MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Brisbane City Council v Curr [2014] QMC*
PARTIES:	**Simon Butterworth (Brisbane City Council)** (complainant) **v** **Ian David Curr** (respondent)
FILE NO/S:	MAG-00246835/13(6)
DIVISION:	Central Division, Brisbane Magistrates Court
PROCEEDING:	Summary Trial
DELIVERED ON:	22 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 and 9 October 2014
MAGISTRATE:	Callaghan CJ
ORDER:	**If find the defendant guilty of all 3 charges**
CATCHWORDS:	*Health Safety and Amenity Local Law 2009 – Deed of Grant of Land in Trust for Aboriginal Purposes – applicability of local laws – lighting and maintaining fires – Statutory interpretation – Land Act 1994 – Local Government Act 2009 – City of Brisbane Act 2010 – Acts Interpretation Act 1954 – Statutory Instruments – Aboriginal Land Act 1991 – whether all people stand equal before the law – mistake of fact - mistake of law – theatrical or similar public performance or displays*
COUNSEL:	L Godfrey, Solicitor for the complainant R Carroll, Counsel for the respondent on Direct Brief
SOLICITORS:	Brisbane City Legal Practice for the complainant

[1] On 13 December 2012 Ian David Curr, the respondent, a non-Aboriginal man was observed lighting and maintaining a fire in Musgrave Park, South Brisbane. Further on 19 December 2012 he was observed maintaining a fire in the same place. He has been charged with three offences:

(1) On 13 December 2012 lighting a fire contrary to subsection 4(1) of the *Health Safety and Amenity Local Law 2009 ("HSALL");*

(2) On 13 December 2012 maintaining a fire contrary to section 5 of HSALL;

(3) On 19 December 2012 maintaining a fire contrary to section 5 of HSALL.

[2] There is some history to the fire and the lands at Musgrave Park in that earlier in 2012 the elders from the Aboriginal peoples: the Jagara, Yuggera and Yuggerapil people and perhaps other Aboriginal persons decided to light a sacred fire in Musgrave Park using some of the ash from the fire that had been burning at the tent embassy in Canberra, Australian Capital Territory for some 40 years in order to commemorate the 40th anniversary of that fire.

[3] The first fire was lit in the lower flat section of Musgrave Park. On 10 and 12 May 2012 the then Lord Mayor of the city of Brisbane, Mr G Quirk, had discussions with the elders during which he purported to give the elders permission to use a different section of Musgrave Park for the purposes of peaceful protests including having a tent that can be used for administrative purposes and two other tents that will enable the maintenance of security over the administrative tent. He also agreed that the elders could maintain a fire for cultural purposes.[1]

[4] Accordingly tents were erected and the cultural fire was moved to the new section which is in the upper part of Musgrave Park. This is the section in which the fire with which we are concerned in this particular hearing was lit and maintained.

[5] Later in the year further meetings were held wherein the elders expressed concerns to the Lord Mayor about security issues within the park. On or about 11 December 2012 Mr Quirk formally rescinded the approval which he had previously purportedly given in May 2012 enabling a fire to be maintained and a small number of tents to be kept for the purpose of peaceful protests.

[6] As a result of the communication of this purported decision the elders had the tent site cleaned with the tents and the rubbish being removed.

[7] Subsequently Kevin Vieritz, an elder of the Yuggera people and one who had been appointed to supervise Musgrave Park gave the responsibility of lighting the fire which had gone out when the tent embassy had been cleaned out to the respondent.

[8] The respondent has made admissions that he lit and maintained the fire on 13 December 2012 and that he maintained the fire on 19 December 2012.

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[1] If the prosecutions contentions that the lighting and maintaining of fires on this land were on 13 and 19 December 2012 prohibited by local law are correct then it would be difficult for them to maintain an argument that the purported permission given by the Lord Mayor to light the fire in May 2012 was lawful.

[9] The fire was lit and maintained on the area which had previously been purportedly approved by Mr Quirk for that purpose and which is described as lot 3 on SP1106538 County Stanley Parish South Brisbane.

[10] On 29 July 1999 the Queen of Australia, with the advice of the Executive Council pursuant to the *Land Act 1994* ("LA") granted in fee simple the said land to the Brisbane City Council subject to the condition that it *"is to hold the land in trust for Aboriginal and for no other purpose whatsoever"*. There were other specified reservations which do not concern this particular matter such as minerals on and below the surface of the land and petroleum on and below the surface of the land are reserved as is access for the purpose of searching for those. This grant is known as a "Deed of Grant of Land in Trust" ("DOGIT").

