [2] I recommended to the relevant Minister and administering authority that, subject to the inclusion of additional conditions in the environmental authority, the mining leases be granted over the application area and that the environmental authority be issued in the terms of the draft environmental authority.
- [3] This decision deals with an application by the applicant seeking an order that the first respondent pay its costs of and incidental to the hearing of the objections, including the reserved costs. The first respondent has submitted that the Court does not have jurisdiction to award costs of the objections hearing under the MRA and EPA. Alternatively, if the Court holds that it does have jurisdiction to award costs, the first respondent submitted, the Court's discretion should be exercised so as to make no order as to costs, or to order that each party bear its own costs, given the public interest nature of the objections and other relevant factors.

[4] No application for costs has been filed by or against the second respondent or the statutory party.

Jurisdiction to award costs in referral matters

[5] The Land Court's jurisdiction to award costs is found in s 34 *Land Court Act 2000* (LCA) which provides:

"34. Costs

- (1) Subject to the provisions of this or another Act to the contrary, the Land Court may order costs for a proceeding in the court as it considers appropriate.
- (2) If the court does not make an order under subsection (1), each party to the proceeding must bear the party's own costs for the proceeding."

In these matters, there is no legislation contrary to s 34, so that the only question is whether s 34 applies.

[6] Doubt has arisen as to the Land Court's jurisdiction to award costs in "referral matters" pursuant to s 34 LCA as a result of the decision of the Land Appeal Court in *Dunn v Burtenshaw*¹ and the Supreme Court in *BHP Billiton Mitsui Coal Pty Ltd v Isdale*². "Referral matters" is a compendious term used in this judgment to describe mining lease applications and objections thereto as well as applications for associated environmental authority and objections thereto. Such matters are referred to the Land Court for hearing by the chief executive of the relevant government departments³.

[7] *Dunn v Burtenshaw* concerned an appeal from a determination of the Land Court recommending that two mining leases be granted under the provisions of the MRA. The question before the Land Appeal Court was whether the recommendation of the Land Court constituted a "decision" which could be appealed, given that s 64 LCA provides that a party to a proceeding in the Land Court may appeal to the Land Appeal Court against a decision of the Land Court. The Land Appeal Court noted that the role of the Land Court, pursuant to s 269 MRA, is to make a recommendation to the Minister and said that the recommendation in no way ultimately, or even in an interim way, determined the rights or entitlements of an applicant for a mining lease⁴. The Land Appeal Court also noted that, notwithstanding the Land Court's recommendation, the Minister remained entitled to either recommend to the Governor-in-Council that a mining lease be granted or approved or reject

¹ (2010) 31 QLCR 156.

² [2015] QSC 107.

³ Section 265(2) *Mineral Resources Act 1989*; s 185 *Environmental Protection Act 1994*.

⁴ (2010) 31 QLCR 156 at [27].

the application entirely⁵. The Land Appeal Court reviewed relevant authorities, particularly in the Western Australia mining jurisdiction⁶, and concluded that⁷:

“For the reasons set out above and having regard to the Court decisions referred to we have come to the view that the recommendation of the learned Land Court Member below is not a “decision” of the sort contemplated by s 64 of the LCA insofar as it is not a proceeding but rather an administrative step consequent upon a statutorily prescribed enquiry conducted by the learned Land Court Member.”

- [8] In *BHP Billiton Mitsui Coal Pty Ltd v Isdale*⁸, the objectors lodged objections to an application by BHP for additional surface area for a mining lease under the MRA and the associated environmental authority under the EPA. The matters were referred to the Land Court for hearing of the applications and objections. At an interlocutory stage the Land Court ordered BHP to provide disclosure. BHP sought judicial review of the Land Court’s decision on the basis that the Land Court did not have the power to make an order for disclosure.
- [9] The Supreme Court held that when the Land Court hears objections to mining lease applications and associated environmental authorities it does not conduct a proceeding but rather undertakes an administrative function. The Supreme Court referred to the Land Appeal Court decision of *Dunn v Burtenshaw*⁹, and relied upon the fact that in such matters the Land Court does not make a decision determinative of future rights but merely provides advice and recommendations to the relevant Ministers who ultimately decide whether the mining lease or environmental authority should be issued. As set out above, mining lease and environmental authority applications and objections are referred to the Land Court by the relevant departments. The Supreme Court noted that various rules in the Land Court *Rules 2000* (LCR) regarding initiating proceedings were not consistent with these matters being referred to the Court. Further, disclosure was inapt for these types of matters where the Land Court must take into account matters such as the public interest which may not be in issue between the parties. The Supreme Court determined that because LCRs 13 and 4 applied to proceedings, not referrals, those rules did not enliven power in the Land Court to order disclosure in matters where the Land Court does not adjudicate upon matters in issue but provides advice to an administrative decision matter.

