SUPREME COURT OF QUEENSLAND

CITATION:	*Witheyman v Van Riet & Ors* [2008] QCA 168
PARTIES:	**PETER ROBERT WITHEYMAN** (applicant/appellant) **v** **NICHOLAS DANIEL VAN RIET** (first respondent) **EKARI PARK PTY LTD** ACN 101 606 419 (second respondent) **N J CONTRACTING PTY LTD** ACN 090 955 954 (third respondent)
FILE NO/S:	Appeal No 522 of 2008 DC No 53 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 June 2008
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2008
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That leave to appeal is granted** **2. That the appeal is dismissed** **3. That the applicant is to pay the respondents' costs of the application and the appeal to be assessed on the standard basis**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – LIMITATION OF TIME FOR PROSECUTION – where the applicant alleged that the respondents had contravened s 4.3.1. of the *Integrated Planning Act* 1997 (Qld) by starting an assessable development without a development permit – where that offence was committed by the clearing of native vegetation which constituted operational works for the purposes of s 4.3.1 of the *Integrated Planning Act* 1997 (Qld) – where s 68 of the *Vegetation Management Act* 1999 (Qld) required that a proceeding for a vegetation offence must start within one year of the offence coming to the complainant's knowledge – where the trial judge found that a complainant

possesses the requisite knowledge for the purposes of s 68 when the complainant has such information as to give reasonable grounds for a belief that the offence has been committed – where the applicant contended that knowledge of the offence necessarily involves knowledge of the identity of the offender – whether the judge erred in holding that a complainant possesses the requisite knowledge for the purposes of s 68 when the complainant knows that the offence has been committed even if the complainant does not then know who committed the offence

Integrated Planning Act 1997 (Qld), s 4.3.1
Vegetation Management Act 1999 (Qld), s 68

Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd [2008] QCA 100, cited
Cross Country Realty P/L v Peebles [2007] 2 Qd R 254; [2006] QCA 501, cited
Foxpine Pty Ltd v Collings [2001] QCA 355, cited
Hablelthwaite& Anor v Andrijevic & Ors [2005] QCA 336, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Smith v Baldwin; ex parte Smith [1979] Qd R 380, cited
Witheyman v Van Riet & Ors [2007] QDC 342, affirmed
Woods v Beattie; ex parte Beattie [1995] 1 Qd R 343; [1993] QCA 085, cited

COUNSEL: A J MacSporran SC with D J Lang for the applicant
P J Callaghan SC with P Sheridan for the respondents

SOLICITORS: Crown Solicitor for the applicant
Crowley and Greenhalgh for the respondents

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** The applicant seeks leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) against a decision of a District Court judge[1] which affirmed a magistrate's decision to dismiss the applicant's proceedings on the ground that they were out of time.

Factual and statutory background

[3] The applicant's complaints against the respondents alleged that each of them contravened s 4.3.1 of the *Integrated Planning Act* 1997 (Qld) between 8 August 2002 and 15 April 2004 by starting assessable development, being "operational works that was the clearing of native vegetation on freehold land", without a development permit. The particulars alleged that 2,823.9 hectares of trees were cleared.

[4] Section 68 of the *Vegetation Management Act* 1999 provided:

"Summary proceedings for offences

1 *Witheyman v Van Riet & Ors* [2007] QDC 342.

(1) A proceeding for an offence against this Act, or for a vegetation clearing offence, must be taken in a summary way under the *Justices Act 1886*.

. . .

(3) Despite the Planning Act, and subject to subsection (4), a proceeding for a vegetation clearing offence[2] must start—

(a) within 1 year after the commission of the offence; or

(b) within 1 year after the offence comes to the complainant's knowledge, but within 5 years after the offence is committed.

(4) If a Magistrates Court considers it just and equitable in the circumstances, the court may, at any time, extend a time set under this section.

. . .

(6) A vegetation clearing offence does not come to the complainant's knowledge merely because the complainant receives a remotely sensed image that may provide evidence of the offence."

[5] The proceedings were started on 20 October 2005, which was more than one year but less than five years after the commission of the alleged offences. The applicant contends the proceedings were started within one year after the offence came to the complainant's knowledge so that they were within time under s 68(3)(b).

[6] The complaints averred that they were within time. The evidence which the magistrate and the judge held justified the contrary conclusion is summarised in the following passage in the latter's reasons:[3]

"The statement of the complainant reveals the following chronology:

April 2004	Investigation allocated to complainant
April 2004	Complainant inspected satellite imagery which suggested vegetation had been cleared.
April 2004	Warrant to enter property under the *Vegetation Management Act* 1999 issued by a magistrate
19 April 2004	Complainant spoke to Mr Jack Van Riet about entry to the property; he asked for something in writing, and a copy of the warrant was sent to him by fax.

