

MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Brisbane City Council v Wu* [2018] QMC 19

PARTIES: **Brisbane City Council**
(Complainant)

v

Ching-Yang Wu
(Defendant)

FILE NO/S: MAG-00198101/17(6)

DIVISION: Magistrates Courts

PROCEEDING: Criminal

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 27 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 14 November 2018

MAGISTRATE: Thacker

ORDER: **The complaint is dismissed**

CATCHWORDS: No case to answer – section 24 Criminal Code

COUNSEL: Mr Sullivan QC with Mr Wylie for the Defendant

SOLICITORS: City Legal for the Complainant
McCullough Robertson for the Defendant

- [1] I publish reasons for accepting on 14 November 2018 the defendant’s “no case to answer” submission.

The Complaint

- [2] In brief, the complaint is that on 7 October 2016 the defendant carried out assessable development, namely building work (demolition of two dwellings) at 36 and 40 Power Street, Norman Park (“the subject properties”) without an effective development permit (“demolition permit”) contrary to section 578(1) of the *Sustainable Planning Act 2009* (“the Act”).

The Issue

At the conclusion of the prosecution case, defence counsel made submission the defendant should not be required to answer the complaint because there is no sufficient evidence the defendant was unreasonable in his mistake about the validity of the demolition permit provided by the development permit certifier, Trevor Gerhardt. The prosecutor submits it was not reasonable for the defendant to mistakenly believe that Mr Gerhardt had properly authorised the demolition work in the circumstances that existed leading up to the demolition permit being granted.

The Law

- [3] Section 578(1) of the Act provided that a person must not carry out assessable development unless there is an effective development permit for the development. The Act was in force at the relevant time but has since been repealed.
- [4] There are rules about what level of evidence a prosecution case must reach before a defendant is required to answer the complaint against him. The test for determining what the quality of that evidence must be is set out in the case of *May v O'Sullivan*, as follows: when, at the close of the case for the prosecution, a submission is made that there is “no case to answer”, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he **could** lawfully be convicted¹.

Utilising this test, the court must determine whether there is evidence which, if accepted, would provide evidence of the complaint; and then if there is such evidence, the court must also determine if it is so lacking in weight or reliability that as a matter of discretion, the court would dismiss the complaint.

It is common ground that the defence of honest and reasonable mistake of fact, utilising section 24 *Criminal Code*, is open to the defendant in a “no case” submission². Section 24 provides that a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist. The prosecutor is not troubled by “honest” notions in this case. Rather, the defendant needs to show that he behaved reasonably when acting on the unlawful authority to demolish.

The Facts

- [5] The defendant was responsible for the demolition of two dwellings on the subject properties. The demolitions occurred pursuant to a private building certifier, Mr Gerhardt’s demolition permit. However, the demolition permit was void because it had been unlawfully issued.

¹ (1955) 92 CLR 654 Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ at 657-658.

² Established by *He Kaw The v The Queen* (1985) 157 CLR 523. See Brennan J at 582; see also *environmental Protection Authority v Cleary Bros (Bombo) Pty Ltd* submitted by defence counsel in the format LexisAdvance caselaw at page 6 of 8.

- [6] Some admissions have been made by the defendant.³ In particular I notice that the defendant together with another has been the registered owner of the subject properties since 2012.
- [7] The demolition contractor, Nathan Donaldson, testified he has conducted a demolition business for over 20 years. He contracted to undertake the demolition work. He was not involved with obtaining the demolition permit. He saw Mr Gerhardt's demolition permit and he was told by Mr Gerhardt it was lawful to proceed with the demolitions. It was not put to Mr Nathan that he wrongly or unreasonably relied on Mr Gerhardt. There was no evidence that Mr Donaldson had any direct communications with the defendant about the matter. He gave credible evidence and I have no doubt his evidence was truthful and I accept it. However, his evidence does not take the issue very far.
- [8] Stephen Milton testified he was the architect engaged by the defendant for development of the subject properties. He was engaged from approximately 2014. He had no experience dealing with houses with a "character overlay" (meaning constructed prior to 1946) but was aware there were "flags" and that a specialist in demolition of character houses would be needed. He did not know one and was referred to Mr Gerhardt by a colleague. He relied on Mr Gerhardt's expertise and communicated between Mr Gerhardt and the defendant. Dealing with Mr Gerhardt was not easy for several reasons including he "lectured" at length about matters and asked for patience whilst associated court proceedings occurred that obstructed him providing the demolition permit. On the advice of Mr Gerhardt that the demolition permit was likely to be given, Mr Milton provided options to the defendant for the development of the subject properties as well as preparing for demolition to occur. He managed the delays. Mr Milton also showed, through emails he sent and received⁴ that while other options had been canvassed, by 5 September 2016 a decision had been made to prepare the houses on the subject properties for demolition.
- [9] Mr Gerhardt's text message sent 18 September 2016 "all go demolition pre 46"⁵ to Mr Milton caused him to phone Mr Gerhardt, almost immediately, despite he was away with family. Mr Gerhardt told him the court case was concluded and that he had lawful authority to demolish the houses. It was the end of months and months of waiting.
- [10] Worryingly, in re-examination prosecution counsel attempted to cross-examine his own witness in an effort to undermine Mr Milton's work method. However, Mr Milton explained himself by reference to checks and investigations he undertook to ensure he was servicing the defendant properly and lawfully, including by obtaining properly qualified consultants and experts including Mr Gerhardt. I have no reason to doubt any of the evidence provided by Mr Milton and I accept his testimony as truthful.
- [11] Exhibited documentation and the admissions made by the defendant show that on 22 April 2013 the defendant made development application for partial demolition

³ See exhibit one.