⁵ At [26].

⁶ *Re Warden French’ ex parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1994) 11 WAR 315 and *Re His Worship Mr Calder; ex parte Gardner* (1999) 20 WAR 525 are authority for the proposition that where the Western Australia Mining Warden must make a recommendation rather than a determination regarding a matter, he/she is conducting an administrative enquiry not a proceeding.

⁷ (2010) 31 QLCR 156 at [47].

⁸ [2015] QSC 107.

⁹ (2010) 31 QLCR 156.

Applicant's submissions

[10] The LCA was amended in 2015¹⁰ (the 2015 amendments). *Inter alia*, a new definition of “administrative function” was inserted into Schedule 2 of the LCA as follows:

“***administrative function*** means an administrative function or power conferred under an Act.

Examples of an administrative function or power -

- 1 the Land Court’s power to make an objections decision under the *Environmental Protection Act 1994*
- 2 the Land Court’s power to make a recommendation in respect of an application for the grant of a mining lease under the *Mineral Resources Act 1989*, section 269.”

[11] The applicant submitted that:

- *Dunn v Burtenshaw* has no application to the question of whether the LCA confers jurisdiction upon the Land Court to award costs following the hearing of an objections decision because that case concerned whether a referral matter was a decision of the kind contemplated by s 64 of the LCA, not whether it was a proceeding.
- The LCA makes provision about the proceedings that come before the Court. These are both administrative and judicial proceedings.
- Section 64 LCA uses the word proceeding in its composite sense of the matters (judicial and administrative) over which the Land Court has jurisdiction. It is only those proceedings which are decisions that are amenable to an appeal pursuant to s 64 (*Dunn v Burtenshaw*).
- Section 34 LCA was not affected by the decision of the Supreme Court in *BHP Billiton Mitsui Coal Pty Ltd v Isdale* nor the 2015 amendments to the LCA.
- All that *BHP Billiton* decided was that two particular kinds of administrative referral matters before the Land Court were not proceedings for the purposes of rr 4(1) and 13 LCR. *BHP Billiton* did not decide that those particular kinds of referral matters or referral matters generally are not proceedings for the purpose of the Act. The Supreme Court was considering only the scope of the LCR, not the LCA.
- While the Supreme Court in *BHP Billiton* found that objections decisions were not proceedings as that term is used in the LCR, and while the term proceeding is also used in the LCA, it is contrary to the rules of statutory interpretation to attempt to read down or narrow the provisions of the *Land Court Act* by reference to the Rules.

First respondent's submissions

[12] The first respondent submitted that:

- the reasoning in *Dunn v Burtenshaw* established that the proper construction of the *Land Court Act* requires a distinction to be made between the Court’s jurisdiction for:
 - (a) judicial proceedings; and

¹⁰ By the *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* which commenced on 22 July 2015.

- (b) administrative functions such as an objections hearing to a mining lease application under s 268 MRA.
- The Land Court’s jurisdiction in s 5(1) LCA and its general power in s 7 make no reference to, and are not limited to judicial proceedings.
 - By contrast, the power to award costs in s 34 and the right of appeal to the Land Appeal Court in s 64 LCA are limited to a proceeding.
 - In contrast to s 34, s 64 and other sections of the LCA, s 21 of that Act now includes powers regarding administrative functions as a result of the 2015 amendments¹¹.
 - Similarly s 35 LCA now expressly refers to and distinguishes between powers regarding a proceeding and administrative functions.
 - The applicant’s submissions give no consideration to the differences in the statutory language in ss 21, 34 and 35 LCA.
 - Based on the reasoning in *Dunn v Burtenshaw*, the amendments to the LCA following *BHP Billiton*, and the proper construction of the Act, the Land Court has no power to award costs for an objections hearing under the MRA or the EPA at least until a regulation is made under s 21¹² providing for an award of costs in relation to such hearings.