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2 A contravention of s 4.3.1 of the *Integrated Planning Act* 1997 (Qld) is "a vegetation clearing offence": see *Vegetation Management Act* 1999 (Qld), schedule definitions of "vegetation clearing offence" and "vegetation clearing provision".

3 *Witheyman v Van Riet & Ors* [2007] QDC 342 at [9] – [12].

20 April 2004	Complainant conducted a field inspection on the subject property, observing large areas of cleared mapped remnant vegetation which confirmed the satellite imagery. During the inspection the complainant met the first respondent who would not talk to him. According to the statement, at the end of the inspection the complainant believed that an offence may have been committed.
29 June 2004	Complainant spoke to Jack Van Riet by telephone; no relevant information was obtained.
30 June 2004	Complainant contacted by respondent's solicitor; no relevant information provided.
19 July 2004	Complainant contacted by respondent's solicitor; no relevant information provided.
22 July 2004	Complainant made aware of clearing on adjoining road reserves.
2 September 2004	Complainant sent notices requiring information under s 51(2) of the *Vegetation Management Act* 1999 to Merle Van Riet, and the second and third respondents.

After the notices were served the solicitor for the respondents sent a facsimile dated 20 September 2004 to the complainant advising that the firm acted on behalf of the second respondent and Mrs Van Riet, referring to the notices, and seeking advice "as to the basis of your reasonable belief that a vegetation clearing offence has been committed on our clients' property." The complainant was asked whether the first respondent could respond to the notices on behalf of the second respondent, the third respondent and Mrs Van Riet. In addition, an extension of time for responding to the notices was sought.

On 22 September 2004 the complainant acknowledged receipt of the fax, and sought confirmation of whether the solicitors were acting for the third respondent. He continued:

"The reasonable belief the department has came from the study of satellite imagery, a field inspection of the property and collection of other information. The department has verified that vegetation has been disturbed and therefore has a reasonable belief that an offence has been committed. Please note this is an alleged offence. As all parties issued with Notice Requirement to Give Information have an interest in the property the department also has reasonable belief that they may be able to give information about the alleged offence. As the department has a legal obligation to investigate this alleged

offence it wishes to gather all information that may be relevant before making any further decision in relation to this matter." [sic]

The complainant went on to insist upon all of the people served with notices responding to them, and to complain about the delay in responding to the notices.

To return to the chronology:

22 October 2004	Complainant received responses to the notices on behalf of Mrs Van Riet and the second and third respondents. From those responses the complainant formed the belief that the respondents had committed the offences ultimately charged.
1 March 2005	Court brief completed by the complainant.
2 March 2005	Court brief forwarded to legal services in Brisbane.
9 May 2005	Complainant advised to obtain additional evidence.
20 July 2005	Complainant obtained additional evidence and forwarded a further court brief to legal services.
20 October 2005	Complaint and summons sworn."

Decisions of the magistrate and the judge

[7] The magistrate accepted the respondents' contention that the offences came to the complainant's knowledge more than one year before the proceedings were started, finding that the complainant possessed the relevant knowledge by 22 September 2004. The magistrate relied on the statement made by the complainant in the correspondence of 22 September 2004 (which followed the complainant's investigation over the preceding five months) that "[t]he department has verified that vegetation has been disturbed and therefore has a reasonable belief that an offence has been committed . . ."

[8] The judge affirmed that conclusion. His Honour considered that *Smith v Baldwin*[4] supported the view that an offence comes to the complainant's "knowledge" for the purposes of s 68(3) when the complainant has such information as to give reasonable grounds for a belief that the offence has been committed. It was clear from the notices sent under s 51 of the Act on 2 September 2004 and the letter of 22 September 2004 that by the latter date the complainant had a belief on reasonable grounds that the offences had been committed.

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4 *Smith v Baldwin, ex parte Smith* [1979] Qd R 380.

The issues

[9] The applicant did not challenge the judge's conclusion that a complainant possesses the requisite "knowledge" for the purposes of s 68(3) when the complainant has such information as to give reasonable grounds for a belief that the offence has been committed. Rather, the applicant's contention was that upon a proper construction of s 68(3) knowledge of the offence necessarily involves knowledge of the identity of the offender.

[10] The judge found that the evidence did not justify the conclusion that the complainant had knowledge of the identity of the offenders more than 12 months before making the complaint.[5] The respondents relied upon the provision in s 67A of the *Vegetation Management Act* 1999 (Qld) that the clearing of vegetation on land in contravention of a vegetation clearing provision is taken to have been done by an occupier of the land in the absence of evidence to the contrary. It was not contended, however, that any of the respondents was the "occupier" as that term is defined in s 67A. There is no reason to reject the applicant's evidence that when he sent the letter of 22 September 2004 he was still unaware of who had conducted or authorised the clearing. The chronology set out earlier indicates that the applicant did not have reasonable grounds for a belief that it was the respondents who had committed the alleged offences until 22 October 2004, which was within the one year period specified in s 68(3)(b).

