PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Booth v Yardley & Anor* [2008] QPEC 100
PARTIES:	**CAROL JEANETTE BOOTH** *Applicant* *V* **RICHARD GEORGE YARDLEY and ANTJE GESINA YARDLEY** *Respondents*
FILE NO/S:	Application No 2845 of 2006
DIVISION:	Planning and Environment
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court of Queensland
DELIVERED ON:	25 November 2008
DELIVERED AT:	Brisbane
HEARING DATES:	15 August, 24 September and 31 October 2008
JUDGE:	Alan Wilson SC, DCJ
ORDER:	**The respondents are fined $5000, payable within 6 months**
CATCHWORDS:	PLANNING – PLANNING LAW – CONTEMPT – application for orders that respondents be punished for ongoing contempt of an order made on 30 November 2006 – penalty *District Court of Queensland Act* s129(4) *Integrated Planning Act* 1997 s 4.1.5, s 4.1.23 *Nature Conservation Act* 1992 *Penalties and Sentences Act* s153A *Uniform Civil Procedure Rules* r 932 Cases considered: *Booth v Yardley* [2007] QPELR 205 *Booth v Yardley* [2007] QPELR 229 *Booth v Yardley* (2008) 160 LGERA 352

Brisbane City Council v Stapleton [2006] QPELR 782
Formal Wear Express Franchising Pty Ltd v Roach [2004] QCA 339
Hervey Bay City Council v George Stathopoulis [2000] QPEC 067
Noosa Shire Council v Cotton On Clothing Pty Ltd [2008] QPEC 13
Purtill v Landfix Pty Ltd [2005] QPELR 281
R v Cuff & Attorney General [2001] QCA 351
Webster v McIntosh (1980) 32 ALR 603
Witham v Holloway (1995) 183 CLR 525

COUNSEL:	Dr C McGrath for the applicant, Dr Booth No appearance by or for the respondents, Mr and Mrs Yardley
SOLICITORS:	Environmental Defenders Office (Qld) Inc for applicant Mr David Walter delivered written submissions on behalf of the respondents

[1] Mr and Mrs Yardley own a property at Mirriwinni in North Queensland where, in the past, they grew lychees and other fruit. In an effort to stop flying foxes taking their produce they constructed aerial grids, electric wires on metal poles, above the orchard which either injured and killed some of those creatures or had the propensity to do so.

[2] Dr Booth has been an active advocate for the conservation of flying foxes since 1999 and brought proceedings in this Court in 2006 for an order under the *Nature Conservation Act* 1992 that the Yardleys dismantle the grids. After a hearing in November 2006 this Court ordered that they do so within 3 months, i.e. by the end of February 2007.

[3] The Yardleys disconnected power to the grids, but did nothing else. Dr Booth then sought an order that they be punished for contempt. In that proceeding the Yardleys argued that disconnecting the electricity was sufficient compliance, but that was rejected and on 8 February 2008 I ordered that, by 31 March, they effect dismantling by pulling down and taking apart the horizontal wires and metal poles which comprised the grids.

[4] In that proceeding I concluded that while contempt of the original order had been proved, it may have been the product of a misunderstanding on the part of the Yardleys as to the order's meaning and effect and was at a relatively low level in terms of its degree of seriousness. The Reasons which accompanied the order of 8 February nevertheless made it clear that *actual* dismantlement was an essential element of compliance

[5] The Yardleys did not, however, complete that task by the end of March this year and Dr Booth returned to this Court on 15 August, again seeking that they be punished for contempt.

[6] As I understood submissions made on their behalf by their representative Mr Walter, they did not contest that at least some of the wires and poles still remained in place at that time. Instead Mr Walter filed a lengthy application which, like other documents he has presented in the course of these various proceedings, continued to dispute the validity of the *Nature Conservation Act* 1992; to demand that Dr Booth's further application be struck out, and that 'full costs and punitive damages' be paid to Mr and Mrs Yardley.