Conclusions about the Land Court’s powers to award costs in referral matters

[13] Following the decision in *BHP Billiton*, it is apparent that where mining lease and environmental authority applications and associated objections have been referred to the Land Court for assessment, the Land Court is conducting an administrative enquiry and not a proceeding. The Supreme Court held therefore that rr 13 and 4 LCR did not apply to referral matters as those rules were applicable to proceedings. I consider that it follows that references in any Land Court rule to proceedings render those particular rules inoperative where the Court is conducting an administrative enquiry. Unless there is some indication to the contrary, it would be illogical and inconsistent with authority¹³ to decide that some of the Court’s rules (those referring to proceedings, such as rr 13 and 4) did not apply to administrative enquiries but other rules referring to proceedings did apply.

¹¹ See in particular s 21(3) *Land Court Act 2000* which provides that:

“21 Rules of Land Court

- (3) Also, without limiting subsection (1), the rules may provide for the procedures when the court, a member or a judicial registrar is exercising or performing an administrative function, including –
- (a) rules providing for costs in relation to the exercise or performance of an administrative function; and
 - (b) rules providing for disclosure by persons in relation to the exercise or performance of an administrative function.”

¹² Section 21(3).

¹³ *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J); *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452.

- [14] I also note that r 3(1) states that these rules apply to proceedings in the Land Court. It is arguable that no rule in the LCR applies to administrative enquiries because they are not “proceedings”.
- [15] The question to be determined is whether s 34 LCA is applicable to administrative enquiries. Should the sections of the LCA that refer to proceedings (such as s 34) be interpreted to include administrative enquiries as well as judicial proceedings?
- [16] In my opinion, this question is answered by application of the reasoning in *Dunn v Burtenshaw*¹⁴. The Land Appeal Court held that the Land Court’s recommendation was not a decision which could be appealed to the Land Appeal Court because the Land Court’s recommendation was not a proceeding but rather an administrative step consequent upon a statutorily prescribed enquiry.
- [17] Although the Land Appeal Court did not expressly say so, it is a necessary consequence of that conclusion that the Land Court’s function in dealing with these referred matters under the MRA and EPA is administrative in nature because the Court must conduct an enquiry and make a recommendation to the Minister or administering authority. The Court does not finally determine the rights of the mining lease applicant. It follows that the enquiry is not a proceeding within the meaning of that term as it is used in s 64 LCA. I note that this reasoning is consistent with the reasoning in *BHP Billiton*.
- [18] On this premise, it is only logical and consistent with the principles of statutory interpretation¹⁵ and common sense, that the sections in the LCA that refer to proceedings do not apply to administrative enquiries, there being no reason to apply a different interpretation.
- [19] Consequently I consider that s 34 LCA does not provide jurisdiction for the Land Court to award costs in administrative enquiries such as this.
- [20] It is recognized that this conclusion is inconsistent with the decision of the Land Appeal Court in *Anson Holdings Pty Ltd v Wallace*¹⁶ where it was held that the Land Court has power, under s 34 LCA, to order costs in referral matters under the MRA and EPA. That case was decided before the decisions in *Dunn v Burtenshaw* and *BHP Billiton* were handed down. The submissions in this matter as to the nature of the Land Court’s function in dealing with referral matters were not raised in *Anson Holdings v Wallace* and, therefore, I consider that that decision is of no assistance in dealing with these submissions.

¹⁴ (2010) 31 QLCR 156.

¹⁵ *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J); *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452.

¹⁶ (2010) 31 QLCR 74.

[21] In view of the conclusions I have reached as to the Court's jurisdiction to award costs in relation to the hearing of referral matters under the MRA and EPA, it is unnecessary for me to consider the parties' submissions as to liability for costs.

ORDER

The application for costs is refused.

**CAC MacDONALD
PRESIDENT OF THE LAND COURT**