[11] The defendant through his counsel argues as follows:

(1) The Brisbane City Council has no power to enforce local laws on the said land because of the DOGIT;

(2) In any event, if it did, the defendant was acting under an honest and mistaken belief as to the fact that he could light fires on the land (section 24 Criminal Code);

(3) The said land is not subject to any local law;

(4) Even if the said land was subject to a local law then section 6 of HSALL which permits the lighting of fire for BBQ, theatrical or similar public displays excuses the actions of the defendant.

[12] There was evidence from Mr Vieritz which I accept that the fire which he asked Mr Curr to light and maintain was a sacred fire in the culture of his people. Mr Vieritz explained that there are two types of fires. One is a communal fire and has significance for the family and community and the other type of fire is the sacred fire around which the truth is to be spoken. It is a place for seeking help and is a place where new ideas are borne.

[13] Samuel Watson also gave evidence. He is an Aboriginal male from the Jagara and Yuggera people. He said that Musgrave Park was always a gathering place for his people. Previously it had been used for protests and for mourning. He explained that a fire is always part of the gathering in their cultures and also different types of fires such as the cooking pit fire is used for more communal purposes such as feeding the community. He explained it was important to have a fire for cultural purposes.

[14] There is no evidence whatsoever that the fire at Musgrave Park with which we are concerned was used in any way for cooking purposes.

[15] I am satisfied that the fire was consistent with the use of the land for Aboriginal purposes.

Power to Enforce Local Law

[16] Section 28(1) of the *Local Government Act 2009* ("LGA") provides:

> *"A local government may make and enforce any local law that is necessary or convenient for the good rule and local government of its local government area."*

[17] The *City of Brisbane Act 2010* ("CBA") provides by section 28 that:

> *"Of there is any inconsistency between our local law and a law made by the State, the law made by the State prevails to the extent of the inconsistency."*

[18] Section 7(1) of the *Acts Interpretation Act 1954* ("AIA") provides:

> *"In an Act, a reference (either generally or specifically) to a law (including the Act), where a provision of a law (including the Act), includes a reference to the statutory instruments made or in force under the law or provision."*

[19] It is argued by the defendant that the DOGIT is a statutory instrument and therefore pursuant to the AIA it is a law and therefore pursuant to section 28 of the CBA, it being a law made by the State prevails to the extent of any inconsistency between it and the local law. I agree that the DOGIT is a statutory instrument. Section 36 of the AIA provides that "statutory instrument" has the meaning given by the *Statutory Instruments Act 1992*. That Act provides that for a document to be a statutory instrument it must satisfy subsections (2) and (3) of section 7 in that it must be made under an Act[2] or another instrument and it must be another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity. In this instance the DOGIT is an instrument of a public nature. The entity making the instrument is the Queen of Australia upon advice of the Executive Council and the instrument has unilaterally affected a right or liability or another entity in that by granting the DOGIT to the Brisbane City Council it placed upon the Brisbane City Council conditions to maintain the land. Accordingly I agree that the DOGIT is by virtue of section 7 of the AIA a law which by virtue of section 28 of the CBA would prevail to the extent of any inconsistency with the local law.

[20] The local law is the HSALL. Section 4 provides that a person must not light a fire in the open air or in an incinerator in any area of the city other than a rural area. Section 5 of HSALL provides that a person must not maintain a fire in the open air or in an incinerator in any area of the city other than a rural area an then there are exceptions which I will go to later.

[21] There is sufficient evidence to satisfy me that the fire with which we are concerned here was a fire in the open air in an area of the city other than a rural area. Musgrave Park is zoned sport and recreation not rural.

[22] The defendant argues that there is however an inconsistency between the local law prohibiting the lighting and maintenance of fires in open areas and the DOGIT

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[2] The deed of grant of land in trust was certainly made under the *Land Act 1994*.

(which, for the reasons aforesaid, has the effect of being a State law) in that he maintains the fire was lit for Aboriginal and no other purpose.

[23] The defendant refers to section 35 of the *LA* which provides the way land granted in trust by the Governor in Council is used must not be inconsistent with a purpose for which it was granted. The defendant points to section 44 of the *LA* which provides that minister may appoint trustees of trust land. Trust land is by definition under the *LA*, land comprising a reserve or deed of grant in trust, which this is. Section 44 goes on to provide that a trustee may be a statutory body which the Brisbane City Council is. The defendant points to section 46 of the *LA* which provides that a trustee's functions are to manage the trust land consistent with achieving the purpose of the trust.