⁴ See exhibits 8 – 26.

⁵ Exhibit 27.

and extensions to two dwellings on the subject properties. This was done through professional Town Planners called Urban Strategies Pty Ltd. On 18 March 2014 a slight variation to this application was made, again utilising the services of the same town planners. Various options for development of the subject properties were canvassed over the ensuing years including with architect Mr Milton. The email threads show that the defendant ultimately opted for demolition of the houses on the subject properties. Exhibits 14, 25 and 26 in particular, show the defendant was being given information that he should “holdfast” and that “Trevor Gerhardt is being prudent” and that he should “be patient”. Once the demolition permit was received, Mr Milton arranged for payment of Mr Gerhardt’s invoice for the work as the final obstacle to the demolition proceeding.

The “No Case” submission and response

- [12] Prosecution submits the defendant’s belief he could lawfully demolish the houses was not reasonable because, as I understand Mr Cartledge’s submission, the defendant agreed to obtain Mr Gerhardt’s services despite the defendant knew the obstacles to achieving demolition and knew that Mr Gerhardt would be able to “get around” those obstacles or was prepared to rely on Mr Gerhardt to get around those obstacles. In other words, the defendant acted to remain wilfully blind. I therefore look for the evidence demonstrating the defendant’s knowledge and / or evidence the defendant exhibited wilful blindness.
- [13] Prosecution counsel submit there is no “actual evidence” the defendant positively held a reasonable belief that was mistaken. Even if this is accurate however, it is not evidence he must have had an unreasonable belief. All it could mean is that prosecution are limited to relying on inferences arising from evidence.
- [14] Prosecution submit that the inferences arise from observation of the activities of the defendant over the course of 2012 – 2017. In this regard, I find the documentary evidence shows the defendant from 2012 forward was involved in the development of the subject properties. Alone, this does not support that he must have had knowledge of what was required to comply with legal requirements for development or that he must have known that he could not easily demolish the subject houses. The prosecutor arrives at his submission by drawing inferences from the defendant’s intention to develop not from any actions that point to the defendant having knowledge of development requirements and or acting to avoid legal requirements. To the contrary, there is a steady accumulation of various professional people, commencing with Urban Strategies Pty Ltd who are engaged by the defendant to undertake the work required at each step of the way. This rather supports that the defendant was not acting on his own knowledge. Furthermore, I find no evidence of the defendant acting to turn a blind eye to what was required. Rather, I find firstly, that while the defendant is cc’d into some (though not all) emails he does not respond. Secondly, when he engages in emails his emails ask pertinent questions to Mr Milton For example:
- [15] Email 21 June 2016 “Any news?”⁶

⁶ Exhibit 14.

- [16] Email 2 October 2016 “Will he issue the approval immediately if I pay this account today? It seems rather expensive. (sic – I think he meant “expensive”).⁷
- [17] Email 3 October 2016 “Please make sure we communicate and instruct to the contractor exactly as per the email sent by Trevor below.”⁸ Prosecution counsel rely heavily on this email to infer the defendant has ulterior motives at play. However, in the context of the circumstances leading to this day, especially the email 2 October and given he was overseas, and had been overseas for some time, and the development actually looked like it was going to proceed after considerable delay, there is ample evidence to support that the defendant wanted no more than to ensure progress of the development without further delay. In the face of these factors, the inference the prosecutor contends for is not evidence of the defendant colluding with service providers in pursuit of an illegal purpose.
- [18] On my analysis of the emails I find the defendant and Mr Milton and Mr Gerhardt were waiting for demolition approval to clear through court proceedings; that the demolition was not going to proceed until approval was given; that the waiting for the approval involved delaying preparations; that there was frustration caused by the delays; that the defendant did not want to have any cause for further delays by any failure to comply with what was being asked to be done by Mr Gerhardt including via his email exhibit 21 and the defendant’s email exhibit 22. The email from Mr Gerhardt regarding his requirement that his invoice be paid before he release the approval is equally unremarkable in the present business climate where such a requirement is almost universal. Nothing of weight can turn on the evidence about price in the invoice as there was not sufficient evidence to the court about the true range of cost related to demolition works of this kind.
- [19] The prosecution case also rests on the haste with which the demolition occurred after the approval was given asking “why does the demolition have to be carried out the day after the approval is given”? The prosecutor points to the facts that the preparations were closely monitoring arrival of the demolition permit with demolition contractor ready to proceed and held waiting to do the job; the permit to demolish was to be in force for 6 months; there were no building plans ready to commence. However, there are many reasons why the defendant, as is his right, would proceed to demolish as soon as he was able. For example, and perhaps most obviously he has been trying to progress the development of the subject properties since 2013 and has stepped through the many procedures required and accepted the delayed preparations following advice to do so. Of relevance here, I notice the email exchange between Mr Milton and Verne Graham dated 14 September 2016 (exhibit 9) highlighting that obtaining authority to demolish was not the only difficulty to achieving demolition. Once the “go ahead” was given then, there was nothing more to stop his progress and he simply moved forward with some of his development plan. Another example, is that he did not want to expose himself to building plans until he was sure by the demolitions that building would be an option. Therefore, I do not accept the sinister inference raised by the prosecution.
- [20] Prosecution also submit that by looking at the situation overall there is weight to the evidence against the defendant by the accumulation of the various pieces of

