PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Booth v Yardley & Anor* [2008] QPEC 5
PARTIES:	**CAROL JEANETTE BOOTH** *Applicant* *V* **RICHARD GEORGE YARDLEY** *First Respondent* *And* **ANTJE GESINA YARDLEY** *Second Respondent*
FILE NO/S:	BD 2845/2006
DIVISION:	Planning and Environment
PROCEEDING:	Application in a proceeding
ORIGINATING COURT:	Planning and Environment Court of Queensland
DELIVERED ON:	8 February 2008
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2007
JUDGE:	**Alan Wilson SC, DCJ**
ORDER:	**1 That on or before 31 March 2008 the respondents dismantle (or cause to be dismantled) the three electric grids constructed on their land at Hosking Road, Mirriwinni being the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker in the State of Queensland by pulling down and taking apart the horizontal wires and metal poles constituting the electric grids** **2 That there be liberty to apply on 14 days notice**
CATCHWORDS:	PROCEDURE – CONTEMPT OF COURT – PLANNING AND ENVIRONMENT COURT – BREACHES OF ORDER – MEANING AND EFFECT OF ORDER – STANDARD OF PROOF – POWER CONSIDER GUILT AND PENALTY TOGETHER – order to dismantle electric grids used to protect crops from fauna – non-compliance – whether respondents understood order – whether acted on mistaken

advice about meaning of order – penalty

Cases considered:

Bakir v Doueihi [2002] QSC 019
Booth v Yardley [2007] QPELR 205
Booth v Yardley [2007] QPELR 229
Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch) [2001] 2 Qd R 118
Festival Records Pty Ltd v Tenth Raymond Management Pty Ltd (1987) 11 IPR 61
Lade & Co Pty Ltd v Black [2006] 2 Qd R 531

COUNSEL: C McGrath for applicant
D Walters, agent, for respondents

SOLICITORS: Environmental Defenders Office (Qld) Inc
Respondents self-represented

[1] Dr Booth seeks an order that Mr and Mrs Yardley be punished for their alleged contempt of an order of this Court originally made on 30 November 2006. She says the order in its terms required the Yardleys to actually take down and remove the constituent parts of an electric grid system on their property which, until the order was made, was capable of electrocuting flying foxes – but they have failed to do that giving rise, it is said, to the contempt.

[2] The order was, relevantly, in these terms:

> 1 Unless and until the respondents have obtained an authority under the Nature Conservation Act 1992 to take flying-foxes (genus pteropus) by the use of electric grids on their property at Hosking Road, Mirriwinni (the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker) the respondents stop and/or not start electrocuting flying-foxes by use of the grid system on that property;
>
> 2 Within three months of the date of this order the First Respondent and the Second Respondent **dismantle or cause to be dismantled any electric grid system constructed for the purpose of electrocuting flying-foxes (genus pteropus) on that property** unless the taking of flying-foxes by electrocution using such an electric grid is specifically authorised under s 88 of the Nature Conservation Act 1992 (*emphasis added*)

[3] There is no dispute about the facts. The Yardleys, through their agent Mr Walter, filed a document[1] in which it is admitted that the steps they have taken to comply with the order have been limited to disconnecting the power supply to the grid structures, which still remain in place. Dr Booth does not dispute that disconnection of the power has occurred[2].

[4] There was no evidence suggesting the respondents have obtained an authority of the kind referred to in clause 1 of the order. Their case, as I understand it, is that because they have removed the electrical connection to, and the electrical wiring from, the grid structures they have sufficiently and satisfactorily complied with clause 2.

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1 eCourt document no 57, filed 19 November 2007
2 T37.25-30

[5] The meaning of an order is to be ascertained by applying ordinary principles of construction, in the matrix of facts in which the order came to be made. It must be clear if it is to be enforced by contempt proceedings[3]. The 'matrix' will include the objective framework of facts from which the order arose, and the meaning given to particular words by the parties. The order will be read so far as is reasonably possible to give it the effect which was apparently intended to achieve the Court's purpose[4].

[6] There cannot be any serious doubt about the meaning of the phrase '*any electric grid system'* in the context of the proceedings which lead to the order. The evidence originally before the Court established, and it was accepted, that three grid structures of approximately 600 – 800 metres in length had been constructed, with around 15 electric wires spaced about 20 centimetres apart strung horizontally between metal poles.

[7] The ordinary meaning of the word '*dismantle*' is to '*… pull down, take apart*'[5]. On its face, then, the order apparently required the Yardleys to do more than simply disconnect the power, or remove wiring; they were ordered to pull down and take apart the entire structure.

[8] What the Yardleys have now done is, in fact, nothing more than more permanently comply with an earlier interlocutory order made by Rackemann DCJ. This earlier order required them to '*… forthwith disconnect the electricity supply from the grid system and not reconnect it during the currency of this order*'[6]. (The terminology of that direction contrasts with what was later required in the subject order and, it may fairly be said, further reduces any risk of uncertainty or confusion about the meaning and effect of the latter.)

[9] The Yardleys continuing assertions of compliance seem to be based, and to rely upon, advice given to them by their representative at both hearings, Mr Walter. One of his affidavits shows that he wrote to the Registrar of this Court on 22 March 2007 advising that as soon as the respondents read the order they '*… effectively dismantled the electric grids*' by disconnecting the electricity. The letter asked that it be 'placed before' me so that I might be advised that my 'Orders had been complied with by Mr and Mrs Yardley'.

