

PLANNING AND ENVIRONMENT COURT

JUDGE BRABAZON QC

P & E Appeal No 4658 of 2004

CAROL JEANETTE BOOTH

Applicant

and

FRIPPERY PTY LTD (ACN 010 890 007)

First Respondent

and

MERVYN MEYER THOMAS

Second Respondent

and

PAMELA ANN THOMAS

Third Respondent

BRISBANE

..DATE 09/12/2008

JUDGMENT

HIS HONOUR: This judgment is hopefully the last instalment in a long legal struggle between Dr Booth and Mr and Mrs Thomas. Dr Booth is a defender of the welfare of flying foxes and Mr and Mrs Thomas are lychee growers in North Queensland.

This is an application to deal with both Mr and Mrs Thomas for contempt of an order of this Court. The question is whether or not there has been contempt, and if so, what should the Court's order be.

It is necessary to turn to the order of Judge Robin made on 16th November 2007 after a three day trial. He ordered that the Thomas's and their company, Frippery Pty Ltd, be restrained from the commission of an offence against Section 88 of the Nature Conservation Act by electrocuting, delivering a non lethal electric shock to and/or shooting flying foxes on their farm.

The Judge went on to order "That within two months of the date of this order the Thomas's and their company and/or their employees or agents dismantle any electric grid system constructed for the purpose of electrocuting or delivering a non lethal electric shock to black flying foxes...unless the taking of black flying foxes by electrocution or delivering a non lethal electric shock using such an electric grid specifically authorised under Section 88 of the Nature Conservation Act 1992."

I should say that that last qualification was inserted as a matter of caution because it appeared at the hearing that

there was some possibility that Mr and Mrs Thomas may have a lawful authorisation to deter or kill the flying foxes. However, as events have turned out, that is now not a live issue.

After that judgment was given, the solicitors for the Environmental Defender's Office wrote a letter as required by the Rules of Court. It pointed out that Mr and Mrs Thomas had to comply with the order and dismantle the entire electric grid system within two months of the date of the order, that is, on or before 16th January 2007. Their letter pointed out "that non compliance with final orders by your clients will be regarded as a contempt of Court and may result in serious penalties or fines for your clients."

Having complied with their duty under the Rules, the letter then went on to give some advice about the meaning of the word "dismantle." They said this, "The plain meaning of 'dismantle' is to pull down and take apart the entire electric grid system constructed by your clients for the purpose of electrocuting or delivering non-lethal electric shock to black flying foxes."

While gratuitous, that advice was undoubtedly accurate and it was not contested.

It has now been revealed that the structures are still standing. The poles and the steel wires are intact. At this hearing, the photographs and indeed Mr Thomas' own affidavit filed on 18th November this year confirmed that.

It was not contested that he has taken away the electronic control units and stored them in a locked room. He says that he did that in mid-January this year. It has not been suggested that any flying foxes were killed after 16th November 2007, the Judge's order, because as Mr Thomas says, the grid has not been electrified.

It is now submitted by Mr and Mrs Thomas that the order does not clearly compel them to dismantle the grids. That submission is based on the clause which describes the electric grid system, "constructed for the purpose of electrocuting or delivering a non-lethal electric shock to black flying foxes."

It is well settled that no-one should be held in contempt of a Court order unless the order is clear. There must be no doubt about what has to be done to comply with the order. If there are two possible meanings, and if the person subject of the order obeys one of them, then that would be enough.

Of course, orders are not to be seen as detached from the facts of each case. As the lawyers say, the factual matrix known to each of the parties has to be taken into account. In this case, we can take into account what was known by Mr and Mrs Thomas. There was a considerable history of litigation before Judge Robin made his order. There in fact had been a trial before Judge Pack, in which the application against them, brought by Dr Booth, was dismissed. That led to an appeal to the Court of Appeal, where it was decided that the trial Judge had made a legal error in considering some of the

legal issues, particularly about Mr and Mrs Thomas' liability for their conduct.

It was ordered that a new trial be held before a different Judge. That is why it came before Judge Robin for three days in September 2007. He found against Mr and Mrs Thomas.

The order to dismantle the electric grid system was made because of the difficulty of supervising any use of the grid if it were not dismantled. It will be understood that this is a farm in a country area in North Queensland and supervision of activities on the farm is necessarily difficult.