⁷ Exhibit 19.

⁸ Exhibit 22.

evidence which must mean the defendant was colluding with Mr Gerhardt to get the demolition permit or at least knew Mr Gerhardt would overcome any and all difficulties and was wilfully ignorant of what Mr Gerhardt was doing to achieve this. The evidence in this regard however is woefully unreliable because each suspicious inference the prosecution seek to raise is quashed by an innocent explanation.

- [21] As defence counsel asked: Is accepting the permit as valid a reasonable mistake in view of the previous work undertaken? I look for evidence showing the defendant was knowledgeable and acted in some that shows this. I can only find that he sought professional assistance at each step of his project and engaged with patience to comply with their advices. There is no evidence he or Mr Milton were ever non-compliant with lawful requirements or that their work together in the period 2014 - 2017 involved any subterfuge.
- [22] Importantly, I find no evidence of collusion behaviour between Mr Gerhardt and Mr Milton. Mr Milton did not know Mr Gerhardt and was referred to his expertise by a colleague. Later emails from Mr Milton to the defendant are unremarkable showing nothing more than that development work proceeded.
- [23] I find from Mr Milton's evidence and the email threads that the defendant relied heavily on Mr Milton's services and his out-sourcing providers, including Mr Gerhardt, and did not directly involve himself with any particular aspect of the project other than to know that it was advancing and advancing according to lawful requirements. There is no suggestion in the emails that Mr Milton or the defendant were seeking to circumvent legal requirements or take short cuts or avoid obtaining appropriate expertise involvement.
- [24] The emails also show a methodical approach to obtaining the appropriate authority before demolition commenced despite this required frustrating delay. I find nothing in the email threads that elicit any suspicion ought to have been aroused by either Mr Milton or the defendant to have them be more careful in their reliance on Mr Gerhardt. Indeed, not only did Mr Milton accept and rely on the demolition permit as valid, so did the demolition contractor.
- [25] I find that the emails are evidence that while the defendant was involved in the project by way of wanting to be informed about where the project was at and why it could not move forward, I find no evidence in these emails suggestive of the defendant wanting to circumvent proper procedure or wanting to act in some illegal way at all. I cannot find anything upon which to base an inference the defendant was not an innocent player in the endeavour to forward his development project on the subject properties.

Conclusion

- [26] I conclude that moving quickly to demolish once the permit was received, agitating for strict compliance with Mr Gerhardt's requirements, going ahead with demolition without building plans for construction of new buildings are all readily explained and in the face of the explanations not evidence inferring the defendant was unreasonable in his reliance on Mr Gerhardt's demolition permit.

- [27] At its highest, the inferences marshalled by the prosecution case are actually no more than evidence of an association the defendant had with Mr Gerhardt and that the prosecution is actually based upon Brisbane City Council dealings with Mr Gerhardt.
- [28] At best the prosecution have shown they have suspicions about the *bona fides* of the defendant based upon their view of Mr Gerhardt. Prosecution of the defendant merely by his engagement of the services of Mr Gerhardt is not evidence to support these inferences.
- [29] If I am wrong about my view in that regard, I also consider the evidence related to the interactions of Mr Gerhardt, Mr Milton and the defendant. By the defendant using the services of Mr Milton to engage Mr Gerhardt is not *simpliciter* enough to support an inference the defendant was colluding through Mr Milton or that he was unreasonable in his reliance on Mr Milton when I have accepted Mr Milton as a witness of truth and that he was acting *bona fides* in his work for the defendant.
- [30] In the circumstances I have analysed, I conclude the evidence produced by the prosecution inferences are non-existent or insufficient in weight and / or are unreliable inferences in the face of the other explanations available. In my discretion the inferences so lack weight and reliability they could not be used against the defendant in this case.
- [31] In these circumstances the prosecution have not made out a case upon which the defendant could be convicted. He should not be required to answer the complaint.

I ORDER the complaint is dismissed.