[24] Section 52 of the *LA* provides that the trustee of the trust land may take all action necessary for the maintenance and management of the land. However, the action must be consistent with the purpose for which the land was granted in trust. The defendant argues that the purpose for which this land was granted in trust was for Aboriginal and no other purpose whatsoever. Therefore, so the argument goes, the trustee of the trust land, the Brisbane City Council, must act consistently with Aboriginal purposes in maintaining and managing the land.

[25] The prosecution accepts this, however argues that the council enforcing its local law is not inconsistent with the purposes for which the deed of trust was granted.

[26] Section 56 of the *LA* provides that the Governor in Council by regulation may make model by-laws for the protection and use of trust land and for other things. Section 56(4) provides that a local government may make local laws for the trust land and adopt model by-laws. Nothing has been placed before me that there were any model by-laws made by the Governor in Council and even if there had been there is no evidence that they had been adopted in the prescribed way as is required by section 56(8) of the *LA*.

[27] The prosecutor argues that section 56(4) applies to local laws made concerning all other lands such as the HSALL which also then apply to the trust land. My view is the subsection is not to be interpreted in that way. The word "the" before the words "trust land" mean that local laws may be made for specific trust land as opposed to general trust land as referred to in section 56(1) where the word "the" does not appear before the words "trust land", or land in general.

[28] In *Police v Chitts and Wharton*[3] his Honour reached a conclusion that this land and those upon it would be subject to compliance with existing legislation, namely the Brisbane City Council By-Laws and Regulations. His Honour reached that conclusion on the basis that this land would be "Aboriginal land" pursuant to section 8 of the *Aboriginal Land Act 1991* ("ALA") and therefore section 32(1) of the ALA applied to persons and things on the land. It says "*To allay any doubt it is declared that, except as provided by this Act or any other Act, the laws of the State apply to Aboriginal land, persons and things on Aboriginal land and acts and things done on Aboriginal land to the same extent and in the same way as if the land were not Aboriginal land.*" The defendant argues that this does not apply because this land is not Aboriginal land. Aboriginal land is defined in section 8 of the ALA as

[3] Unreported decision of Magistrate Costello delivered on 23 May 2014 in Brisbane.

being "transferred land or granted land" and including land that was "transferred land and has subsequently become granted land." Transferred land is defined in section 9 of the ALA to be land "that is granted under part 4 without a claim being made under this Act for the land."

[29] DOGIT land, which this is, is something different. It is transferrable land.[4]

[30] Granted land is defined in section 22 of the Act as being "claimable land that has been claimed by, and granted under this Act to a group of Aboriginal people." Accordingly I agree with the argument that this land is neither "transferred land" nor "granted land" nor is it "transferred land and has subsequently become granted land".

[31] It follows that this land is not "Aboriginal land" and therefore section 32 of the *ALA* does not apply to it.

[32] The lighting and maintenance of fire are acts which render the defendant to a penalty hence they are offences.[5] As offences are of two kinds only, namely criminal and regulatory offences [6] and these are not regulatory offences, they are therefore criminal offences albeit simple offences because they are not otherwise designated.

[33] In *Walker v New South Wales* [7] Mason CJ [8] said:

> *"It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle (see Racial Discrimination Act 1975 (Cth), s 10). The general rule is an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters. The rule extends not only to all persons ordinarily resident within the country but also to foreigners temporarily visiting. And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose. The presumption applies with added force in the case of the criminal law which is inherently universal in its operation and whose aims would otherwise be frustrated."*

[34] It could be argued that the principle set out by Mason CJ above is not offended by what has been done here. The defendant is a non Aboriginal person. It could be argued that the law equally applies to him as it does to an Aboriginal person as long as he is doing for Aboriginal purposes and for no other purpose. In my view, because of what follows, the fact that he is a non Aboriginal person acting on the instruction of or at the request of an Aboriginal elder doesn't assist the defendant's argument.