The Judge was concerned about the possibility of lawful authorisation to use the grid, hence the qualifying expression at the end of paragraph 2 of the order.

With regard to the matrix of facts, note should be taken of paragraphs 1, 9, 10, 15, 16 and 69 to 72 of the Judge's reasons, that is to say, his finding that dismantling the grid was necessary to give effect to the order.

Here, it is said that the expression, which I have already quoted in relation to the construction for a certain purpose, described the grids that were erected and therefore should not be understood as limiting the dismantling to the disconnection of the electronic controlled units. That is, Mr Williamson submitted, that because of that clause, it was not clear that Mr Thomas had to go further and actually dismantle the whole grid as opposed to simply taking away the electronic control

boxes. Once that were done, it was submitted, it could not be used for the purpose of electrocuting or delivering a non-lethal electric shock and therefore the order would have been satisfied.

However, Mr Thomas himself in his affidavits does not say that he misunderstood the order or understood it in that limited way. On his behalf, an application was made here to change the order made by Judge Robin. There was an application that the Judge's order be changed so as to delete the word "dismantled" and in a certain place thereof, the words "remove all electronic control units required to supply electricity to."

It is appropriate here to dismiss that application. There is no good reason to change Judge Robin's order to that effect.

Having heard from counsel and looked at the affidavits, I am satisfied beyond reasonable doubt that a contempt has been committed since 16th January 2008. An affidavit from Mr Thomas now shows that he and his wife are in a weak financial position. He says that the farm is not producing any fruit this year.

With regard to a fine for contempt, attention was paid to the fine of \$5000 imposed in another piece of litigation between Dr Booth and a fruit grower called Yardley.

It is true that the circumstances, of course, are rather different in each case. If anything, the conduct here is perhaps more deliberate. Mr Yardley was given the benefit of

having received pretended legal advice from someone who was not qualified to give it, whereas as far as we know here, Mr and Mrs Thomas have their solicitors.

In any case, putting the fine details apart and taking into account their present financial circumstances, Dr McGrath was minded to accept that \$5000 might be sufficient in this case. It is in the circumstances a modest enough sum of money.

Subject to any further comments by counsel the order will be that they are jointly fined \$5000, that sum to be paid on or before 10th February 2009 to the Registrar of the Planning & Environment Court at Brisbane.

My feeling, once again subject to counsel's remarks, is that this application should be adjourned for mention to that date, 16th March 2009.

I wish to say that in this case everything has been done by the Courts and the legal practitioners to see that the law has been properly applied. There have been two trials, and an appeal to the Court of Appeal which did say that the first trial contained a legal error. There was an effort on the part of Mr and Mrs Thomas to go to the Federal Court, but that did not achieve anything. In short, great care has been taken by the legal system to correctly declare, as it were, the results of the competing allegations between Dr Booth and Mr and Mrs Thomas.

It can be understood that there must have been strong feelings on both sides, on the part of Dr Booth as a defender of the welfare of the flying foxes and no doubt on behalf of Mr and Mrs Thomas as farmers growing fruit from which they proposed to make a living.

One could easily understand that this litigation may also have had and probably did have a substantial financial impact upon them, but if I may say, Mr and Mrs Thomas need to understand that as citizens, once the Court process has come to an end, unfortunately for them, against their personal interests, it simply must be obeyed. It is vital for the effective functioning of the Courts in our society that they are obeyed. That is one reason why these proceedings have been brought, and why, in this case, a fine has been imposed.

Mr and Mrs Thomas should understand that if they do not take this opportunity to purge their contempt by dismantling the electric grids, there are likely to be further proceedings. In that case it is very likely they will be faced with a bigger fine and/or actual imprisonment.

Now, I understand there's no question of costs. Is that right?

MR WILLIAMSON: That's correct, your Honour.

HIS HONOUR: All right. Now, what about what I said about having it mentioned in three months' time. I noted that they had originally two months to comply with the order, so it just

seemed to me that it might be fair enough to give them two months to pay the fine.

MR WILLIAMSON: Can I just clarify one thing, your Honour?

HIS HONOUR: Yes.

MR WILLIAMSON: Perhaps it was my misunderstanding. Your Honour said that the fine was to be paid before the 10th February 2009 and it was adjourned to mention to the 16th March 2009.