[11] Accordingly, the applicant submits that resolution of the construction issue in his favour should result in the setting aside of the decisions of the magistrate and the judge. In the alternative, the applicant also seeks leave to appeal to challenge the judge's decision to affirm the magistrate's refusal to extend time under s 68(4).

The construction issue

[12] The question is whether the judge erred in holding that a complainant possesses the requisite knowledge for the purposes of s 68(3)(b) when the complainant knows that the offence has been committed even if the complainant does not then know who committed the offence.[6]

[13] That question is of some general significance. In my view the applicant's contention that the judge erred is fairly arguable. If there was such an error the complaints should not have been summarily dismissed. For these reasons, I would grant leave to appeal on this proposed ground of appeal.[7]

[14] It was submitted on behalf of the applicant that the natural construction of the phrase in s 68(3)(b) "the offence comes to the complainant's knowledge" necessarily implies knowledge of the identity of the offender. This was said to follow from the use of the phrase "the offence" rather than more general words such as "an offence".

[15] I disagree. The requirement that "a proceeding for a vegetation clearing offence must start . . . within one year after the offence comes to the complainant's knowledge . . ." does not necessarily imply knowledge of the identity of the

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5 *Witheyman v Van Riet & Ors* [2007] QDC 342 at [29].

6 *Witheyman v Van Riet & Ors* [2007] QDC 342 at [31].

7 Cf *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 at [5].

offender. Where someone knows of specific facts that constitute the elements of a particular offence at a particular place and within a particular period, but is in doubt as to the identity of the offender, it is a perfectly natural use of language to say that the person knows the offence has been committed. It involves no misuse of language to say that the applicant knew of the commission of the offence against s 4.3.1 of the *Integrated Planning Act* 1997 (Qld) described in the complaints once the applicant knew that someone had started assessable development within the specified period in the form of the clearing of trees covering the specified 2,823.9 acres of the described land without any development permit.

[16] That view derives support from a number of considerations identified by the judge.[8] The authorities provide some guidance as to what is required for the relevant "knowledge", but in none of the authorities is there a clear statement that knowledge of the identity of the offender is required. If the legislature had intended that s 68(3)(b) required knowledge of the identity of the offender the enactment of s 68(6) seems particularly odd: s 68(b) implies that, were it not enacted, a complainant might know of the commission of an offence merely by receiving a remotely sensed image. The one year period specified in s 68(3) provides ample time for the complainant to investigate the offence and gather the necessary evidence, including in that process identifying the particular offender, before proceedings are commenced in time; that is a relatively generous period when compared with other statutory examples. If the legislature had intended that knowledge of the identity of the offender was required to set time running, the legislature could easily have said so, as legislatures occasionally have done.

[17] This provision is an exception to the general rule allowing 12 months in which to commence a prosecution after a summary offence is committed. It concerns the prosecution of an offence. One purpose of the limitation provision is to provide protection to citizens who may have committed offences. Another purpose is to encourage the efficient and timely investigation of offences. As his Honour observed, [9] these matters also suggest that s 68(3)(b) should not be given a wider construction than is clearly indicated by its text.

[18] I would add that the presence in s 68(4) of the power to extend time points in the same direction. If a complainant does not learn the identity of the offender within the specified time that might, in a particular case, be a very weighty factor in favour of the exercise of the discretion to extend time (for example, where that occurred despite prompt and diligent efforts by the complainant or as a result of obstructive conduct by the offenders).

[19] Senior counsel for the applicant referred the Court to statements in the explanatory notes for the *Natural Resources and Other Legislation Amendment Bill* 2003 (Qld), and in the second reading speech for that Bill, concerning the clause which became s 68 of the Act and a clause in the same terms which was inserted in the *Land Act* 1994 (Qld). These statements referred to the enlargement of the time limit and the reasons for that,[10] but in my opinion they do not provide any assistance in the resolution of this construction issue.

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8 *Witheyman v Van Riet & Ors* [2007] QDC 342 at [32], [34], [37], [38].

9 *Witheyman v Van Riet & Ors* [2007] QDC 342 at [39] and [19], citing *Tesco Stores Ltd v London Borough of Harrow* [2003] EWHC 2919 per Newman J at 25.

10 *Natural Resources and Other Legislation Amendment Bill* 2003 (Qld), explanatory notes, p 7, 15, 26(cl 28), 37(cl 73); second reading speech 25 February 2003 at p 55.