[7] The relief claimed, and the submissions which accompany it are redolent of the same air of unreality which infests most of the documents Mr Walter has sent to the Court, ostensibly on the Yardleys behalves. Variations of these arguments have been rejected by this Court on three previous occasions.[1] The orders Mr Walter seeks are not within the court's jurisdiction and his submissions raise matters that are irrelevant to the issues in dispute, and fundamentally mistaken.

[8] It is disappointing, and regrettable, that neither those submissions nor any material filed for the Yardleys properly addresses the primary questions arising in this application: whether contempt has occurred or, if so, what penalty (if any) is appropriate.

[9] Dr Booth's application came on for hearing early in July this year but Mr Walter informed the court then that proceedings had been commenced in the High Court. A concern not to act in a way which might embarrass that Court led to an adjournment, but when the matter ultimately came back on 15 August it was clear that whatever documents Mr Walter had attempted to file in the High Court had been rejected, and no proceedings had been commenced or were on foot there. Nothing in the documents and messages since received from Mr Walter suggests anything has changed.

[10] The evidence presented for Dr Booth plainly establishes that the contempt - i.e., non-compliance or only partial compliance with the 2006 order – persisted from 31 March until at least 3 July 2008.

[11] After the hearing on 15 August Mr Walter did send messages to the effect that the grids had in subsequently been wholly dismantled, but failed to file material establishing that. Eventually, the matter was listed again on 31 October when Mr Walter appeared by telephone and was given leave to read and file an affidavit from one of the Yardleys' neighbours, Mr Ah Shay, who said that at the Yardleys' request he inspected the property on 11 October 2008 and observed that all of the electric wires and the poles which had supported them had now been cut down.

[12] At the hearing of the first contempt application the Yardleys were given the benefit of the doubt that it was probable that they honestly believed they were complying with the 2006 order by simply disconnecting the electricity. Their continued non-compliance with the order of 8 February 2008 suggests the assumption may have been generous to them. They did not comply with that order within the period of almost two months allowed under it and, indeed, had not done so by the middle of this year. Only the threat of actual punishment for contempt seems, finally, to have persuaded them to comply with an order made almost two years ago.

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1 *Booth v Yardley* [2007] QPELR 205; *Booth v Yardley* [2007] QPELR 229; *Booth v Yardley* (2008) 160 LGERA 352.

[13] Dr McGrath, who appeared for Dr Booth, submitted that although a breach of an order of the kind made here is ordinarily seen as a civil, rather than a criminal contempt it can become the latter if it involves deliberate defiance or is contumacious[2] and that the Yardleys' continual failure to comply can be described in those terms. That, he said, meant the contempt was a serious one with aggravating features, which he categorised as deliberate disobedience of a calculated kind and, in its nature, much more than a mere technical breach.

[14] In addition, of course, there is little sign of any remorse or regret from the Yardleys. Rather, their agent Mr Walter continues to dispute the validity of the legislation applied throughout these proceedings and to present the Court with informal documents seeking remedies which are unavailable, ostensibly supported by arguments which are untenable and have previously been strongly and clearly rejected. I am troubled, however, that the Yardleys may not fully appreciate just what is being said and done by their agent on their behalves, and reluctant to conclude that responsibility for Mr Walter's conduct should be automatically sheeted home to them – while appreciating, of course, that that is the usual consequence of things said or done by an agent for a party, lawyer or non-lawyer. Rather, it simply defies logic that, properly advised and understanding their position in these proceedings, they should fail to address the critical issues.