HIS HONOUR: Yes, I did say that.

MR WILLIAMSON: Oh, okay-----

HIS HONOUR: Well, I was only proposing those dates. I'm open to any suggestion about them, first of all, I thought that a fair enough thing might be to give them two months to pay the fine. Judge Robin's order is not actually altered by what I've said, and they remain in contempt.

MR WILLIAMSON: Yes.

HIS HONOUR: But in a practical sense, in my own mind, I would have something like two months in mind that they had to get the work done, put it that way.

MR WILLIAMSON: Yes.

HIS HONOUR: And that's why I thought a mention, perhaps of a further month, which would be 16th March, might be about

right, to see what's happened. So I'm open to any suggestion about those dates.

MR WILLIAMSON: Your Honour, in terms of the time for payment, that's - I don't cavil with the time of payment. In terms of the mention, that's a good idea, but is there a need, in fairness, to add maybe a further order that Judge Robin's order of the 16th November 2007 be suspended for two months to give them an opportunity to purge the contempt, otherwise they are in contempt and remain to be in contempt until the grid is in fact dismantled.

HIS HONOUR: Well, I'm open to suggestions about it. The first draft of what I wrote down was in fact to, as it were, extend his order.

MR WILLIAMSON: Yes.

HIS HONOUR: And on reflection, I thought perhaps that wasn't the right thing to do, that they should remain in contempt until they get the work done, but in a practical sense, I realise that will take some time. But I'm open to suggestions about the best form of order.

MR WILLIAMSON: Yes. Your Honour, my submission is that in the circumstances it would be appropriate for an additional order that paragraph 2 of Judge Robin's order of the 16th November 2007 be suspended to the - it's operation be suspended until the 10th February 2009, so within the two months, my clients have an opportunity to pay the requisite fine and purge the contempt, as it were.

HIS HONOUR: All right. Mr McGrath, what about the right form of order?

MR McGRATH: Your Honour, my client would submit there's no need to suspend the order. As your Honour has indicated, they do remain in contempt. At a practical level, if further contempt proceedings were brought, say in a week's time, the Court has a discretion what further orders to make and your

Honour's already indicated that your Honour is minded to allow them two months.

As a matter of discretion while they remain in contempt, there would be essentially a time when they can pull apart the grids and comply with the order, and certainly my client is not minded to come back before the Court until it is abundantly clear that they're not complying. She waited many months after the order was not complied with until - I think it was about eight months after the order was not complied with, hoping that the respondents would comply and there would be no need to bring contempt. When the contempt applications were brought, there were many indications to the respondents to - the proceedings would be discontinued. She's got no wish to come back before the Courts unnecessarily. She doesn't wish to see them punished.

HIS HONOUR: All right.

MR McGRATH: Your Honour mentioned that it would be the respondents jointly fined \$5000. The proceedings are actually against the three respondents, the company and the two-----

HIS HONOUR: So it is. Yes, you are quite right.

MR McGRATH: And while it appears that Frippery Pty Ltd is just a family company and effectively it's the Thomas's - the proceedings have always been against the company - so in my submission the order would be best framed as simply "The respondents are fined \$5000" so that it's jointly applicable to all three of them.

Your Honour also mentioned that the fine be paid to the Registrar.

HIS HONOUR: Yes.

MR McGRATH: In relation to the Yardley matter, my instructing solicitor has had communication with the Registrar of this Court. His Honour Judge Wilson in the Yardley matter ordered simply that the respondents are fined \$5000 payable within six months, without specifying who it should be paid to.

HIS HONOUR: Yes, I saw that, but - who would they pay it to then?

MR McGRATH: The Registrar is uncertain at this stage and is attempting to liaise with the criminal jurisdiction to have the fine registered in the SPER system so-----

HIS HONOUR: Well, I think - if you want to do that, I think the order is that the Registrar of the Court refer the collection of the fine to SPER - words pretty like that.

MR McGRATH: Yes.

HIS HONOUR: That occurred to me. I could easily say that.

MR McGRATH: That would be, in my mind-----

HIS HONOUR: That might be - that would be a normal criminal order, I think.

MR McGRATH: Yes, your Honour, because as I understand it, there's no provision for the Registrar to receive the money other than - and the Registrar did indicate that it was a novel matter and they were trying to work out the procedures and also the fine-----

HIS HONOUR: You mean the Registrar of this Court?