[20] It was also submitted that various statements in the authorities supported the construction propounded for the applicant. Reference was made, for example, to the statement in *Smith v Baldwin*[11] that there was no evidence to show that an authorised person "either had knowledge, or had, or should have had reasonable grounds to believe . . . that the respondent had committed an offence". In that case, if any offence was committed at all it was committed by that respondent. The relevance of knowledge of the identity of the offender was not an issue. In that context, the statement I have quoted does not imply that such knowledge was relevant or essential. The same is true of the similar statements in *Woods v Beattie*,[12] *Cross Country Realty P/L v Peebles*, [13] and *Foxpine Pty Ltd v Collings* [14] to which the applicant's senior counsel also referred. Those decisions do not support the applicant's construction of s 68(3)(b).

[21] In my opinion there was no error in the decisions of the magistrate and the District Court judge that the proceeding did not start within one year after the offence came to the complainant's knowledge. The proceedings were therefore out of time.

[22] For these reasons, whilst I would grant leave to appeal on the construction point, I would dismiss the appeal.

The discretion to extend time

[23] The question for the magistrate under s 68(4) of the *Vegetation Management Act* 1999 was whether it was "just and equitable in the circumstances" to extend time. The magistrate declined to extend time, holding that it was not just and equitable to do so, particularly in light of the tardy prosecution of the alleged offences.

[24] In this respect, the District Court judge said:

> "It seems to me that the chronology referred to earlier provides ample justification for such conclusion, even apart from the fact that it seems to have taken five months before there was anything useful done by way of investigation into the original report. The position was investigated in April 2004, which produced a belief that an offence may have been committed. After attempts to obtain information voluntarily were unsuccessful, notices under s 51 were sent out in early September 2004, evidently after other information had been collected. By the end of September 2004 the department had a reasonable belief that an offence had been committed. The notices were responded to in October 2004, but it took until March 2005 for a court brief to be completed by the complainant and forwarded to Legal Services, two months for the complainant to be told to obtain additional evidence and over two months for the complainant to obtain the further evidence. There was then a further delay of three months, after matters ought to have been all ready to go. Overall, it seems to me that the conduct of this prosecution was decidedly tardy."

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11 *Smith v Baldwin, ex parte Smith* [1979] Qd R 380 at 386 per W B Campbell J.

12 *Woods v Beattie; ex parte Beattie* (1995) 1 Qd R 343 at 344; [1993] QCA 085.

13 *Cross Country Realty Pty Ltd v Peebles* [2007] 2 Qd R 254; [2006] QCA 501 at [9].

14 *Foxpine Pty Ltd v Collings* [2001] QCA 355.

[25] It was submitted that the finding that the conduct of the prosecution was tardy was not justified. In my respectful opinion the facts upon which the finding was based, which were not themselves in issue, justified the finding. I would add that the judge acted on a view that was generous to the applicant when his Honour put to one side the fact that it took five months before anything was usefully done by way of investigation into the original report of the offence. Whilst that fact might be irrelevant to the question whether the complainant was guilty of any delay, in determining whether it is just and equitable to extend time I can see no reason to ignore the extent of the whole period that has elapsed since the alleged commission of the offence.

[26] Senior counsel for the applicant acknowledged that it was not possible to identify in the judgment of the magistrate any particular error in the exercise of the discretion. The submission was that the result was so "unreasonable or plainly unjust" as to justify the inference that in some unidentified way there had been a failure properly to exercise the discretion.[15]

[27] In my opinion, there was no error in the judge's conclusion that there was no justification for setting aside the magistrate's exercise of the discretion.[16] There is no reason to think that the magistrate did not give appropriate weight to the fact that the applicant did not within the one year period have reasonable grounds for believing that the respondents were the perpetrators of the offences. Nor is any error demonstrated by the fact that, as was submitted for the applicant, part of that delay was attributable to conscientious and bona fide attempts by the complainant to identify the appropriate defendant. That the factors in favour of the extension were thought by the magistrate to be outweighed by other relevant considerations, particularly the significant delay in bringing the proceeding, does not demonstrate any error in the exercise of the discretion.

[28] The limitation period enacted in s 68(3) serves very important public purposes. An inevitable result of such provisions is that some prosecutions that otherwise might proceed cannot do so. That fact does not itself establish any injustice and none is evident in this case. The applicant has already had the benefit of two hearings in which to seek an extension of time. Leave to appeal should not be granted for the purpose of permitting the applicant a third hearing.[17]

Orders

[29] I would grant leave to appeal, but I would dismiss the appeal. I would order that the applicant pay the respondents' costs of the application and the appeal to be assessed on the standard basis.

[30] **DAUBNEY J:** I respectfully agree with Fraser JA, and with the orders he proposes.

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15 *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40.

16 *Witheyman v Van Riet & Ors* [2007] QDC 342 at [46].

17 Cf *Hablelthwaite v Andrijevic* [2005] QCA 336 at [21].