[15] This court's power to punish for contempt rests on s 4.1.5 of the *Integrated Planning Act* 1997. As an analysis of the relevant legislation helpfully undertaken by Rackemann DCJ in *Brisbane City Council v Stapleton* [2006] QPELR 782 shows, a reference in s 4.1.5(4) (concerning the upper limits of the appropriate penalty) to s 129 of the *District Court of Queensland Act* is out of date and should, by virtue of the *Acts Interpretation Act* 1954, now be taken to be a reference to s 129 in its current form. The result, his Honour's analysis shows, is that this Court may punish contempt by any order that can be made under the *Penalties and Sentences Act* 1992. Hence, although s 4.1.5(4) appears to impose a maximum penalty of 3,000 penalty units or 2 years' imprisonment in truth the maximum is that applying under the *Penalties and Sentences Act*, namely a fine of up to 4,175 penalty units (presently, $313,125.00) or imprisonment for up to two years.[3]

[16] That said, Dr McGrath fairly submitted that for the purposes of this proceeding, the Court should not consider a maximum penalty of more than the 3,000 penalty units referred to in the *Integrated Planning Act*. That course, he suggested, provided the least onerous outcome for the respondents and avoided the difficulties created by the outdated reference, in the *Integrated Planning Act*, to s 129(4) of the *District Court Act* identified by Judge Rackemann.

[17] Adopting that figure means the maximum penalty is $225,000.00. The point is, in any event, that the contempt here does not on any view require the court to contemplate a very large fine and the upper limit is in that sense academic.

[18] In suggesting, here, a fine of about $10,000.00 Dr McGrath relied upon the decision in *Formal Wear Express Franchising Pty Ltd v Roach* [2004] QCA 339. The defendant in that case had repeatedly breached an undertaking to the District Court which had been incorporated into an order not to conduct a formal menswear hire

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2 *Witham v Holloway* (1995) 183 CLR 525 at 430, 538-539.

3 *Penalties & Sentences Act* 1992, s 153A.

business. At the first contempt proceeding the defendant was fined $3,000.00 but at the second he was sentenced to six months imprisonment for each of three separate acts of contempt, to be served concurrently.

[19] The Court[4] found the sentence of six months excessive but imposed sentences of three months, also to be served concurrently. Imprisonment was appropriate, the Court held, because a fine would very likely be futile, and because of the high level of contempt apparent from the continued breaches.

[20] That point has not, however, been reached here and I accept that a fine is appropriate. Further, while the second act of contempt is troubling it is possible to deduce, amongst the confused welter of material from Mr Walter, that the Yardleys have encountered some difficulty finding the time and resources to cut down the poles and wires, brought about by the fact that Mr Yardley has been obliged to seek employment away from the property and Mrs Yardley is not well enough to perform the heavy physical work involved.

[21] It is also relevant that although the contempt at the time this application was brought in the middle of this year has been clearly proven, the evidence subsequently shows the Yardleys have belatedly, but actually, complied with the order.[5] A fine of $5,000.00 reflects, I think, a fair balancing of the various factors touching the question: the long delay, the non-compliance with the order earlier this year, and the fact that, belatedly, actual compliance has been effected.

[22] Dr Booth sought costs, and on an indemnity basis. This court has previously ordered indemnity costs by consent[6] in two cases involving contempt, relying on r 932 of the *Uniform Civil Procedure Rules* (which allows them in civil proceedings). Costs in this jurisdiction are, however, governed by statute (s 4.1.23 of the *Integrated Planning* Act) and in *Hervey Bay City Council v George Stathopoulis* [2000] QPEC 067 Quirk DCJ concluded that the section simply failed to address or include circumstances involving contempt.

[23] Dr McGrath properly referred me to that decision, which does not appear to have been noted in either of the previous decisions leading to costs orders made by consent in this court. He also referred to *Webster v McIntosh* (1980) 32 ALR 603, in which Brennan J (as he then was) noted that a statutory provision like s 4.1.23 will override a rule like r 932. In the result I am persuaded a costs order is not open.

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4 Williams JA, with whom McPherson JA and White J agreed.

5 See, eg *R v Cuff & Attorney General* [2001] QCA 351 per Williams JA at 5.

6 *Purtill v Landfix Pty Ltd* [2005] QPELR 281, *Noosa Shire Council v Cotton On Clothing Pty Ltd* [2008] QPEC 13.