[10] In his submissions to the Court[7] Mr Walter said of this letter, at page 26:

> 132 As no reply or advice about that correspondence was received from the applicant, her solicitors or the Planning and Environment Court, the respondents and I both assumed that the situation was satisfactory to all parties. Mr and Mrs Yardley had no mens rea at common law and they honestly believed that they had complied with the Order of the Court.

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3 *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 at 133, and 166; *Bakir v Doueihi* [2002] QSC 019 at [16]-[24] (Atkinson J).

4 *Festival Records Pty Ltd v Tenth Raymond Management Pty Ltd* (1987) 11 IPR 61 at 73; *Bakir v Doueihi* (supra) at [18]

5 Macquarie Dictionary (3rd edition, 2001)

6 *Booth v Yardley* [2007] QPELR 205 (Rackemann DCJ)

7 eCourt document no 57

[11] The question this throws up is whether contempt occurs if the respondents, in deliberately failing to dismantle the wires and poles honestly believed (or were wrongly advised, but acted in reliance upon the advice) that to do so would not constitute a breach of the order.

[12] Recently, in *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531 Jerrard JA and Keane JA disagreed whether contempt occurred if the relevant act or omission was casual, accidental or unintentional. Jerrard JA thought not. Keane JA on the other hand concluded that because of the provisions of UCPR r 930 there is, in Queensland, a statutory basis for imposing a fine which does *not* require that it be established that the breach of the order was wilful or worse than casual, accidental or unintentional. The other member of the Court, Jones J, said that he agreed generally with Keane JA but his Honour's reasoning appears, with respect, to be closer to that of Jerrard JA on the point.

[13] The difference in approach is not ultimately germane here because, as Jerrard JA also concluded[8], it is no defence to the charge that a party deliberately doing the act honestly believes, or was wrongly advised, that it would not be in breach of the order. Although the evidence is sparse it can fairly be deduced from the matters raised earlier that, at the highest for the respondents, they listened to advice from Mr Walter and believed disconnecting the wires was sufficient. For the reasons discussed earlier that was never a proper construction of, or response to, the plain terms of the order.

[14] As Counsel for the applicant, Mr McGrath, fairly pointed out however the 'mental element' – the state of mind and belief, here, of the respondents – may fairly be taken into account in terms of penalty or sentence. I am satisfied that the Yardleys accepted that my order required them to discontinue using the electrical system to kill or discourage flying foxes, and acted to achieve that end. Their non-compliance (while constituting a technical contempt) was, then, of a relatively low or minor order in terms of its seriousness, flagrance or, as it is sometimes described, contumely.

[15] Relevantly, too, the Yardleys did not appear at the final hearing of the proceedings which led to the making of the order although Mr Walter did deliver written submissions on their behalf. Nothing in those submissions was, however, relevant to the form of order, and there was not, in particular, any argument or submission that the final orders might be in a form which, for example, would have involved simple disconnection and removal of the wires, rather than the metal supports. That is, perhaps, to be regretted.

[16] Nor was there, at this hearing, any request to vary the order. One of Mr Walter's affidavits purported to show that the cost of complete dismantling would be over $25,000 and he spoke in passionate terms, regrettably unsupported by evidence, about the effects the order and these proceedings were having on the respondents' health, finances and circumstances. The quotation document containing the price for dismantling was in truth one prepared by the respondents in concert with Mr Walter[9] and its reliability must be debatable; but Mr Walter is also a farmer, and

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8 At 541-2

9 T 4

there is no reason to think he and the respondents would not have a fair idea what the work would cost.

[17] Natural sympathy and concern for the respondents must be tempered by the evidence at the original hearing, from which it was clear that the Yardleys constructed the electric grid system alert to the real prospect it might offend state legislation protecting flying foxes.

[18] At the same time and to the respondents credit, of course, they have affected actual, practical compliance with all orders of the Court in the past and there is no suggestion they have continued to use the grids in any way.

[19] Mr Walter raised all sorts of obscure, quasi-legal matters, none of which have any substance – a conclusion which remains appropriate in light of the lengthy discussion of them set out in my earlier judgment at [2007] QPELR 229. Nothing in Mr Walter's further submissions, either in writing or orally at the hearing, attracted a different conclusion now. The point is, however, that the Yardleys appear to have taken and accepted advice from him and it is probable, and at least possible, that they honestly believed they were complying with the order in simply disconnecting the electricity.

[20] When all these matters are weighed the only fair conclusions are that the contempt is established, but also that it is of a low order in terms of seriousness, and may have been the product of a misunderstanding. So much was, fairly, conceded by Counsel for Dr Booth who also emphasised a concern that any order be in the 'least onerous' terms for the Yardleys, and without any 'harsher penalty'[10].

[21] The proper remedy in all these circumstances is to confirm, to the respondents, the meaning and effect of the order while minimising the likelihood of hardship by allowing the opportunity to affect dismantling in the least expensive way, over sufficient time.

[22] The appropriate Order is that on or before 31 March 2008 the respondents dismantle (or cause to be dismantled) the three electric grids constructed on their land at Hosking Road, Mirriwinni being the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker in the State of Queensland by pulling down and taking apart the horizontal wires and metal poles constituting the electric grids; and, and that there be liberty to apply on 14 days notice.

[23] I am not persuaded this is a case in which it is necessary to improve the prospect of obedience by flagging, in the order, a penalty accruing on something like a daily basis if there is non-compliance after the stipulated date. The Yardleys now understand, I am sure, the need for compliance and the way that is to be achieved.

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[10] T 38.43-48