MR McGRATH: Yes, Ms Stilgoe, your Honour.

HIS HONOUR: I see.

MR McGRATH: Trying to work out the procedure so that in the Yardley case, they could give the information to the respondents. We were concerned in that case that they know how to pay it and that they could pay it to, for instance, the Registry in Townsville or Cairns if they wish to, because they're located there.

HIS HONOUR: All right. Well, just let me refashion these orders a bit, then I'll just read them to you again.

MR WILLIAMSON: I'm sorry, your Honour. Can I just add one thing.

HIS HONOUR: Yes.

MR WILLIAMSON: If there's some confusion about the entity to whom the fine is paid, given the time of the year, should the time be extended in case there is administrative difficulties that my clients face.

HIS HONOUR: Well, someone will take their money, I'm sure.

MR WILLIAMSON: Well, I'd hope so, but-----

HIS HONOUR: Because the Planning and Environment Court has got aspects of criminal jurisdiction, as we all know, looking at the jury trials and so on, because of offences under it, can't it. I think there are, there've been a couple, I think So all they have to do is make an effort to do it, I mean, no-one will blame them if the Court system has difficulty processing it.

MR WILLIAMSON: Well, as long as that's well understood, your Honour.

HIS HONOUR: Yes. I'm sure that's right. So just let me attempt a couple more orders.

Now, what if I simply said this, to accommodate what's been said.

(a) Find the respondents guilty of contempt of Court since 16th February 2008, in failing to dismantle the electric grid system;

(b) Fine the respondents jointly \$5000. The collection of that fine to be referred by the Registrar of the Planning and Environment Court to SPER;

(c) Adjourn the application to a date to be fixed.

Hence obviating the need - no need to come on [indistinct]. That satisfies you, Mr Williamson, I hope - if there's no need to come back, we won't. I'll just adjourn it to a date to be fixed.

MR WILLIAMSON: Yes.

HIS HONOUR: I think the intimation is, is it not - well, can I say this, if I'm to deal with it, one of the reasons I mentioned three months was my own availability. If there's anything to be dealt with, I would be content to do it and could do it in the week beginning 16th March next year. I'll just say that.

MR WILLIAMSON: Your Honour, could we take a review date in that week, as it were?

HIS HONOUR: Yes, if you like. If you want to make any date in the week, I don't mind.

MR WILLIAMSON: I'm content to suit your Honour's convenience.

HIS HONOUR: Well, it's a long way off, I suppose. What if we just select the Monday, which is 16th March 2009.

MR WILLIAMSON: Thank you, your Honour.

HIS HONOUR: I just say that informally. That's not part of the order in any way.

MR WILLIAMSON: All right. Thank you, your Honour.

MR McGRATH: Your Honour, it's a matter for your Honour, but the first order, in my submission, is - a finding is an unusual - it would be unusual to include as an order-----

HIS HONOUR: Is it?

MR McGRATH: I'm not sure if your Honour intended to-----

HIS HONOUR: Well, what would the normal order be?

MR McGRATH: Your Honour's already found, in your Honour's reasons, that they are in contempt. In my submission the order would simply be the fine, so orders 2 and 3 would be the appropriate orders. It's a matter for your Honour, of course.

HIS HONOUR: Well-----

MR WILLIAMSON: Your Honour, I thought what you may have had in mind was the usual preamble that follows the orders in this Court, that is, upon the Court being satisfied that the respondents are in contempt of Court, it is ordered that-----

HIS HONOUR: Well, we can simply make it like a recital.

MR WILLIAMSON: Yes, precisely, if that-----

HIS HONOUR: So - thank you.

Upon the respondents being found guilty, etc, order:

- (a) A fine and
- (b) The adjournment

MR WILLIAMSON: Thank you, your Honour.

HIS HONOUR: So should I read that finally just to see if there's any fault in it?

MR WILLIAMSON: Yes, please, your Honour.

HIS HONOUR: Upon the respondents being found guilty of contempt of Court since 16th February 2008 in failing to dismantle the electric grid system, order:

- (a) The respondents be jointly fined \$5000. The collection of that fine is to be referred by the Registrar of the Planning and Environment to SPER; and
- (b) Adjourn the application to a date to be fixed.