[35] Earlier in *Walker v New South Wales* Mason CJ [9] said:

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[4] See section 10 *Aboriginal Land Act 1991.*
[5] See section 2 Criminal Code.
[6] See section 3 Criminal Code.
[7] [1994] 182CLR 45
[8] At p 49
[9] At p 48

> *"The legislature of New South Wales has power to make laws for peace, welfare and good government of New South Wales in all cases whatsoever. The proposition that those laws could not apply to particular inhabitants or particular conduct occurring within the State must be rejected. As Gibbs J. (with whom Aickin J. agreed) said in Co v The Commonwealth ((1979) 53 ALJR 403 at p 408; 24 ALR 118 at p 129) 'The Aboriginal people are subject to the laws of the Commonwealth and of the states or territories in which they respectfully reside'.*

[36] Section 2 of the *Constitution Act 1867* (Qld) similarly provides that the legislative assembly can advise and consent to the Queen making laws for the peace, welfare and good government of the colony in all cases whatsoever and through the *Land Act*, the *Local Government Act* and the *City of Brisbane Act* the Brisbane City Council is empowered to make these by-laws which it is alleged the defendant has offended. As Mason CJ said as quoted above, the proposition that these laws could not apply to particular inhabitants or particular conduct occurring within the State must be rejected.

[37] Reading that proposition into the deed of grant of land in trust, one would have to interpret the schedule of trusts which says *"The grantee is to hold the land in trust for Aboriginal and for no other purposes whatsoever"* as being subject to persons upon the land acting lawfully.

[38] It follows that the local laws are not inconsistent with the DOGIT.

Does section 24 apply?

[39] It is argued by the defendant that in lighting the fire he was acting under the honest and reasonable but mistaken belief that he had the lawful right to light the fire, in that the DOGIT permitted it. It is argued that that is a question of fact.

[40] I find that it is a question of law and section 24 does not apply. Mistake as to the effect of a document is not a mistake of fact.[10]

[41] Similarly as raised with counsel for the defendant the case of *Ostrowski v Palmer* [11] concerned the respondent fisherman being charged with commercially fishing in an area for rock lobsters in a place where he had been told by public officials he was allowed to fish. The High Court found that to be a mistake of law.

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[10] See *Beetham v Tremearne (1995)* 2 CLR 582 per Griffith CJ at 585.
[11] [2004] HCA 30.

Is the DOGIT land subject to any local law?

[42] Here it is argued that pursuant to section 56 of the *LA* that as no model by-laws had been adopted and no local laws had been made for the trust land, that the trustee City Council cannot apply their other laws to the land. I do not accept that argument for the reasons given above especially those espoused by Mason CJ in *Walker v New South Wales.*

Is the lighting and maintenance of a fire an exception under section 6 of the HSALL?

[43] That section provides "*this division*"[12] will not apply to fires-

(a) Where the fire is used for a barbecue or similar apparatus to cook food for human consumption; or
(b) Where there is a permit for the fire under section 65 of the *Fire and Rescue Authority Act 1990*; or
(c) The fire is required to be lit by notice under section 69 of the *Fire and Rescue Authority Act 1990;* or
(d) Where a person is authorised or required to light the fire under another Act or local law; or
(e) Used in connection with theatrical or similar public performances or displays.

The evidence is that the fire was never used for cooking food for human consumption so (a) does not apply.

[44] Similarly there is no evidence that any permit under section 65 or a requirement to light the fire by notice under section 69 of the *Fire and Rescue Authority Act 1990* existed hence (b) and (c) do not apply. Further there is no evidence that the defendant was authorised or required to light the fire under another Act or local law, so (d) does not apply. The question is was the fire *"used in connection with theatrical or similar public performances or displays"*?

[45] Mr Vieritz gave evidence that the fire was a sacred fire, evidence which I accept. He said that ashes from the Canberra fires that had been lit outside the tent embassy there 40 years ago were used to light this one. He said he understood that there was a smoking ceremony when this fire was originally lit. He said the fire was significant. He said that even though the fire went out when the tents were cleaned out of the site, the fire had not been extinguished.

[46] Mr Watson gave evidence that the fire was a sacred fire. Again I accept this evidence. He said though that the fire was more for symbolic value. I accept this evidence. The fire was a symbol of the protest that had been occurring in Canberra over the previous 40 years. It was a symbol of solidarity with that protest. In my view the lighting of the fire by the defendant on the 13th December 2012, the maintenance of it on the same day and the maintenance of it on 19th December

[12] Which includes sections 4 and 5 – the offences for which the defendant has been charged

2012 was never in connection with theatrical or similar public performances or displays. It was a public display of protest in part. It was a public display of symbolism in part, but it was not theatrical. The word theatrical where it appears in (d) colours the rest of the subsection. Displays of symbolism or protest can sometimes be parts of theatrical productions but this was not such an event.

[47] It follows, due to the prosecution having proved each element of the offence beyond reasonable doubt and the fact that because of my findings that the sections 4 and 5 of the *HSALL* apply to that land upon which the fire was lit and maintained, that the defendant must be found guilty.

C Callaghan

Magistrate